

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

P.C., Appellant	)	
	)	
and	)	<b>Docket No. 18-1703</b>
	)	<b>Issued: March 22, 2019</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
District Heights, MD, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On September 10, 2018 appellant filed a timely appeal from a May 31, 2018 merit decision and a June 13, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish a left shoulder condition causally related to the accepted April 11, 2018 employment incident; and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Following the issuance of OWCP's June 13, 2018 decision on appeal, appellant submitted new evidence. 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.*

(2) whether 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 April 12, 2018 appellant, then a 34-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on April 11, 2018, she sustained a left shoulder strain as a result of lifting a parcel that weighed approximately 50 pounds out of her truck while in the performance of duty. She stopped work on April 14, 2018.

On the reverse side of the claim form, appellant's supervisor controverted the claim, contending that appellant had a hand truck and had worked her entire shift on April 11, 12, and 13, 2018.

OWCP subsequently received narrative statements dated April 14, 2018 from the same supervisor and appellant's coworker. They related that on April 11, 2018 appellant notified them that she had sustained a left arm/shoulder strain as a result of retrieving a heavy parcel from the back of her vehicle. Appellant's supervisor noted that appellant did not request a Form CA-1 when she took her information on April 12, 2018. On April 14, 2014 she completed a Concentra Medical Centers employer's authorization for examination or treatment form for appellant's April 11, 2018 injury.

OWCP also received medical reports dated April 16 and 18, 2018 from a physical therapist and a certified physician assistant who noted on April 11, 2018 that appellant had lifted a parcel weighing approximately 50 pounds from her vehicle while at work. Appellant was diagnosed with left shoulder/ left upper arm strain. The physical therapist advised that she was unable to perform her work activities or her activities of daily living. The physician assistant advised that appellant could perform full-time modified-duty work with restrictions. In a duty status report (Form CA-17) dated April 18, 2018, she indicated that appellant's left shoulder strain was due to injury.

OWCP, by development letter dated April 26, 2018, advised appellant of the factual and medical deficiencies of her claim. It provided a questionnaire for her completion regarding the circumstances of the injury. Appellant was also asked to provide a narrative medical report from her physician which contained a detailed description of findings and diagnoses, explaining how the reported incident caused or aggravated her medical condition. She was afforded 30 days to respond.

OWCP received additional reports from the same physical therapist and physician assistant dated April 18, 23, and 26, and May 1 and 8, 2018, who reiterated their diagnosis of left shoulder/left upper arm strain and opinions regarding appellant's work capacity.

On May 18, 2018 appellant submitted the completed OWCP development questionnaire. She explained that, commencing April 11, 2018, she finished her route while using her right arm and hand to roll parcels out of her truck onto the ground and then onto a hand truck. In a narrative statement dated April 12, 2018, appellant reiterated the factual history of injury she provided on the April 12, 2018 Form CA-1.

Appellant also submitted additional reports dated April 16 and 26 and May 1 and 17, 2018 from the same physical therapist and physician assistant, who restated their diagnosis of left shoulder/upper arm strain and appellant's work capacity and restrictions. In a Form CA-17 report dated April 16, 2018, the physician assistant continued to opine that appellant's left shoulder strain was due to her April 11, 2018 injury.

By decision dated May 31, 2018, OWCP denied appellant's traumatic injury claim, finding that she had not submitted medical evidence containing a medical diagnosis in connection with the accepted April 11, 2018 employment incident. It noted that a physician assistant was not considered a "physician" under FECA.

OWCP subsequently received additional reports dated May 25, 2018 from the same physician assistant, who again reiterated her prior left shoulder diagnosis and appellant's work capacity and restrictions.

On June 11, 2018 appellant requested reconsideration of the May 31, 2018 decision.

In support thereof, appellant submitted a report dated June 5, 2018, wherein the physician assistant again restated her diagnosis of prior left shoulder/left upper diagnosis and again addressed appellant's work capacity and restrictions.

