

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

L.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jacksonville, FL, Employer**

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**Docket No. 12-942
Issued: November 26, 2012**

Appearances:
Doris E. Orr-Richardson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 19, 2012 appellant, through her representative, filed a timely appeal from an October 6, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed from the most recent merit decision dated December 3, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case but has jurisdiction over the nonmerit decision pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On appeal, appellant contends that the medical evidence supports that left shoulder surgery is medically warranted and causally related to the June 25, 2005 claimed injury. She

¹ 5 U.S.C. §§ 8101-8193.

further states that her condition has worsened and her pain has progressively increased over the last two years, since the original request to repair her left shoulder was denied.

FACTUAL HISTORY

On December 7, 2007 appellant, then a 44-year-old mail processing clerk, filed an occupational disease claim alleging that her bilateral shoulder conditions arose in the course of her federal employment. OWCP accepted her claim for bilateral shoulder impingement and paid benefits, including a right shoulder arthroscopy/surgery on October 21, 2008. Following a period of part-time modified employment, appellant returned to full-time modified employment. On December 15, 2009 she was placed on work restrictions pursuant to an October 26, 2009 functional capacity evaluation (FCE).

In an April 5, 2010 report, Dr. Rahul V. Deshmukh, a Board-certified orthopedic surgeon, recommended left shoulder arthroscopy, including rotator cuff repair, subacromial decompression and distal clavicle excision.

On April 8, 2010 an OWCP medical adviser reviewed the medical evidence of record and recommended that the proposed surgery for the left shoulder be denied. He noted that appellant had prior decompression surgeries to the left shoulder in 1998 and again on March 25, 2002. The medical adviser stated that a March 21, 2008 magnetic resonance imaging (MRI) scan of the left shoulder found scar tissue and degenerative osteoarthritis but no rotator cuff tear. Furthermore, the April 6, 2010 physical examination was relatively benign.

OWCP referred appellant to Dr. Steven Lancaster, a Board-certified orthopedic surgeon, for a second opinion examination. In an August 26, 2010 report, Dr. Lancaster noted the history of injury, reviewed the medical records and a statement of accepted facts and presented findings on examination. An impression of left shoulder impingement, status post three shoulder surgeries with residual scarring and status post right shoulder subacromial decompression in 2008 were provided. Dr. Lancaster opined that appellant had bilateral shoulder impingement with residual scarring from the multiple surgeries. Appellant had impingement in the past and was treated with subacromial decompression. Residual scarring, gave rise to her continued pain. Dr. Lancaster opined that maximum medical improvement was reached and appellant was able to work with restrictions. He stated that the right shoulder did not appear to significantly improve with the subacromial decompression. Dr. Lancaster further opined that it would not be beneficial for appellant to undergo an additional subacromial decompression on the left side as there was no rotator cuff tear. He stated that appellant would have long-term continued problems with her shoulders but would be able to work within the prescribed work restrictions.

In response to OWCP's request for clarification, Dr. Lancaster stated in an October 6, 2010 report that appellant would be able to successfully pursue a rehabilitation program as she could push, pull and lift for at least three hours a day for a total of 15 pounds below her shoulder for three hours each.

By decision dated December 3, 2010, OWCP denied appellant's request for left shoulder surgery. The weight of the medical evidence rested with OWCP's medical adviser and

Dr. Lancaster, the second opinion physician, who both found that there was no evidence of a rotator cuff tear.

In a July 15, 2011 letter, appellant requested reconsideration. She noted that an MRI scan was performed on July 28, 2010 which showed a partial thickness tearing involving the distal supraspinatus tendon as well as degenerative fraying of the glenoid labrum. Appellant argued that biceps tendinitis was typically associated with rotator cuff tear pathology and impingement. She was diagnosed on August 16, 2010 with bicep tendinitis and received injection and physical therapy which OWCP approved. Appellant also contended that surgical intervention could improve the decreased functional capacity she had on a daily basis.

Appellant submitted August 16 and 30, 2010 reports signed by Ryan Sutton, a certified physician's assistant for Dr. Deshmukh,² an August 30, 2011 prescription and certificate of medical necessity from Dr. Deshmukh noting shoulder pain March 11, July 27 and August 29, 2011 vocational rehabilitation reports; a February 28, 2011 work capacity evaluation from Dr. Deshmukh diagnosing bilateral shoulder impingement and noting restrictions as of October 2009 FCE.

