

FACTS

On March 18, 2010 appellant, then a 44-year-old mail handler, filed an occupational disease claim stating that he first noticed pain in his right shoulder after pushing, pulling and turning containers and loading trucks on January 15, 2010. He alleged that the repetitive motions of his work caused tears to his right shoulder. Appellant indicated that he had been taken off work for other medical problems, including his right shoulder and that he was released to return to light-duty work on March 15, 2010. The employing establishment stated that he was last exposed to conditions alleged to have caused his condition on February 3, 2010.

In support of his claim, appellant submitted a March 18, 2010 narrative statement, a June 8, 2010 duty status report from Dr. Rankin, a family practitioner, which indicated that his rotator cuff tear was consistent with repetitive use injury of pulling/pushing and physical therapy reports dated June 8 and 15, 2010.

In statements dated March 30 and April 13, 2010, the employing establishment indicated that appellant was off work prior to filing his claim and that he never reported an injury to his supervisor.

In a June 21, 2010 letter, OWCP advised appellant of the deficiencies in his claim and requested additional factual and medical evidence, including a comprehensive medical report from his treating physician which contained an explanation as to how and why the incidents in his employment caused or contributed to his right shoulder condition.

In response to the development letter, OWCP received several physical therapy reports, a March 14, 2010 magnetic resonance imaging (MRI) scan and arthrogram of the right shoulder.

An initial consultation report dated June 8, 2010 from Liberty Health Care with an illegible signature noted that appellant stated that he injured his right shoulder at work on January 15, 2010. Examination findings were provided, which noted that his right shoulder was depressed. No diagnosis was provided. In an unsigned progress note dated June 8, 2010, a history was provided of appellant pushing a heavy cart on January 15, 2010 when he fell and felt sharp pain in his right shoulder. It noted that he had been treated by his primary care physician and his MRI scan showed a partial tear of the rotator cuff. A diagnosis of rotator cuff tear of the left shoulder was provided.

By decision dated July 22, 2010, OWCP denied appellant's claim on the grounds that there was no medical evidence from a physician which contained a medical diagnosis in connection with the injury and/or accepted work events.

On September 10, 2010 appellant requested a review of the written record before an OWCP hearing representative. Additional evidence was submitted. By decision dated November 29, 2010, the hearing representative denied appellant's request for a hearing, finding that it was untimely and the issue could be equally well addressed by requesting reconsideration.³

³ Appellant did not appeal this decision.

On January 11, 2011 appellant requested reconsideration. In support of his request, he submitted copies of evidence previously submitted along with an August 31, 2010 functional capacity evaluation, physical therapy notes and medical progress notes regarding his right shoulder: from an unknown provider; and medical records regarding other conditions such as his right knee.

Reports dated March 24, April 22 and May 20, 2010 from Dr. Marvin E. Van Hal, a Board-certified orthopedic surgeon, regarding appellant's right shoulder condition were also provided. In the March 24, 2010 report, he reported that appellant was a mail handler who was working light duty. Dr. Van Hal noted that appellant reported a long history of pushing and positioning carts and trailers and that on January 15, 2010 appellant had increased pain in the arm and shoulder area. A diagnosis of right shoulder impingement with probable labral tear, lateral epicondylitis with discomfort over the elbow region and cervical strain were provided. The other reports from Dr. Van Hal reported on the status of appellant's right shoulder condition.

In a June 8, 2010 amended initial medical narrative report, Dr. Mallapur S. Rao, a family practitioner, provided a diagnosis of right shoulder rotator cuff tear, which he opined was directly related to his occupation. He stated that appellant engaged in repetitive motions daily that, over time, cause inflammation in the shoulder. Dr. Rao explained that this directly leads to a weakening of the muscle structures which leads to tearing of the muscles. He noted the history of injury as occurring on January 15, 2010 while appellant was pushing a heavy cart in the performance of duty. Appellant reportedly was treated by his primary care physician, Dr. Louis D. Zegarelli, who referred him to Dr. Van Hal due to positive MRI scan findings. He was returned to work with restrictions as of June 8, 2010.

By decision dated March 25, 2011, OWCP denied further reconsideration of the merits. It found that appellant did not provide any new and relevant medical evidence or show that OWCP erroneously applied or interpreted a point of law.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP

⁴ Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁵ 20 C.F.R. § 10.606(b)(2). See *Susan A. Filkins*, 57 ECAB 630 (2006); *J.M.*, Docket No. 09-218 (issued July 24, 2009).

⁶ *Id.* at § 10.607(a). See *Robert G. Burns*, 57 ECAB 657 (2006); *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

will deny the application for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

The only decision before the Board is the March 25, 2011 nonmerit decision denying appellant's request for reconsideration of OWCP's July 22, 2010 merit decision denying his claim. The Board finds that he has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously considered. Consequently, appellant was not entitled to a review of the merits of his case based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(2). The underlying issue is medical in nature, whether he presented sufficient medical evidence supporting that employment factors caused or aggravated his claimed right shoulder condition.

Appellant also submitted evidence, some which was previously of record. 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.⁸ Appellant also submitted physical therapy treatment notes. Pursuant to section 8101(2) of FECA, the term physician includes surgeons, podiatrists, dentists, psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice.⁹ Lay individuals, such as physical therapists, are not physicians as defined FECA. Therefore, their opinions do not constitute competent, relevant evidence and cannot constitute a basis for reopening a case.¹⁰ The other evidence appellant submitted, such as progress notes from an unknown provider, a functional capacity evaluation and evidence pertaining to other conditions, are not relevant to the underlying issue of whether his right shoulder condition is causally related to his employment duties.

Appellant also submitted new medical reports from Drs. Van Hal and Rao, which OWCP found was insufficient to warrant a merit review of the case. The Board finds that Dr. Van Hal's reports are not relevant to the underlying issue of whether appellant's right shoulder condition is causally related to his employment as he did not offer his own opinion on causal relationship. However, Dr. Rao's June 8, 2010 report is new and it is relevant. He opined that appellant's right shoulder rotator cuff tear is directly related to the repetitive nature of his occupation and explained the basis of his opinion. Because this medical evidence is new and relevant to the underlying issue, causal relationship, the Board finds that appellant's request for reconsideration satisfies the third standard for obtaining a merit review of his claim.¹¹ To require OWCP to conduct a merit review, the evidence need only be new and relevant.¹² If it should determine that

⁷ *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁸ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

⁹ 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238 (2005).

¹⁰ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹¹ *V.B.*, 58 ECAB 725 (2007).

¹² See 20 C.F.R. § 10.606(b)(3). See also *Mark H. Dever*, 53 ECAB 710 (2002).

the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹³ The Board will set aside OWCP's decision denying reconsideration and remand the case for an appropriate final decision on the merits.

On appeal, appellant set forth arguments regarding the merits of his claim. As noted, the Board only has jurisdiction regarding whether OWCP properly denied a merit review of the claim. In light of the disposition of this appeal, OWCP shall issue a decision that addresses the merits of the claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision.

Issued: January 26, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹³ *Donald T. Pippin*, 54 ECAB 631 (2003).