

**United States Department of Labor
Employees' Compensation Appeals Board**

P.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hot Springs, SD, Employer**

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**Docket No. 19-0119
Issued: July 5, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 22, 2018 appellant filed a timely appeal from an August 28, 2018 merit decision and an October 9, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a left shoulder injury causally related to the accepted factors of her federal employment; and (2) whether

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 25, 2018 appellant, then a 67-year-old sales and service associate, filed an occupational disease claim (Form CA-2) alleging that she developed injuries while in the performance of duty, which "felt similar to those received on the job in 2013 and [were] irritate[d] by reaching, stretching, lifting, which is done on a daily basis."³ She indicated that September 1, 2017⁴ was the date she first realized the disease or illness was caused or aggravated by her factors of her federal employment.⁵ Appellant noted that she did not realize that she could file a claim for repetitive activities, as there was no specific date for the injury. She stopped work on March 6, 2018.

In a supplemental statement dated May 25, 2018, appellant explained that she had undergone her first shoulder surgery in 2013. She described her work activities, which included working at a counter, using a step stool to climb, reaching around electronic equipment, crawling, moving items, manually pushing a roll-up window two times per day, placing packages of various weights up to 70 pounds on shelves, raising packages from the floor to customers, taking packages from customers weighing up to 70 pounds, and lowering the packages into cages. Appellant described her February 13, 2013 employment injury which resulted in a torn rotator cuff.

OWCP received an April 19, 2018 work excuse from Dr. Samuel L. Mortimer, a Board-certified orthopedic surgeon.

In a letter dated May 31, 2018, C.T., a health and resource management specialist, controverted the claim. She noted that appellant had referred to her prior 2013 shoulder injury, however, she had reached maximum medical improvement on May 20, 2014, and had received a schedule award.

In a development letter dated June 12, 2018, OWCP requested that appellant submit additional evidence in support of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for completion. By separate letter of even date, OWCP also requested additional information from the employing establishment. It afforded both appellant and the employing establishment 30 days to respond.

³ The record reflects that OWCP accepted appellant's February 13, 2013 claim for right shoulder and rotator cuff sprain and calcified tendinitis of the right shoulder, under OWCP File No. xxxxxx918. This claim has not been administratively combined with the current claim.

⁴ The Board notes that, although the claim form referenced "September 1, 2018," the Board concludes that appellant inadvertently included that date since she provided notice to her supervisor on May 30, 2018 and the employing establishment provided the following statement on the claim form: "The dates [for initial awareness of the condition and relating it to her federal employment] should be September 1, 2017[.] Wrong year was incorrectly entered."

⁵ Appellant did not specify which shoulder was the subject of this claim. However the medical evidence of record indicates that her current medical treatment was for left shoulder conditions and her prior injury was to the right shoulder. The form indicated 2018; however, the employing establishment clarified that the date should be 2017.

OWCP received a January 24, 2018 report from Dr. Mortimer diagnosing left shoulder impingement, acromioclavicular joint arthrosis, rotator cuff tear, and a March 6, 2018 operative report from him with the same diagnoses. It also received a March 19, 2018 note from a physician assistant. OWCP continued to receive reports from Dr. Mortimer including April 16 and May 30, 2018 reports in which he discussed appellant's postoperative findings following her left shoulder arthroscopy, a May 31, 2018 work excuse, June 27 and July 25, 2018 forms indicating that appellant could return to modified duty, and an August 22, 2018 work restriction form.

In a June 6, 2018 report, Dr. Mortimer noted that appellant underwent left shoulder arthroscopy with subacromial decompression, acromioplasty, distal clavicle resection, and arthroscopic rotator cuff repair. He advised that she had issues with her contralateral shoulder dating back to a 2013 work injury when she lifted a box, and had increasing issues with the left shoulder over time, without any specific recent injury. Dr. Mortimer noted that he had recommended an ergonomic evaluation in 2013 which determined that appellant's work environment was not safe and was not conducive for the type of lifting she was performing. He indicated that she now presented with a contralateral shoulder injury which revealed a tear in the rotator cuff requiring surgical intervention. Dr. Mortimer opined that appellant did not have a fall or another injury and "given the fact that she has continued to work in an environment where the ergonomics of her workstation were not improved, this could have a direct relation to the patient's subsequent rotator cuff tear."

Dr. Mortimer explained that appellant's lifting mechanics were affected by the fact that she had to reach out at a 90 degree angle with her arms fully extended with loads exceeding those that are normal. He opined that her workplace "could be the major contributing factor to her problem." Dr. Mortimer noted that appellant had experienced pain, underwent surgical evaluation, and was recovering. He further opined that "this is a work-related injury and should be covered."

