

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Indianapolis, IN, Employer)

**Docket No. 22-0545
Issued: March 22, 2023**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 1, 2022 appellant filed a timely appeal from an October 15, 2021 merit decision and a January 14, 2022 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 over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a right shoulder condition causally related to the accepted factors of her federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 12, 2021 appellant, then a 59-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on January 24, 2021 she injured her right rotator cuff when shifting levers on a forklift while in the performance of duty. There is no indication that she stopped work. The employing establishment acknowledged that appellant was in the performance of duty at the time of the alleged injury. However, it controverted the claim as she did not report the injury prior to February 8, 2021.

In a February 9, 2021 statement, appellant indicated that her arm began to hurt two weeks prior while driving the forklift. It worsened to the point she had limited range of motion and she could not sleep. On February 2, 2021 appellant's doctor indicated that she had a rotator cuff injury.

In a development letter dated February 18, 2021, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary. OWCP afforded appellant 30 days to respond.

In a February 2, 2021 note, Dr. Brock Vanderbush, a Board-certified family practitioner and sports medicine specialist, excused appellant from work from February 1 through 7, 2021 for a right shoulder rotator cuff injury. In a February 3, 2021 note, he indicated that her x-rays showed early arthritis of the right shoulder joint with some bone spurring at the rotator cuff tendons which was likely contributing to rotator cuff irritation.

In a February 26, 2021 attending physician's report (Form CA-20), Dr. Vanderbush reported a date of injury of January 24, 2021 with two months of gradual onset of right shoulder pain without specific trauma or injury. He diagnosed osteoarthritis and rotator cuff tendinopathy which he opined were not caused or aggravated by employment activity. Dr. Vanderbush related that appellant's symptoms were present prior to the stated injury of January 24, 2021. He explained that arthritis was a chronic condition, and there was no mention of an injury at either the February 1, 2021 visit to her primary care provider or his initial evaluation of February 2, 2021. Dr. Vanderbush opined that appellant could resume light work as of February 2, 2021.

By decision dated March 26, 2021, OWCP denied appellant's traumatic injury claim, finding that the employment incident was not established, as alleged. It also noted that it was unclear whether the claimed injury was traumatic in nature or an occupational disease. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 19, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearing and Review. She explained that her primary care physician, whom she saw on December 29, 2020 for another issue, gave her two exercises for her right shoulder pain. Appellant continued to drive the forklift with her shoulder hurting slightly. On January 24, 2021 her shoulder started to hurt from the repetition of shifting the forklift gears and worsened into limited right arm range of motion and inability to use her right hand. When she saw her physician again on February 1, 2021, appellant was referred to Dr. Vanderbush, who saw her the next day. She attributed her shoulder condition to shifting the forklift gears.

Evidence received included copies of February 2, 2021 right shoulder x-rays, which demonstrated degenerative changes and undersurface spurring. OWCP also received Dr. Vanderbush's initial report of February 2, 2021, which noted that appellant's shoulder pain had been ongoing for the last two months without any specific trauma or inciting event and with no previous right shoulder injuries or procedures. Dr. Vanderbush provided an assessment of right shoulder pain and tendinopathy of rotator cuff.

In a February 25, 2021 report, Dr. Vanderbush diagnosed right shoulder pain, rotator cuff injury and arthritis of right shoulder region and ordered a magnetic resonance imaging (MRI) scan. He opined that appellant's shoulder condition was not consistent with a definitive workers' compensation injury. Dr. Vanderbush explained that she had complained of similar right shoulder pain one month prior to her primary care provider and had denied any specific trauma or injury to both he and the primary care provider.

A telephonic hearing was held before an OWCP hearing representative on August 4, 2021. Subsequently, appellant submitted additional evidence.

In a September 2, 2021 report, Dr. Vanderbush diagnosed right shoulder pain, tendinopathy of right rotator cuff and arthritis of right shoulder region. He discussed the importance of appellant obtaining the MRI scan. Dr. Vanderbush also advised that her lack of specific injury at work made an acute workplace injury unlikely, as previously discussed. He opined, however, that given the nature of appellant's job, where she must frequently lift, carry, and reach overhead, it was more likely than not that her job had contributed to her symptoms in some capacity.

