

FACTUAL HISTORY

On April 9, 2012 appellant, then a 47-year-old carrier technician, filed a traumatic injury claim alleging that on that day he blacked out and fell from his parked postal vehicle, injuring his right shoulder. He stopped work that day. In a May 10, 2012 statement, appellant indicated that on April 9, 2012, as he stopped to deliver mail and began to exit the postal vehicle, he felt pain in his knee and remembered nothing further until he woke up in an ambulance. He stated that the emergency medical technician (EMT) told him he had broken his shoulder and perhaps had a seizure. Appellant was then taken to Underwood Memorial Hospital and treated for a broken clavicle and possible seizure. He stated that he had never had a seizure before this incident and that he had surgery on April 20, 2012.

In reports dated May 4, 2012, Dr. Raymond R. Ropiak, an attending Board-certified orthopedic surgeon, indicated that appellant fell and fractured his right clavicle and had surgery. He advised that appellant would be unable to work for three months after his surgery, approximately, until July 20, 2012, or until he was able to return to light duty.

In correspondence dated May 8, 2012, Patricia Takata, customer service supervisor at the employing establishment, indicated that two witnesses saw appellant on the ground after his fall on April 9, 2012 and called police. An ambulance responded and appellant was taken to the hospital. Ms. Takata indicated that she arrived shortly after appellant reached the hospital, and that, in her presence, Dr. Mark E. Flores, an osteopath, informed appellant and his wife that appellant had broken a bone in his shoulder and that he believed appellant also had a seizure.

By decision dated May 31, 2012, OWCP denied the claim on the grounds that appellant suffered an idiopathic fall on April 9, 2012.

Appellant's counsel timely requested a hearing. He submitted a partial hospital record from Underwood Memorial Hospital dated April 9, 2012. The report included the EMT history of present illness which stated that bystanders witnessed appellant having a grand mal seizure lasting one to two minutes, and that appellant had a laceration to his posterior head and blood on his tongue. A right shoulder x-ray demonstrated a comminuted fracture of the distal third of the right clavicle. A computerized tomography (CT) scan of the brain revealed no evidence of acute intracranial abnormality. Dr. Flores noted a history that appellant was found on the ground having a seizure per witnesses. He provided physical examination findings that included a superficial occipital laceration and a tongue laceration. The discharge instructions, signed by Dr. Flores, included a final diagnosis of seizure with additional diagnoses of closed clavicle fracture and minor closed-head injury. Appellant was instructed to follow-up with his family physician and a neurologist.

By decision dated August 14, 2012, an OWCP hearing representative remanded the case to OWCP to obtain appellant's initial medical record. She indicated that the medical evidence of record did not indicate that appellant had a seizure, only that the employing establishment referenced a seizure. On September 26, 2012 OWCP noted that the hospital records, which were in the case file on August 2, 2012 and available for review, indicated that the most likely cause of appellant's fall was a seizure. It explained that, because he fell from a postal vehicle, a hazard special to employment, the injury was accepted for a closed fracture of the right clavicle.

Appellant was instructed that if the injury resulted in lost time from work, he should file a CA-7, claim for compensation.

OWCP referred appellant to a medical management nurse. On October 15, 2012 she advised OWCP that she had been unable to contact appellant. On October 22, 2012 OWCP referred appellant for a second opinion examination with Dr. Kenneth P. Heist, a Board-certified osteopath specializing in orthopedic surgery. In a November 6, 2012 report, Dr. Heist noted his review of the statement of accepted facts and medical records, including the emergency room records from Underwood Memorial Hospital. He indicated that appellant also had an employment-related right knee injury. Dr. Heist advised that on upper extremity physical examination, appellant demonstrated satisfactory range of motion in supination, pronation, flexion and extension and that there were no major restrictions in internal rotation, external rotation, abduction or adduction. He diagnosed status postoperative open reduction, internal fixation utilizing a bone plate and transfixing bone screws for a fractured right clavicle. Dr. Heist advised that the clavicle fracture had healed with no residuals and that appellant was capable of returning to work without restrictions.

By decision dated November 27, 2012, OWCP terminated appellant's entitlement to wage-loss compensation. It noted that Dr. Ropiak indicated that appellant could return to work on July 20, 2012, and that appellant had submitted no additional medical evidence subsequent to Dr. Ropiak's May 4, 2012 reports. OWCP found that the weight of the medical evidence rested with the opinion of Dr. Heist who provided a comprehensive evaluation and advised that appellant had no residuals of the accepted right clavicle fracture and could return to work without restriction. On November 28, 2012 it issued a proposed termination of medical benefits.