By decision dated August 28, 2018, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that her diagnosed left shoulder conditions were causally related to the accepted factors of her federal employment.

On September 10, 2018 appellant requested reconsideration. She resubmitted a copy of Dr. Mortimer's June 6, 2018 report "in case this was not received previously" and noted that it established her left shoulder claim.

By decision dated October 9, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence was repetitious and consisted of copies of documentation previously received and considered.⁶

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time

⁶ OWCP noted that its prior decision found that the medical evidence supported that the newly diagnosed condition was related to her 2013 work injury, rather than a new injury.

limitation period of FECA,⁷ that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁸ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁹

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.¹⁰

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹¹ A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹² Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a left shoulder injury causally related to the accepted factors of her federal employment.

In support of her claim, appellant submitted reports from Dr. Mortimer including his January 24, 2018 report diagnosing left shoulder impingement, acromioclavicular joint arthrosis, and a rotator cuff tear, a March 6, 2018 operative report with the same diagnoses, April 16 and May 30, 2018 reports summarizing postoperative findings, as well as May 31, June 27, July 25, and August 22, 2018 work restriction forms. These reports only contained medical diagnoses, but did not indicate that appellant's employment factors as a sales and service associate caused or

⁷ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁹ *M.S.*, Docket No. 19-0189 (issued May 14, 2019).

¹⁰ *C.D.*, Docket No. 17-2011 (issued November 6, 2018); *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

¹¹ *M.S.*, *supra* note 9; *Robert G. Morris*, 48 ECAB 238 (1996).

¹² *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

¹³ *Id.*

aggravated her left shoulder conditions. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁴

In a June 6, 2018 report, Dr. Mortimer indicated that appellant had problems with her left shoulder and denied any recent, specific injury. He explained that her shoulder problems stemmed from her 2013 work injury to the contralateral shoulder. Dr. Mortimer opined that "given the fact that appellant has continued to work in an environment where the ergonomics of her workstation were not improved, this could have a direct relation to the patient's subsequent rotator cuff tear." He further opined that appellant's workplace activities "could be the major contributing factor to her problems" and that "this is a work-related injury and should be covered."

The Board notes that this opinion is speculative, as Dr. Mortimer opined that appellant's workplace activities "could have" or "could be" related to her condition. Dr. Mortimer did not provide an opinion with reasonable medical certainty. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.¹⁵

OWCP also received a March 19, 2018 note from a physician assistant. Health care providers such as physician assistants are not physicians under FECA.¹⁶ Thus, their opinions regarding causal relationship do not constitute rationalized medical opinions and have no probative value.¹⁷

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹⁸ Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.¹⁹ As there is no opinion expressed with reasonable medical certainty and medical rationale explaining how appellant's repetitive employment duties caused or aggravated a diagnosed condition, appellant has not met her burden of proof to establish a left shoulder injury causally related to the accepted factors of her federal employment.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁴ See *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *K.K.*, Docket No. 18-1209 (issued March 7, 2019).

¹⁵ See *T.H.*, Docket No. 18-1736 (issued March 13, 2019); see *D.R.*, Docket No. 17-0971 (issued October 5, 2017); *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

¹⁶ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). Section 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See also *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹⁷ *K.C.*, Docket No. 18-1330 (issued March 11, 2019); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

¹⁸ See *Joe T. Williams*, 44 ECAB 518, 521 (1993).

¹⁹ *Id.*

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.²⁰ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.²¹ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.²²

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²³ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.²⁴

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In her September 10, 2018 timely reconsideration request, appellant alleged that Dr. Mortimer's June 6, 2018 report established her claim. The Board finds that she has neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance relevant legal arguments not previously considered by OWCP.²⁵

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, she is not entitled to further review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

²⁰ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

²¹ 20 C.F.R. § 10.607.

²² *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

²³ 20 C.F.R. § 10.606(b)(3).

²⁴ *Id.* at § 10.608(a), (b); *see also C.C.*, Docket No. 18-0316 (issued March 14, 2019); *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁵ *See S.F.*, Docket No. 16-1019 (issued May 4, 2017).

In support of her request for reconsideration, appellant resubmitted the June 6, 2018 report from Dr. Mortimer, which was previously considered by OWCP. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²⁶

Appellant submitted no new evidence with her request for reconsideration. Accordingly, the Board finds that she has not provided OWCP with evidence which has met the third-noted requirement of 20 C.F.R. § 10.606(b)(3) sufficient to require further merit review of her claim.

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁷

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a left shoulder injury causally related to the accepted factors of her federal employment. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

²⁶ See *A.F.*, Docket No. 18-1154 (issued January 17, 2019); see *L.R.*, Docket No. 18-0400 (issued August 24, 2018).

²⁷ See *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the October 9 and August 28, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 5, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board