In a February 1, 2011 report, Dr. Deshmukh noted findings on examination and provided an assessment of continued left shoulder pain and decreased function with continued symptoms secondary to rotator cuff impingement and partial rotator cuff tearing. Conservative management of symptoms was initiated. In a February 28, 2011 report, Dr. Deshmukh assessed a high grade partial rotator cuff tear, impingement and acromioclavicular (AC) degenerative joint disease with biceps tendinitis. Conservative management of symptoms was continued.

By decision dated October 6, 2011, OWCP denied appellant's reconsideration request on the grounds that the evidence submitted was insufficient to warrant a merit review of its prior decision. It found that the evidence submitted was cumulative and repetitious in nature.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.³ Section 10.608(b) of OWCP's regulations provide that, 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

² Evidence previously of record included her December 7, 2007 claim form, an October 26, 2009 FCE; an April 8, 2010 surgical request; an August 3, 2007 report and March 28, 2008 work capacity evaluations from Dr. Deshmukh, a July 28, 2010 left shoulder MRI scan, Dr. Lancaster's August 26, 2010 second opinion report, a September 2, 2010 medical authorization form for physical therapy and physical therapy reports; a September 8, 2010 physical therapy evaluation from Christopher Walker, physical therapist, a November 8, 2010 letter from appellant and a copy of the December 3, 2010 decision.

³ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141 (2007).

reconsideration without reopening the case for a review on the merits.⁴ The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁵

ANALYSIS

The only decision before the Board is the October 6, 2011 nonmerit decision denying appellant's request for reconsideration of OWCP's December 3, 2010 merit decision denying her request for left shoulder surgery as there was no evidence of a rotator cuff tear. The underlying issue is whether she provided sufficient medical evidence to establish the need for left shoulder surgery causally related to her accepted bilateral shoulder impingement. The Board finds that appellant did not allege or show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant new argument not previously considered. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(2).

Appellant submitted evidence that was previously of record and considered at the time of the December 3, 2010 decision. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁶ It is insufficient to warrant further merit review.

Appellant also submitted new evidence which included an August 30, 2011 prescription and certificate of medical necessity from Dr. Deshmukh noting shoulder pain, March 11, July 27 and August 29, 2011 vocational rehabilitation reports and a February 28, 2011 work capacity evaluation from Dr. Deshmukh diagnosing bilateral shoulder impingement and noting restrictions per the October 2009 FCE. These reports, while new, are not relevant as they are either not from a physician or do not support that appellant needs surgery due to a torn left rotator cuff. The August 16 and 30, 2010 reports from Mr. Sutton, the certified physician's assistant for Dr. Deshmukh, as well as the physical therapist's reports are not relevant as they are not written or approved by a physician.⁷

Appellant also submitted two new reports from Dr. Deshmukh dated February 1 and 28, 2011. In the February 1, 2011 report, Dr. Deshmukh provided an assessment of continued symptoms of left shoulder pain and decreased function with continued symptoms secondary to rotator cuff impingement and partial rotator cuff tearing. In the February 28, 2011 report, he provided an assessment of high grade partial rotator cuff tearing, impingement and AC degenerative joint disease with biceps tendinitis. Dr. Deshmukh's previous reports of record failed to find any rotator cuff tearing of the left shoulder, which both OWCP's medical adviser and Dr. Lancaster, the second opinion physician, opined was necessary for the requested left shoulder surgery. The reports directly addressed the grounds upon which OWCP denied

⁴ *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495 (2008).

⁵ *See Daniel Deparini*, 44 ECAB 657 (1993).

⁶ *Id.*

⁷ *See* 5 U.S.C. § 8101(2); *E.K.*, Docket No. 09-1827 (issued April 21, 2010) (medical opinion, in general, can only be given by a qualified physician; lay individuals such as physicians' assistants, nurses and physical therapists are not competent to render a medical opinion under FECA).

appellant's claim for surgery of the left shoulder. For this reason, the Board finds that Dr. Deshmukh's February 1 and 28, 2011 reports constitute relevant and pertinent new evidence not previously considered by OWCP. It satisfied one of the three standards for obtaining a merit review of appellant's case. The Board finds that she is entitled to a merit review.

The Board will set aside OWCP's October 6, 2011 decision denying appellant's request for reconsideration and will remand the case for a merit review. After such further development of the evidence as might be necessary, OWCP shall issue an appropriate final decision.

CONCLUSION

The Board finds that OWCP abused its discretion by denying appellant's request for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: November 26, 2012
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board