

FACTUAL HISTORY

On November 29, 2006 appellant, then a 34-year-old nursing assistant, filed a traumatic injury claim alleging that on November 9, 2006 she sustained an injury to her left shoulder when she assisted a patient who was losing her balance. She stopped work on November 27, 2006 and returned on October 4, 2007.

In support of her claim, appellant submitted reports from Dr. Charles R. Ellis, a Board-certified family practitioner and an employing establishment physician. On November 9, 2006 Dr. Ellis reported that appellant was seen on that day for left shoulder pain, which began after she helped a patient stand and then helped turn another patient. He diagnosed left shoulder strain and recommended light work. Appellant was seen for follow-up on November 13, 2006 at which time Dr. Ellis again noted her left shoulder complaint and diagnosed left shoulder strain. On November 23, 2006 Dr. Ellis reported that she had returned with a progression of symptoms, with decreased strength in the left arm and wrist and pain radiating into the right leg. On November 21, 2006 Dr. Steven W. Able, a Board-certified radiologist, interpreted a magnetic resonance imaging (MRI) scan as revealing C4 cervical disc protrusion.

In a December 1, 2006 report, Dr. Thomas E. Melin, a Board-certified neurological surgeon, reported that appellant complained of significant muscle tightness, left greater than right, throughout her upper neck that traveled into the left shoulder blade and of weakness throughout the entire left arm compared to the right. Appellant explained that the neck and left arm pain began on November 9, 2006 about an hour after she helped a heavy patient at work. He recommended that she undergo another MRI scan of the cervical spine.

In a January 24, 2007 report, Dr. Melin noted that on November 9, 2006 appellant lifted a heavy patient at work and now complained of weakness in her left shoulder and arm and mild weakness in her left leg. He diagnosed multilevel cervical disc disease, cervical disc herniation with myeloradiculopathy and myofascial neck pain. On February 2, 2007 Dr. Melin performed a C4-5 anterior cervical discectomy and fusion (ACDF), with bone graft.

In an August 27, 2007 report, Dr. Melin diagnosed status post ACDF C4/5 with presurgical myeloradiculopathy and improved left upper extremity radiculopathy. He authorized appellant to return to work with restrictions to exert 10 pounds of force occasionally, 25 pounds of force frequently and up to 10 pounds of force consistently to move objects for eight hours a day. Dr. Melin stated that she had neck, shoulder and left arm pain after assisting a patient on November 9, 2006. He reported that it was impossible for him to state that appellant's disc pathology, which was found at the time she presented to his office, did in fact worsen following the November 9, 2006 incident, although the condition she sustained on that date did progressively worsen.

In an October 3, 2007 medical report, Dr. Melin authorized appellant to return to work without limitations.

On September 17, 2008 OWCP accepted appellant's claim for left shoulder strain.³ On April 7, 2009 appellant filed a claim for compensation for the period November 22, 2006 to October 3, 2007 and submitted a leave analysis form.

In an April 8, 2009 letter, the employing establishment controverted appellant's claim for compensation on the grounds that the medical evidence submitted regarding her temporary total disability related to a condition other than the accepted left shoulder strain.

On April 28, 2009 OWCP advised appellant that additional medical evidence was needed to establish that she was disabled for work for the period November 22, 2006 to October 3, 2007 as a result of the November 9, 2006 injury. It further noted that the medical evidence of record indicated that she was disabled from work for a cervical condition beginning in November 2006, but the only accepted condition in her claim was for a left shoulder strain.

In a decision dated April 27, 2010, OWCP denied appellant's claim for compensation for the period November 22, 2006 to October 3, 2007, because the medical evidence did not demonstrate that she was temporarily totally disabled during that period as a result of the accepted left shoulder strain injury.

On June 2, 2010 appellant, through her representative, submitted a request for reconsideration. She related that on November 9, 2006 she suffered a shoulder strain injury at work and alleged that substantial medical evidence demonstrated that she sustained a neck injury as well. Appellant also provided a computer printout of a medical article regarding disc herniation.

Appellant resubmitted November 17, 2006 occupational health record and diagnostic reports. In the November 17, 2006 occupational health record, Dr. Ellis noted that she was initially examined for shoulder pain but now complained of neck and chest pain. He stated that x-rays revealed normal shoulder and neck conditions, except for loss of normal curvature and diagnosed shoulder strain with pain, involving shoulder, neck and upper chest area. In a November 17, 2006 report, Dr. Able noted that appellant was examined for shoulder and neck pain. On November 21, 2006 he reviewed a cervical spine MRI scan and observed a central disc protrusion at C4, but did not note any significant stenosis or disc bulging. Dr. Able diagnosed central disc protrusion with spinal stenosis at C4.

Appellant also stated that she was resubmitting Dr. Melin's August 27, 2007 report, but the record does not reflect this resubmission.

By decision dated June 11, 2010, OWCP denied appellant's request for reconsideration because she failed to submit new or relevant evidence and raise arguments not previously considered sufficient to warrant further review under 5 U.S.C. § 8128(a).

³ The record reflects that OWCP also denied appellant's claim for the conditions of ACDF C4/5 with presurgical myeloradiculopathy and cervical disc herniation on the grounds of insufficient medical evidence establishing causal relationship.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁴ OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district Office.⁵

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

“(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.”⁶

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.⁷ 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.⁸ 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 review on the merits.⁹

ANALYSIS

As previously noted, the Board does not have jurisdiction over the merits of this case. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her June 2, 2010 request for reconsideration, appellant, through her representative, did not allege that OWCP erroneously applied or interpreted a specific point of law. She also failed to advance a relevant legal argument. Appellant alleged that on November 9, 2006 she sustained a neck injury along with her accepted shoulder strain at work. OWCP had however previously rejected

⁴ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁶ *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

that the November 9, 2006 incident caused any condition other than the accepted left shoulder strain.

Appellant also did not submit relevant and pertinent evidence not previously considered by OWCP, but resubmitted occupational health records dated November 17 and 21, 2006. The submission of evidence which repeats or duplicates evidence already of record and considered by OWCP does not constitute a basis for reopening a case and is insufficient to warrant further merit review.¹⁰

Appellant also submitted an internet medical article regarding disc herniation. Scientific studies, as well as medical literature, have probative value only to the extent that they are further interpreted by a physician, rendering an opinion regarding the facts of the case at hand.¹¹

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

CONCLUSION

The Board finds that OWCP did not abuse its discretion by denying appellant's June 2, 2010 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹⁰ *D.K.*, 59 ECAB 141 (2007); *E.M.*, Docket No. 09-39 (issued March 3, 2009).

¹¹ *Elizabeth H. Kramm*, (*Leonard O. Kramm*) 57 ECAB 117 (2005).

ORDER

IT IS HEREBY ORDERED THAT the nonmerit decision of the Office of Workers' Compensation Programs dated June 11, 2010 is affirmed.

Issued: September 14, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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