



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated April 22, 2011, the Board reversed OWCP's September 15, 2009 decision terminating appellant's medical benefits effective May 1, 2009. The Board found that the opinion of Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon and the impartial medical specialist, was equivocal and unrationalized on the issue of whether appellant had continuing residuals of the accepted work-related injuries of right shoulder strain, cervical strain and thoracic strain and whether further treatment or therapy was warranted.<sup>2</sup>

By decision dated November 14, 2012, the Board affirmed OWCP's March 2, 2012 decision finding that appellant had failed to establish entitlement to intermittent wage-loss compensation for the periods March 29 to December 21, 2009, January 3 to December 25, 2010 and January 3 to June 4, 2011.<sup>3</sup> The law and facts of the previous Board decisions are incorporated herein by reference. Appellant retired from the employing establishment on June 1, 2011.

In a November 4, 2013 letter, received by OWCP on November 14, 2013, appellant requested reconsideration. She argued that she provided evidence of her on-going symptoms and need for medical treatment and gym exercises. Appellant referenced her current medical treatment and requested that OWCP reimburse her for the 13 years of time, travel and money of trying to attain medical and manageable relief from her allegations of constant and continued spasms, muscle pain and lack of enjoyment she experiences. She included copies of referrals to physical therapy as well as copies of physical therapy reports from July through October 2013.

In a June 26, 2013 report, Dr. Dale R. Martin, a Board-certified orthopedic surgeon, noted the history of the October 2000 work injury and that appellant stated that she has never gained relief from her continuous subjective pain complaint and intermittent recurrent spasm. He reported no objective findings of shoulder internal derangement or labral tears. There were cervical disc protrusions and some spondylosis. Dr. Martin diagnosed chronic periscapular myofascial pain and found nothing of a surgical nature or anything treatable orthopedically regarding her shoulder. He recommended a physiatrist's perspective. In a separate letter dated June 26, 2013 to Dr. Brooke Bennis, an osteopath and Board-certified physiatrist, Dr. Martin reiterated that appellant has a 13-year history of chronic periscapular myofascial pain and that his evaluation did not indicate anything of an orthopedic nature.

In a July 16, 2013 report, Dr. Bennis noted the history of the October 2000 work injury and presented examination findings as well as a review of the medical evidence. He assessed facet joint cervicgia at the levels of C4-5 through C7-T1 on right side; cervical degenerative disc disease; right shoulder pain; right shoulder impingement; right glenohumeral joint degeneration; myofascial pain syndrome in the right parascapular region; scapular dyskinesia

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<sup>2</sup> Docket No. 10-1026 (issued April 22, 2011). On October 6, 2000 appellant, a senior associate advocate, slipped and fell on an icy surface while walking toward the entrance of her workplace. She lost intermittent time from work and received wage-loss compensation. Appellant returned to full duty without restrictions in August 2002.

<sup>3</sup> Docket No. 12-997 (issued November 14, 2012).

and subjective insomnia. Dr. Bennis provided appellant with a right subacromial injection and prescribed physical therapy.

In an October 23, 2013 report, Dr. Alicia Feldman, a Board-certified physiatrist, noted that appellant was last seen on August 27, 2013 and since then had been undergoing physical therapy. She assessed neck and scapular pain and myofascial pain. Appellant was advised to return to the clinic as needed and may benefit from trigger point injections. Dr. Feldman also prescribed Lidoderm patches.

By decision dated January 6, 2014, OWCP denied reconsideration without reviewing the merits of the case.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>4</sup> 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 of the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence which:

“(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.”<sup>5</sup>

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.<sup>6</sup>

### **ANALYSIS**

The underlying issue on reconsideration is whether appellant has submitted sufficient evidence relevant to the issue of compensation for intermittent wage loss for the periods March 29 to December 21, 2009, January 3 through December 25, 2010 and January 3 through June 4, 2011. Appellant’s November 4, 2013 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(2).

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b).

<sup>6</sup> *Id.* at § 10 608(b).

The Board further finds that appellant did not provide any relevant or pertinent new evidence warranting the reopening of the case on the merits. Medical evidence and physical therapy reports from 2013 showed ongoing symptoms related to the right shoulder. This evidence, while new to the present claim, is not relevant to the claimed periods of lost wages from work for the periods in 2009, 2010 and 2011. Thus, this information is insufficient to reopen appellant's claim for further merit review.<sup>7</sup>

The Board also finds that appellant did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP. Appellant did not meet any of the regulatory requirements and OWCP properly declined to reopen her claim for further merit review.<sup>8</sup>

On appeal, appellant contends that she has continued to substantiate the need for medical treatment and physical and massage therapy and independent exercise. However, her claim remains open for medical treatment. Appellant bears the burden of proof to establish entitlement to wage-loss compensation. As noted, evidence of continuing medical treatment in 2013 due to the accepted injury is irrelevant to wage-loss claims in 2009, 2010 and 2011.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

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<sup>7</sup> OWCP properly noted that appellant's file remained open for medical treatment of the accepted diagnoses for right shoulder strain, cervical strain and thoracic strain.

<sup>8</sup> *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration does not meet at least one of the three requirements enumerated under 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 January 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2014  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board