

On appeal, appellant indicated that she was awaiting an appointment with a specialist and her claim was denied before her doctor could evaluate her condition. She submitted additional medical evidence.

FACTUAL HISTORY

On January 16, 2014 appellant, then a 45-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her a right arm and shoulder on December 2, 2013 while casing parcels in the performance of duty.

In a December 27, 2013 report, Karen Pellicore, a nurse practitioner, diagnosed shoulder injury and listed a possible rotator cuff injury. She stated that while working on December 2, 2013 appellant felt right shoulder pain. Ms. Pellicore checked a box “yes” indicating that appellant’s condition was caused or aggravated by an employment activity. She advised appellant to use the left arm and rest the right shoulder. Ms. Pellicore opined that appellant was able to resume her federal employment effective December 28, 2013.

On January 21, 2014 the employing establishment controverted appellant’s claim.

In a January 28, 2014 letter, OWCP notified appellant of the deficiencies of her claim and requested additional factual and medical evidence. It afforded her 30 days to submit additional evidence and respond to its inquiries. Appellant did not respond.

By decision dated March 4, 2014, OWCP accepted that the December 2, 2013 incident occurred. It denied the claim finding that appellant failed to submit evidence providing a firm medical diagnosis in connection with the accepted incident.

On March 11, 2014 appellant requested reconsideration and submitted a narrative statement explaining her difficulty in seeking a specialist and a letter dated December 2, 2013 notifying the employing establishment of her injury.

By decision dated March 28, 2014, OWCP denied appellant’s request for reconsideration. It found that she did not submit pertinent new and relevant evidence or show that it erroneously applied or interpreted a point of law not previously considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA and that an injury⁴ was sustained in the performance of duty. These

³ 5 U.S.C. § 8101 *et seq.*

⁴ OWCP regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a “fact of injury” has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.⁶

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that the employment incident of December 2, 2013 occurred at the time, place and in the manner alleged. The issue is whether appellant sustained an injury as a result. The Board finds that she did not meet her burden of proof to establish that she sustained an injury related to the December 2, 2013 employment incident.

In support of her claim, appellant submitted a December 27, 2014 report from a nurse practitioner, Ms. Pellicore, who diagnosed a shoulder injury and checked a box “yes” indicating that appellant’s condition was caused or aggravated by an employment activity. The Board notes that this report does not constitute competent medical evidence as a nurse is not a “physician” as defined under FECA.⁸ The Board further notes that the diagnosis of “shoulder injury” is a general description of a symptom rather than a firm diagnosis of the medical condition.⁹ This report is insufficient to establish appellant’s claim of injury.

On appeal, appellant indicated that she was awaiting an appointment with a specialist and her claim was denied before her doctor could evaluate her condition. She submitted additional

⁵ See *O.W.*, Docket No. 09-2110 (issued April 22, 2010); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁶ *Id.* See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

⁷ See *O.W.*, *supra* note 5.

⁸ See 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: “(2) ‘physician’ includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.” See also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004); *Joseph N. Fassi*, 42 ECAB 677 (1991); *Barbara J. Williams*, 40 ECAB 649 (1989).

⁹ See *P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

medical evidence. The Board notes that, following the issuance of the March 28, 2014 OWCP decision, appellant submitted new medical evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision.¹⁰

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.¹¹ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).¹²

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by 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.¹³ To be entitled to a merit review of an OWCP's 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.¹⁴ 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.¹⁵

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁶ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷

¹⁰ See *supra* note 2.

¹¹ *Supra* note 1. Under section 8128 of FECA, 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 U.S.C. § 8128(a).

¹² See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

¹³ 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁴ *Id.* at § 10.607(a).

¹⁵ *Id.* at § 10.608(b).

¹⁶ See *A.L.*, *supra* note 13. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁷ *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ANALYSIS -- ISSUE 2

In support of her March 11, 2014 reconsideration request, appellant submitted a narrative statement explaining her difficulty in scheduling an appointment with a specialist and a letter dated December 2, 2013 notifying the employing establishment of her injury. The Board finds that submission of these documents did not require the reopening of her case for merit review. This material addresses the history of appellant's claim and is not relevant to the issue of causal relation, which was the issue before OWCP. This evidence does not constitute relevant and pertinent new evidence and is not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP, nor did she constitute any relevant and pertinent new evidence not previously considered. The Board finds that she did not meet any of the regulatory requirements. OWCP did not abuse its discretion by denying merit review.¹⁸

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury in the performance of duty. The Board further finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

¹⁸ See *L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the March 4 and 28, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 10, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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