On September 17, 2021 appellant underwent a right shoulder MRI, which revealed a tear of the supraspinatus tendon from the posterior and anterior surface, additional tendinopathy, moderate acromioclavicular degenerative joint disease and potential adhesive capsulitis. In a September 21, 2021 report, Dr. Vanderbush noted the MRI scan showed several things, including tears of two of the rotator cuff tendons, evidence of chronic irritation of additional rotator cuff tendons and biceps tendon and evidence of bursitis around some of the rotator cuff tendons. He opined that those findings were all evidence of chronic irritation that typically comes from repetitive lifting, carrying and overhead reaching, which likely occurred because of her job. Dr. Vanderbush also opined that the adhesive capsulitis or frozen shoulder was likely the result of the underlying inflammation.

By decision dated October 15, 2021, an OWCP hearing representative modified the March 26, 2021 decision to convert appellant's claim to an occupational disease, but affirmed the denial on the basis that causal relationship was not established.

On January 11, 2022 appellant requested reconsideration and submitted additional evidence. This included her December 30, 2021 completed questionnaire and witness statements attesting to the fact that she operates a forklift.

In an October 20, 2021 note, Dr. Casimir R. Starslack, an osteopath Board-certified in orthopedic surgery, indicated that appellant could return to work.

By decision dated January 14, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA² has the burden of proof to establish the essential elements of his or her claim, including 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 limitation of FECA,³ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁴ 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.⁵

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁶

The medical evidence required to establish causal relationship is rationalized medical opinion evidence.⁷ The opinion of the physician must be based on a complete factual and medical background of the employee, 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 accepted employment factors.⁸

In any case where a preexisting condition involving the same part of the body is present and the issue of causal relationship, therefore, involves aggravation, acceleration or precipitation, the physician must provide a rationalized medical opinion that differentiates between the effects of the work-related injury or disease and the preexisting condition.⁹

² *Id.*

³ *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁴ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁵ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁶ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

⁷ *S.S.*, Docket No. 19-0688 (issued January 24, 2020); *A.M.*, Docket No. 18-1748 (issued April 24, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

⁸ *A.C.*, Docket No. 21-1307 (issued March 22, 2022); *A.S.*, Docket No. 19-1955 (issued April 9, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3e (January 2013); *M.B.*, Docket No. 20-1275 (issued January 29, 2021); *see R.D.*, Docket No. 18-1551 (issued March 1, 2019).

ANALYSIS -- ISSUE 1

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

Appellant filed a claim for a traumatic injury (Form CA-1), but described in her statements and hearing testimony factors of employment consistent with an occupational disease. She alleged that her right shoulder condition was due to shifting gears on the forklift over a period of time. In her hearing testimony appellant indicated that she had been driving a forklift for about a year and had previously driven a tug, which included hooking up, pulling, and taking off containers.

In his February 2, 2021 reports, Dr. Vanderbush diagnosed right shoulder rotator cuff injury and right shoulder tendinopathy. He explained, in a February 3, 2021 note, that appellant's x-rays showed early arthritis of the shoulder joint with some bone spurring at the rotator cuff tendons, which was likely contributing to rotator cuff irritation. Dr. Vanderbush, however, did not provide an opinion as to the cause of her condition. The Board has held that 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.¹⁰ These reports are, therefore, insufficient to meet appellant's burden of proof.

In his February 25 and 26, 2021 reports, Dr. Vanderbush diagnosed right shoulder pain, tendinopathy of rotator cuff, rotator cuff injury, and arthritis of right shoulder region. However, he negated causal relationship by indicating that appellant's right shoulder conditions were not consistent with a definitive workers' compensation injury. This was based on the fact that appellant had complained of similar right shoulder pain one month prior to her primary care provider and she denied any specific trauma or injury to both the primary care provider and himself in February.