Appellant, through his attorney, timely requested a hearing. In medical reports dated April 12 to June 8, 2012, Dr. Ropiak described appellant's pre- and postoperative care. On June 8, 2012 he indicated that appellant came in earlier than scheduled, hoping to be released to light duty. Dr. Ropiak advised that appellant could drive but should not perform overhead activities, should limit repetitive activities and lift nothing heavier than 10 pounds. Appellant was to return in one month. On September 6, 2012 Dr. Ropiak indicated that appellant was supposed to be seen prior to July 4, 2012 but at that time he had a second seizure, and had to be placed in restraints which caused pinching and burning along the shoulder and incision line. Physical examination demonstrated hypersensitivity at the medial and lateral aspect of the incision consistent with paresthesias and had impingement signs. X-rays that day showed no signs of loosening of the plate and screw fixation. Dr. Ropiak diagnosed right shoulder pain, status postclavicle fracture and right shoulder impingement. He advised that the clavicle itself was healed and not an issue and the pain about the incision was in the nerves. Dr. Ropiak noted that appellant was scheduled for a partial knee replacement.

Appellant was not present at the hearing, held on March 25, 2013. His attorney asserted that Dr. Ropiak's reports indicated that appellant had continued residuals and needed physical therapy. On May 9, 2013 appellant submitted a CA-7, claim for compensation, for the period July 29 to November 27, 2012. The employing establishment indicated that appellant received continuation of pay from April 10 to May 24, 2012 and that he had not returned to work since that time. In a January 25, 2013 report, Dr. Laura E. Ross, a Board-certified osteopath specializing in orthopedic surgery, noted a history that appellant fractured his clavicle on

April 9, 2012. She stated that he was being seen because he wanted his hardware removed because his shoulder was painful and he felt there was looseness in the shoulder. Dr. Ross also noted that the previous October appellant underwent a knee arthroplasty and had continued knee pain and swelling. Physical examination demonstrated that the shoulder moved fully through range of motion with no tenderness over the sternoclavicular joint. Dr. Ross recommended a shoulder x-ray.

By decision dated June 12, 2013, an OWCP hearing representative affirmed the November 27, 2012 decision. On October 29, 2013 appellant, through his attorney, requested reconsideration. He submitted additional medical reports dated May 21 to June 25, 2013 in which Dr. Ross indicated that appellant continued to have discomfort in his right shoulder with tenderness on palpation over the subcutaneous hardware. Dr. Ross recommended hardware removal. On August 22, 2013 she noted that appellant had a partial right knee arthroplasty the previous October, in addition to the right clavicle surgery, and was also diagnosed with a seizure disorder. Dr. Ross diagnosed painful right knee and painful hardware in the right shoulder. She again recommended right shoulder surgery. On September 16, 2013 Dr. Ross reiterated that appellant had painful right clavicle hardware. In a letter of medical necessity dated November 14, 2013, she described the history of OWCP injury and indicated that when appellant presented to her office on January 25, 2013, he felt there was looseness in his shoulder, felt pain due to the hardware and wanted it removed. Dr. Ross indicated that appellant was tender over the hardware and that, while the procedure was nonemergent, surgery was medically necessary for appellant to experience relief from his continued pain. In a January 13, 2014 report, she indicated that appellant threw a snowball on January 3, 2014 that aggravated his shoulder. Dr. Ross diagnosed impingement tendinopathy of the right shoulder.

On November 25, 2013 OWCP informed appellant that before the claim for compensation could be processed, he should furnish a work and leave analysis for the period May 25 through July 29, 2012, and that if he returned to work prior to July 29, 2012, he should submit a notice of recurrence. He was given 30 days to respond. No response was received.

In a February 18, 2014 decision, OWCP denied appellant's request for reconsideration. It noted that Dr. Ross did not address disability in her reports, which were therefore irrelevant to the merit issue in this case.

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.¹ Section 10.608(a) of the Code of Federal Regulations (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).² This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows

¹ 5 U.S.C. § 8128(a).

² 20 C.F.R. § 10.608(a).

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.³ 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.⁴

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated February 18, 2014 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.⁵

The Board finds that appellant has not established that OWCP erroneously applied or interpreted the law to be without merit. With the October 29, 2013 reconsideration request, appellant's attorney asserted that appellant had continuing residuals of the accepted right clavicle fracture. As the case remains open for medical benefits, this argument is irrelevant. The attorney also generally asserted that appellant was entitled to wage-loss compensation. However, this is not a new argument and has been thoroughly reviewed by an OWCP hearing representative in its June 12, 2013 decision. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁶ 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).⁷

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted reports from Dr. Ross dated January 25, 2013 to January 13, 2014. However, Dr. Ross did not discuss appellant's ability to work in any of these reports. While she recommended that the fixation hardware in appellant's shoulder should be removed, as noted above, the case remains open for medical treatment. OWCP has not issued a final decision regarding authorization for surgery, and the Board's jurisdiction extends only to the review of final OWCP decisions.⁸ Appellant, therefore, did not submit relevant and pertinent new evidence not previously considered by OWCP.

On appeal, appellant's attorney also argued the merits of appellant's claim. As noted above, the Board does not have jurisdiction over the merits.

³ 20 C.F.R. § 10.608(b)(1) and (2).

⁴ 20 C.F.R. § 10.608(b).

⁵ For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e); *R.C.*, Docket No. 10-2371 (issued July 14, 2011).

⁶ *J.P.*, 58 ECAB 289 (2007).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 501.2(c); *E.L.*, 59 ECAB 405 (2008).

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

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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