

FACTUAL HISTORY

On November 30, 2011 appellant, then a 37-year-old human resources officer, filed a traumatic injury claim alleging that on November 16, 2009 she injured her left shoulder when she fell on ice. The employing establishment controverted the claim as she was at her car for an unknown reason during duty hours and the claim was not filed until two years after the alleged incident.

In a mishap report form dated November 16, 2009, appellant described her injury as occurring when she slipped on ice while walking to a building from her vehicle and “fell somewhat under a parked car, sliding on my right leg and catching myself with my right hand.”

In a statement dated January 9, 2012, appellant related that she was walking in the parking lot of the employing establishment when she slipped on ice. She stated, “It was a fairly significant fall, as I went completely under a parked vehicle without having the ability to stop myself. I did try, but slid on my right side and tried to catch myself with both arms.” Appellant related that she had recently had a baby at the time of the injury and became pregnant again shortly thereafter.

On December 18, 2011 Dr. Bruce D. Smith, a Board-certified internist, performed an open near capsular shift on the left shoulder. In a report dated January 6, 2012, he indicated that appellant sustained the first of her “now chronic anterior left shoulder dislocations” after she fell on ice in the parking lot at work. Dr. Smith related that she subsequently experienced laxity and frequent dislocations. He advised that surgery revealed a labral tear. Dr. Smith stated, “While I did not have the advantage of examining your shoulder before and after the injury you sustained, it was certainly the type of injury which can cause a shoulder dislocation with concomitant labral pathology. Certainty from the standpoint of your history, it appears this was the initiating event in the development of your left shoulder issues.”

By decision dated January 13, 2012, OWCP denied appellant’s claim finding that she did not establish that she was in the performance of duty at the time of her alleged November 16, 2009 slip and fall. It determined that she had not addressed whether she was performing her assigned work duties at the time of the alleged injury.

In a report dated July 23, 2012, Dr. Jonathon Medina, Board-certified in family practice, noted that appellant had received treatment from another physician on November 17, 2009 after she slipped and fell on ice. He asserted that she injured both arms when she fell on November 16, 2009 but initially was unaware of the extent of injury to the left shoulder. Dr. Medina stated, “In [appellant’s] case, I believe she fell on her right side, slid under a car on her back and while sliding, she grabbed the bumper of the car with her left arm. This mechanism of injury is consistent with the incident.” He indicated that she delayed seeking treatment of her injury due to pregnancy. Dr. Medina related, “Based on my review of the records and the information provided by [appellant], it is my opinion that the accident of November 16, 2009 caused [her] to suffer the following conditions: chronic left anterior shoulder instability, [a] complete tear of the anterior labrum and mild glenoid loss anteriorly.”

On July 27, 2012 Dr. Smith concurred with Dr. Medina's comments regarding the cause of appellant's injury and noted that it was common to injure both extremities in a fall, especially on ice.

On August 13, 2012 appellant requested reconsideration.

In a decision dated January 14, 2013, OWCP modified its January 13, 2012 decision and found that appellant was in the performance of duty on November 16, 2009. It noted that she provided a statement that she had driven back from a work meeting and was walking to her building at the time she fell on November 16, 2009. The employing establishment confirmed that it controlled the parking lot and it was only for the use of its employees. OWCP determined, however, that the medical evidence was insufficient to establish that appellant sustained a left shoulder injury as a result of the November 16, 2009 slip and fall because her physicians relied upon an inaccurate history of injury, that of her trying to catch herself on a car bumper with her left arm. It found that her January 9, 2012 statement that she tried to catch herself with both arms was less probative than the November 2009 form report from the employing establishment indicating that she caught herself with her right hand.

On June 17, 2013 appellant requested reconsideration. She stated, "It appears to me that the events of November 16, 2009 have been misconstrued as it appears there is confusion about the time of day when I fell and which arm I said I hurt when I fell." Appellant related that she was traveling between two work buildings when she fell in the parking lot. She related:

"When I fell to the ground I tried to catch myself and so I put out my right hand onto the ground to protect myself. When I attempted to catch myself I scratched up my right hand a bit, but I ended up sliding under a parked car. At the point I started to slide under the car I was pretty much on my right side and slightly on my back going under the car feet first. It was quite slick out. As I was sliding under the car I reached up and tried to grab the bumper with my left hand in a further attempt to stop myself from sliding. In effect I was simultaneously trying to brake myself with both hands, one on the ground and one reaching up for the bumper. I did stop myself from sliding any further under the car but ended up tearing my left shoulder as later diagnosed by my doctors."

Appellant related that she ignored her left shoulder condition after the accident because she believed that the pain would subside. She continued to experience problems but a doctor believed that her pain was due to her pregnancy and did not realize that her shoulder was torn.

By decision dated September 10, 2013, OWCP denied appellant's request for reconsideration after finding that she did not submit evidence or raise argument sufficient to warrant reopening the case for further merit review under section 8128. It found that her statement was cumulative in nature and that she did not provide contemporaneous evidence showing a left shoulder injury at the time of her fall on November 16, 2009.

On appeal appellant argues that OWCP should have considered the merits of her June 17, 2013 statement as it was new evidence relevant to OWCP's prior finding that her physicians' reports were based on an inaccurate history. She asserts that her comprehensive description of

her injury with her reconsideration request constituted new evidence that warranted reopening her case for further merit review. Appellant notes that the account that she gave to the employing establishment on November 16, 2009 was general in nature. She relates that she experienced left shoulder problems after the accident but could not have objective tests due to pregnancy and breast feeding.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² 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) constitute relevant and pertinent new evidence not previously considered by OWCP.³ To be entitled to a merit review of an 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.⁴ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁵

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.⁶ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.⁷ If OWCP should determine that 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.⁸

ANALYSIS

By decision dated January 14, 2013, OWCP denied appellant's claim after finding that the medical evidence was insufficient to show that she sustained a left shoulder injury due to her November 16, 2009 slip and fall. It determined that her physicians relied upon an inaccurate history of injury, that of her slipping under a car and grabbing a bumper with her left arm on November 16, 2009. OWCP noted that a November 16, 2009 report of the incident indicated that appellant fell and caught herself with only her right hand. It found that the contemporaneous

² 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *Donald T. Pippin*, 53 ECAB 631 (2003).

⁷ *Id.*

⁸ *See Annette Louise*, 53 ECAB 783 (2003).

incident report was of greater probative value than appellant's January 9, 2012 statement that she tried to stop herself from sliding with both of her arms.

With her June 13, 2013 request for reconsideration, appellant provided a detailed account of the November 16, 2009 slip and fall. She maintained that she caught herself on the ground with her right hand when she fell. Appellant began to slide under a car and tried to grab the car bumper with her left hand to stop herself, injuring her left arm. In its September 10, 2013 decision, OWCP found that she did not submit relevant evidence sufficient to warrant a merit review of her claim; however, it previously denied appellant's claim based on its finding that her physicians relied upon an inaccurate history of injury, and her factual statement pertained directly to the issue of how her injury occurred. Appellant's statements constitute pertinent new and relevant evidence. While she had previously submitted a brief statement indicating that she caught herself with both hands, the record does not contain a prior detailed account of the circumstances surrounding the November 16, 2009 work incident.

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.⁹ As appellant's June 17, 2013 statement constituted pertinent new and relevant evidence, the Board finds that OWCP improperly denied her request for review of the merits of the claim. The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue a merit decision on the claim.

CONCLUSION

The Board finds that the case is not in posture for decision.

⁹ See *Donald T. Pippin*, *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 4, 2014
Washington, DC

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

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

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