

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

C.H., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
Omaha, NE, Employer)

Docket No. 13-1661
Issued: January 15, 2014

Appearances:
Appellant, pro se,
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 2, 2013 appellant filed a timely appeal from the April 11, 2013 Office of Workers' Compensation Programs' (OWCP) nonmerit decision, denying her request for further merit review of her claim. As the last merit decision was issued on March 1, 2012, more than 180 days from the filing of this appeal, the Board does not have jurisdiction over the merits of the claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 18, 2011 appellant, then a 54-year-old nursing assistant filed a traumatic injury claim alleging that on August 10, 2011 she tripped on the carpet at work and injured her right shoulder and hip. Her supervisor did not indicate that appellant stopped work. The employing establishment later provided light-duty work available.

Appellant submitted several medical records in support of her claim including an August 18, 2011 report from Dr. Jeffrey J. Jenkins, a Board-certified family practitioner, who noted that appellant fell at work on August 10, 2011. Dr. Jenkins stated that while she was walking rapidly down the hallway to assist a patient, she fell on her right side striking her hip and shoulder. He diagnosed hip and shoulder pain and indicated that appellant should not work on August 18 and 19, 2011. OWCP also received August 18, 2011 x-rays of the right hip and shoulder, read by Dr. Kristofer A. Vander Zwaag, a Board-certified diagnostic radiologist, which were negative. Dr. Vander Swaag noted that there was no bone, joint or soft tissue abnormality.

In an August 19, 2011 report, Dr. George J. Emodi, a Board-certified orthopedic surgeon, noted that appellant was seen for right shoulder and hip pain. He related that appellant stated that she apparently saw a patient falling and went to move quickly to his aid and tripped on a rug and ended up falling violently on her right side. Dr. Emodi opined, "I think the patient probably sustained an injury to her right hip labrum. She might be suffering from right rotator cuff tend[i]nitis versus a tear as well." He released appellant to sedentary work.

By decision dated January 6, 2012, OWCP denied appellant's claim. It found that the medical evidence did not demonstrate that the claimed medical condition was related to established work events.

By letter dated February 3, 2012, appellant requested reconsideration and submitted additional evidence. She described her injury on August 10, 2011 and noted that she was taking care of a very high risk patient, she ran down the hall at full speed to get to him before he fell. Appellant indicated that she continued to suffer from pain in her hip, right arm and shoulder.

The additional evidence included a January 24, 2012 report from Dr. Emodi, who opined that the causal relationship between appellant's work-related fall and her right shoulder and hip pain was self-evident. Dr. Emodi related that she denied having pain in her shoulder and hip prior to the work-related fall, and she "suffered with it ever since." He noted that he had reviewed appellant's history of injury and imaging studies including her shoulder and hip magnetic resonance imaging (MRI) scans.² Dr. Emodi opined that she sustained a partial-thickness rotator cuff tear, partial biceps tear, and a superior labral tear of her right shoulder when she fell. He also opined that appellant suffered a labral tear of her right hip and developed an associated periarticular ganglion cyst. Dr. Emodi opined, "[t]o be absolutely clear, it is my opinion that these injuries are the direct result of her fall."

² An October 14, 2011 MRI scan of the right shoulder and right hip read by Dr. Kevin L. Nelson, a Board-certified diagnostic radiologist, revealed: anterior impingement; degenerative change acromioclavicular joint; mild downsloping anterior acromion arch; fairly severe distal supraspinatus tendinitis, partial-thickness articular surface tearing, no muscle atrophy and moderately severe proximal bicipital tendinitis, intact glenoid labral rim.

By decision dated March 1, 2012, OWCP denied modification of the prior decision.

In a letter dated December 10, 2012, appellant's attorney requested reconsideration. He noted that appellant was submitting new medical evidence from Dr. Emodi and Dr. Steven Williams, a Board-certified family practitioner, which supported her claim.³ Appellant also argued that the reports from Dr. Emodi dated August 19, 2011 and January 24, 2012 were sufficient to establish causal relationship.

OWCP received copies of the August 18, 2011 radiology reports of her right shoulder from Dr. Vander Zwaag.

In a decision dated April 11, 2013, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁴ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(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].”⁵

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

Appellant disagreed with the denial of her traumatic injury claim and requested reconsideration on December 10, 2012.

Appellant's counsel indicated that he would submit new evidence from Dr. Emodi and Dr. Williams. However, no new medical evidence accompanied the reconsideration request.

³ However, no new medical evidence accompanied her letter.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b).

⁶ *Id.* at § 10.608(b).

Counsel also argued that Dr. Emodi's reports dated August 19, 2011 and January 24, 2012 established causal relationship. However, OWCP previously considered those reports in the prior decisions dated January 6 and March 1, 2012. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.⁷

OWCP also received duplicate reports dated August 18, 2011 from Dr. Vander Zwaag. As noted above, the submission of evidence or argument which repeats or duplicates that already in the case record does not constitute a basis for reopening a case.⁸

Consequently, the evidence submitted by appellant on reconsideration does not satisfy any of the regulatory criteria for reopening a claim for a merit review. Therefore, OWCP properly denied her request for reconsideration.⁹

On appeal, appellant argued that no one at the employing establishment questioned or challenged her injury. The Board notes that the incident has been established. The claim was denied because appellant did not demonstrate that the claimed medical condition was causally related to her work-related events. As discussed, appellant did not submit sufficient evidence to require OWCP to reopen the claim for a merit review. Although, she indicated that she submitted new evidence with her request, no new medical evidence was received by OWCP.

CONCLUSION

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

⁷ *Edward W. Malaniak*, 51 ECAB 279 (2000).

⁸ *Id.*

⁹ *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *Candace A. Karkoff*, 56 ECAB 622 (2005) (when an application for reconsideration does not meet at least one of the three requirements enumerated under then section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the April 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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