

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On appeal appellant asserts that, as she furnished new and relevant evidence with her reconsideration request, OWCP should have conducted a merit review and that medical evidence established that she continued to have residuals of right upper extremity injuries.³

FACTUAL HISTORY

On May 22, 2002 appellant, then a 42-year-old customs inspector, filed a traumatic injury claim alleging that she injured her right hand on that date while lifting a wooden barricade. The claim was initially accepted for bursitis right shoulder and later expanded to include right shoulder adhesive capsulitis and right shoulder de Quervain's tenosynovitis. Appellant was paid wage-loss compensation for intermittent periods until she stopped work on October 31, 2005 and did not return. On March 23, 2007 OWCP accepted that she sustained a recurrence of disability on December 19, 2006, and she was placed on the periodic compensation rolls. On September 26, 2007 and April 9, 2008, Dr. Francis Moll, III, a Board-certified orthopedic surgeon, performed corrective right shoulder surgery.

In a January 12, 2009 report, Dr. Manuel Porth, an attending Board-certified orthopedist, noted appellant's history of right shoulder surgery and her complaint that her left shoulder had been symptomatic recently. He advised that appellant had significant stresses due to job loss and ongoing upper extremity complaints and needed continued psychiatric counseling. On March 2, 2009 OWCP requested that Dr. Porth provide an update regarding appellant's accepted right upper extremity condition. Dr. Porth did not respond and OWCP referred appellant for a second-opinion evaluation.⁴

In a June 13, 2009 report, Dr. Richard L. Glatzer, Board-certified in orthopedic surgery, noted the history of injury, his review of the medical record and the statement of accepted facts, and appellant's complaints of pain in the right hand and shoulder and left shoulder. He provided physical examination findings and diagnosed post arthroscopy right shoulder with continuing subjective complaints. Dr. Glatzer stated that, other than the healed arthroscopy scars, there were no objective orthopedic or neurological clinical findings to corroborate appellant's

³ Appellant is requesting only medical benefits under the instant claim, adjudicated by OWCP under file number xxxxxx987. She has a separate claim for a psychiatric condition, adjudicated by OWCP under file number xxxxxx750. In a July 13, 2006 order, Docket No. 06-780, the Board remanded the case to OWCP for further development of the medical evidence. In an order dated February 26, 2007, Docket No. 06-1485, the Board dismissed an appeal at appellant's request. Following further development, on August 27, 2009, OWCP accepted that she sustained an employment-related adjustment disorder with depressed mood. Appellant was placed on the periodic compensation rolls under this claim, effective August 7, 2009, the date her compensation benefits under the instant claim were terminated. *See discussion infra.* The emotional condition claim is not before the Board on the present appeal.

⁴ OWCP initially referred appellant to Dr. Barry Schapiro, a Board-certified orthopedic surgeon, who did not timely provide a report. It then referred appellant to Dr. Richard L. Glatzer.

complaints, which indicated to him that the May 22, 2002 employment injury was no longer active and was not causing objective findings. He found no residuals of the employment-related right shoulder conditions, either from his review of the medical records or upon his evaluation. Dr. Glatzer indicated that appellant had a functional overlay which caused possible iatrogenically-induced-pain-related behavior. He explained that, if she had the pain she claimed in the right upper extremity, there would have been some evidence of atrophy from disuse but that none had been measured by him or noted by any other doctor. Dr. Glatzer concluded that appellant was capable of performing her job duties with minor restrictions based on her subjective complaints, indicating that there was no objective basis for imposing restrictions. In an attached work capacity evaluation, he advised that appellant could perform her usual job.

On June 24, 2009 OWCP proposed to terminate appellant's medical benefits and wage-loss compensation. Appellant disagreed with the proposed termination. By decision dated August 5, 2009, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Glatzer and terminated appellant's medical benefits and wage-loss compensation, effective August 6, 2009.

On June 24, 2010 appellant requested reconsideration. She submitted reports dated January 23 and May 17, 2010 in which Dr. Porth noted that appellant was symptomatic with regard to both shoulders, with the right worse than the left. Dr. Porth recommended electrodiagnostic studies of the upper extremities. In a June 17, 2010 report, Dr. Douglas M. Lanes, a Board-certified psychiatrist, advised that, as a consequence of appellant's injured shoulder, she had developed an adjustment reaction with depression which was totally disabling.⁵

In a merit decision dated August 20, 2010, OWCP reviewed the medical evidence submitted and denied modification of the August 5, 2009 decision. On August 12, 2011 appellant again requested reconsideration, stating that she was requesting medical benefits for this claim and that Dr. Porth's requests for testing should be authorized. She noted that she had separate OWCP claims for a left shoulder condition and a reinjury to her right shoulder and wrist in August 2004 and still had pain and discomfort in the right shoulder. Appellant submitted an August 5, 2011 report in which Dr. Porth noted a chief complaint of left shoulder and right wrist discomfort with continued complaints of right shoulder problems. Dr. Porth recommended a right upper extremity electrodiagnostic study and magnetic resonance imaging of the left shoulder.

In a nonmerit decision dated October 5, 2011, OWCP denied appellant's reconsideration request. It found that she had not shown that it erroneously applied or interpreted a point of law and that the evidence and argument submitted were cumulative or immaterial.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with 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.⁶ Section 10.608(a) of Title 20 of the Code of Federal Regulations

⁵ *Supra* note 3.

⁶ 5 U.S.C. § 8128(a).

(C.F.R.) provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).⁷ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸ 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.⁹

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated October 5, 2011 denying appellant's application for review. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of appellant's claim.¹⁰

With her August 12, 2011 reconsideration request, appellant requested medical benefits for this claim and that Dr. Porth's requests for testing should be authorized. She therefore did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(2).¹¹

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted an August 5, 2011 report from Dr. Porth. In the last merit OWCP decision dated August 20, 2010, OWCP noted that it had reviewed all medical evidence submitted with appellant's June 24, 2010 reconsideration request. This evidence included a May 17, 2010 report in which Dr. Porth requested authorization for upper extremity electrodiagnostic studies. In his August 5, 2011 report, submitted with appellant's August 12, 2011 reconsideration request, he discussed appellant's left upper extremity condition, which is not relevant in this case which is in regard to appellant's right shoulder. Regarding the right shoulder, Dr. Porth merely indicated that appellant continued to complain of right upper extremity pain and again recommended an electrodiagnostic study, as previously recommended by him on May 17, 2010. He did not discuss physical examination findings or render an opinion regarding the merit issue in this case. Thus, appellant did not submit relevant and pertinent new evidence not previously considered by OWCP.

⁷ 20 C.F.R. § 10.608(a) (1999).

⁸ *Id.* at § 10.608(b)(1), (2) (1999).

⁹ *Id.* at § 10.608(b).

¹⁰ *Supra* note 1.

¹¹ 20 C.F.R. § 10.606(b)(2).

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied her reconsideration request.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board