

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

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C.C., Appellant)	
)	
and)	Docket No. 14-884
)	Issued: September 4, 2014
U.S. POSTAL SERVICE, POST OFFICE,)	
Trenton, NJ, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 4, 2014 appellant filed a timely appeal of the September 9, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied her request for reconsideration without conducting a merit review.¹ Because more than 180 days elapsed since the most recent merit decision dated May 9, 2013 and the filing of this appeal on March 4, 2014, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal, is considered filed upon receipt by the Clerk of the Appellate Boards. One hundred and eighty days from September 9, 2013, the date of OWCP decision, was March 8, 2014. Since using March 10, 2014, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 4, 2014, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. §§ 8101-8193.

ISSUE

The issues is whether OWCP properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On March 21, 2005 appellant, then a 45-year-old distribution clerk, filed an occupational disease claim, alleging that she developed pain in the right shoulder while pitching mail at work. OWCP accepted the claim for bursitis, right rotator cuff syndrome of the shoulder and allied disorders.

Appellant was treated by Dr. David Weiss, an osteopath, from March 22 to May 11, 2005, who diagnosed rotator cuff tendinitis of the right shoulder, post-traumatic subacromial bursitis, right shoulder impingement and rule out rotator cuff tear. A magnetic resonance imaging (MRI) scan of the right shoulder dated April 28, 2005 revealed tendinosis without a discrete tear of the supraspinatus tendon, severe acromioclavicular (AC) joint osteoarthritis, partial subscapular tendon tear and intra-articular body associated with glenohumeral osteoarthritis.

On March 2, 2006 appellant came under the treatment of Dr. Brian Sennett, a Board-certified orthopedist, who performed an authorized arthroscopic subacromial decompression of the right shoulder, right distal clavicle excision, surgical arthroscopy of the right shoulder and debridement of the rotator cuff. Dr. Sennett diagnosed impingement syndrome of the right shoulder, AC joint arthropathy, right shoulder, loose body right shoulder and partial rotator cuff tear of the right shoulder.

In a September 19, 2006 progress note, Dr. Weiss advised that appellant had finished the course of postoperative therapy and rehabilitation and had returned to full-duty work. He noted findings and diagnosed status post partial thickness cuff tear, AC impingement and status post right shoulder arthroscopy. Dr. Weiss advised that appellant was discharged from his care.

On October 10, 2006 appellant filed a claim for a schedule award. In a report dated January 10, 2007, an OWCP medical adviser reviewed the medical evidence and opined that she had five percent right arm impairment due to shoulder range of motion deficits and pain. In a decision dated January 23, 2007, OWCP granted appellant five percent impairment of the right arm. The period of the award was from September 5 to December 23, 2006.

Appellant requested reconsideration. She submitted an October 25, 2007 report from Dr. Weiss who diagnosed post-traumatic right shoulder impingement, AC joint arthropathy, loose bodies and partial rotator cuff tear, status post right shoulder arthroscopy with subacromial decompression, right distal clavicle excision, removal of loose body and rotator cuff debridement. Dr. Weiss opined that appellant had 18 percent impairment of the right upper extremity.

In a decision dated February 20, 2008, OWCP vacated the decision dated January 23, 2007 and noted that an award for an additional impairment of the right upper extremity was approved and would be issued in a separate decision. In a report dated February 14, 2008, the

medical adviser concurred in Dr. Weiss' determination that appellant sustained 18 percent impairment of the right upper extremity.

In a February 25, 2008 decision, OWCP granted appellant a schedule award for 18 percent impairment of the right arm. It advised that she had been previously paid for 5 percent impairment and was entitled to an additional award of 13 percent impairment of the right arm. The period of the award was from October 25, 2007 to August 3, 2008.