In a September 2, 2021 report, Dr. Vanderbush diagnosed right shoulder pain, tendinopathy of right rotator cuff and arthritis of right shoulder region. He opined that given the nature of appellant's job where she had to frequently lift and carry, as well as reach overhead, it was more likely than not that her job has contributed to her symptoms in some capacity. In his September 21, 2021 report, Dr. Vanderbush indicated that the MRI scan findings of tears and chronic irritation of the rotator cuff tendons and bicep tendon typically come from repetitive lifting, carrying and overhead reaching which likely occurred as a result of her job. The Board has held that medical opinions that suggest that a condition was "likely" or "possibly" caused by work activities are speculative or equivocal in nature and have limited probative value.¹¹ For these reasons, Dr. Vanderbush's September 2 and 21, 2021 reports are of limited probative value and insufficient to meet appellant's burden of proof.

Appellant also submitted diagnostic studies, in the form of x-rays and an MRI scan report. The Board has held that diagnostic studies, standing alone, lack probative value on the issue of

¹⁰ See *B.S.*, Docket No. 20-0895 (issued June 15, 2021); see *D.C.*, Docket No. 19-1093 (issued June 25, 2020); see *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹¹ *J.R.*, Docket No. 20-0903 (issued April 22, 2021); *J.W.*, Docket No. 18-0678 (issued March 3, 2020).

causal relationship, as they do not provide an opinion as to whether the employment incident caused any of the diagnosed conditions.¹² Accordingly, these diagnostic studies are insufficient to establish appellant's claim.

As there is no rationalized medical evidence of record explaining how appellant's accepted factors of her employment caused or aggravated her right shoulder condition, the Board finds that 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(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.¹⁴

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁵ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁶ If the request is timely, but fails

¹² See *K.C.*, Docket No. 20-1325 (issued May 5, 2021); *C.B.*, Docket No. 20-0464 (issued July 21, 2020).

¹³ 5 U.S.C. § 8128(a); see *D.G.*, Docket No. 20-1203 (issued April 28, 2021); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); see *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

¹⁴ 20 C.F.R. § 10.606(b)(3); see *D.G.*, *id.*; *L.D.*, *id.*; see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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 (September 2020). 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). Chapter 2.1602.4b.

¹⁶ *Id.* at § 10.608(a); *D.C.*, *supra* note 10; *F.V.*, Docket No. 18-0230 (issued May 8, 2020); see also *M.S.*, 59 ECAB 231 (2007).

to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁷

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).

Appellant's timely January 3, 2022 request for reconsideration did not demonstrate that OWCP erroneously applied or interpreted a specific point of law. Moreover, she has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a 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).¹⁸

Furthermore, appellant has not provided relevant and pertinent new evidence in support of her request for reconsideration. On reconsideration she submitted her response to OWCP's questionnaire, witness statements, and a return to work note from Dr. Starslack. However, the underlying issue on reconsideration was whether appellant had met her burden of proof to establish that her medical condition was causally related to the accepted employment factors. This is a medical issue that requires rationalized medical opinion evidence to resolve the issue.¹⁹ This evidence, including Dr. Starslack's report, however, does not address whether appellant's diagnosed condition was causally related to the accepted employment factors and, therefore, are insufficient to warrant a merit review. The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.²⁰ As appellant did not provide relevant and pertinent new evidence related to the underlying issue of causal relationship, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board finds that appellant did not meet 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 submit relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly denied review of the merits of the claim.

¹⁷ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁸ *See R.L.*, Docket No. 20-1403 (issued July 21, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁹ *F.L.*, Docket No. 20-1288 (issued July 13, 2021); *D.P.*, Docket No. 20-1225 (issued January 8, 2021); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *T.B.*, Docket No. 18-1214 (issued January 29, 2019).

²⁰ *D.C.*, Docket No. 21-0947 (issued February 6, 2023); *L.W.*, Docket No. 21-0942 (issued May 11, 2022); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right shoulder condition 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).

ORDER

IT IS HEREBY ORDERED THAT the October 15, 2021 and January 14, 2022 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 22, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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