OWCP, by decision dated June 13, 2018, denied further merit review of appellant's claim, finding that the evidence submitted was cumulative, repetitious, and insufficient to warrant a merit review of its prior decision.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>4</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>5</sup>

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. The second component is whether the employment

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>5</sup> *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

incident caused a personal injury and generally can be established only by medical evidence.<sup>6</sup> The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.<sup>7</sup> The belief of the claimant that a condition was caused or aggravated by the employment is insufficient to establish a causal relationship.<sup>8</sup>

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence sufficient to establish such causal relationship.<sup>9</sup> The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>10</sup>

### ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a left shoulder condition causally related to the accepted April 11, 2018 employment incident.

In support of her claim, appellant submitted medical evidence, which consists solely of reports from a physical therapist and a physician assistant. However, physical therapists and physician assistants are not considered physicians as defined under FECA and; therefore, their opinions are of no probative value.<sup>11</sup> As such, this evidence is insufficient to meet appellant's burden of proof to establish her claim

As appellant failed to submit a rationalized opinion from a qualified physician relating her diagnosis to the accepted April 11, 2018 employment incident,<sup>12</sup> the Board finds that she has not met her burden of proof.

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<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989); see 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

<sup>7</sup> *Lourdes Harris*, 45 ECAB 545 (1994); see *Walter D. Morehead*, 31 ECAB 188 (1979).

<sup>8</sup> See *M.J.*, Docket No. 17-0725 (issued May 17, 2018); see also *Lee R. Haywood*, 48 ECAB 145 (1996); *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

<sup>9</sup> *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

<sup>10</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *supra* note 5.

<sup>11</sup> 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 5 U.S.C. § 8102(2); *M.M.*, Docket No. 16-1617 (issued January 24, 2017) (lay individuals such as physician assistants and physical therapists are not competent to render a medical opinion under FECA). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

<sup>12</sup> See *C.S.*, Docket No. 17-1267 (issued December 18, 2017); *G.H.*, Docket No. 17-1387 (issued October 24, 2017).

On appeal appellant contends that a medical report from her new physician establishes that she sustained a left shoulder injury causally related to the April 11, 2018 employment incident. As explained above, the evidence of record at the time of the May 31, 2018 OWCP decision was insufficient to establish causal relationship between her diagnosed left shoulder condition and the accepted employment incident. Therefore she has not met her burden of proof.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>13</sup> Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>14</sup> This section provides that the application for reconsideration must be submitted in writing and 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.<sup>15</sup> Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>16</sup>

### **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 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and she did not advance a new and relevant legal argument not previously considered. Thus, she was not entitled to review of the merits of her claim based on the first and second requirements under 20 C.F.R. § 10.606(b)(3).<sup>17</sup>

Appellant also failed to submit relevant and pertinent new evidence with the June 11, 2018 request for reconsideration. The underlying issue in this case is whether she submitted medical evidence sufficient to establish causal relationship between a diagnosed medical condition and the

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<sup>13</sup> 5 U.S.C. § 8128(a).

<sup>14</sup> 20 C.F.R. § 10.608(a).

<sup>15</sup> *Id.* at § 10.606(b)(3).

<sup>16</sup> *Id.* at § 10.608(b).

<sup>17</sup> *Id.* at § 10.606(b)(3)(i) and (ii).

accepted incident of April 11, 2018. On reconsideration appellant submitted additional reports dated May 25 and June 5, 2018 from a physical therapist diagnosing a left shoulder/left upper arm condition. However, as noted above, physical therapists are not considered physicians as defined under FECA and their opinions are therefore of no probative value.<sup>18</sup> Because the additional reports of appellant's physical therapist are irrelevant to the underlying issue of causal relationship, they do not constitute a basis to reopen appellant's case for review of the merits.<sup>19</sup> Thus, she was also not entitled to review of the merits of her claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a left shoulder condition causally related to the accepted April 11, 2018 employment incident. 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).

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<sup>18</sup> See *supra* note 11.

<sup>19</sup> *R.B.*, Docket No. 18-0898 (issued January 15, 2019).

<sup>20</sup> See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 13 and May 31, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 22, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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