Appellant was treated by Dr. Neal C. Chen, a Board-certified orthopedist, on March 2, 2011, who diagnosed right glenohumeral joint arthritis, right carpal tunnel syndrome, mild and rotator cuff tendinopathy. Dr. Chen recommended physical therapy, possible total shoulder arthroplasty and wrist splints. On June 1, 2011 he diagnosed status post right shoulder arthroscopy and osteoarthritis and noted that appellant was doing well with therapy. On January 18, 2012 Dr. Chen indicated that she had severe right shoulder pain. X-rays revealed osteoarthritis of the glenohumeral of the large inferior spur with loose chondral bodies. He recommended surgery. In a February 21, 2012 operative report, Dr. Chen performed extensive debridement of the right glenohumeral joint, subacromial decompression and distal clavicle excision.³ On February 29, 2012 he treated appellant status post right shoulder arthroscopic debridement. Other reports dated May 9 and July 18, 2012 by Dr. Chen reported that she was progressing slowly status post surgery and was able to regain a substantial amount of her motion. He noted tenderness at the acromion joint and recommended injections. In prescription notes dated March 2, May 1 and June 1, 2011 and February 29 and May 5, 2012, Dr. Chen prescribed physical therapy for right shoulder osteoarthritis and tenosynovitis. Appellant submitted physical therapy notes from June 15 to 29, 2012.

On October 29, 2012 appellant requested an additional schedule award. On March 7, 2013 OWCP advised her of the type of evidence needed to support her claim.

In a decision dated May 9, 2013, OWCP denied appellant's claim for an additional schedule award.

In an appeal request form dated June 14, 2013, appellant requested reconsideration. She indicated, in a June 14, 2013 statement, that her physician recommended a functional capacity evaluation, which would be the basis of her reconsideration request and indicated that the report would be submitted in June 2013. Appellant submitted reports from Dr. Chen dated June 1 and March 2, 2011 and January 18 and February 21, 2012, a prescription note dated April 10, 2013 and physical therapy reports, all previously of record. She submitted prescription notes from Dr. Chen dated February 24 and May 9, 2012 for prescribed physical therapy. In a January 16, 2013 report, Dr. Chen noted appellant's complaints of pain in the acromial clavicular (AC) joint with improvement in glenohumeral joint pain. He noted tenderness over the AC joint and recommended injection of the joint stump. In an April 10, 2013 report, Dr. Chen noted appellant's complaints of right shoulder soreness with improving range of motion. An x-ray revealed that an anterior osteophyte remained diminished in size. Dr. Chen recommended a functional capacity evaluation to determine appellant's physical abilities. Appellant submitted a

³ OWCP authorized the surgery.

functional capacity report prepared on May 16, 2013 by a physical therapist who indicated that she could work at or below the light physical demand level.

In a September 9, 2013 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁴ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;

“(2) Advances a relevant legal argument not previously considered by OWCP;

“(3) 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

OWCP denied appellant's claim for an additional schedule award on the grounds that the evidence was insufficient to establish that she sustained additional impairment greater than the 18 percent of the right upper extremity which was previously granted. Thereafter, it denied her reconsideration request, without a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. In her June 14, 2013 statement, she noted that a functional capacity evaluation report would be the basis of her reconsideration request. This does not show a legal error by OWCP nor is it a new and relevant legal argument. The underlying issue in this case is whether appellant sustained permanent impairment to her right upper extremity. That is a

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b).

medical issue which must be addressed by relevant new medical evidence.⁷ However, appellant did not submit any new and relevant medical evidence in support of her claim.

Appellant submitted reports from Dr. Chen dated June 1 and March 2, 2011 and January 18 and February 21, 2012, a prescription note dated April 10, 2013 and physical therapy reports. However, these reports are duplicative of evidence previously submitted and were considered by OWCP in its decision dated May 9, 2013 and found insufficient. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁸

Appellant submitted prescription notes from Dr. Chen dated February 24 and May 9, 2012. In a January 16, 2013 report, Dr. Chen noted her complaints of pain in the AC joint with improvement in the glenohumeral joint pain and recommended injection of the joint stump. Similarly, in an April 10, 2013 report, he noted appellant's complaints of soreness of the right shoulder with improving range of motion. Dr. Chen noted an x-ray revealed an anterior osteophyte remained diminished in size and recommended a functional capacity evaluation. However, these reports are not relevant because they do not specifically address the issue of whether appellant sustained additional permanent impairment of her right upper extremity. As noted, this is a medical issue which must be addressed by relevant medical evidence.⁹ However, appellant did not submit any new and relevant medical evidence in support of her claim for a schedule award.

Appellant submitted a functional capacity report prepared by a physical therapist on May 16, 2013 which indicated appellant's ability to perform work tasks. The Board has held that treatment notes signed by a physical therapist are not considered medical evidence as these providers are not a physician under FECA.¹⁰

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). She did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

⁷ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁸ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁹ *Id.*

¹⁰ See *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

ORDER

IT IS HEREBY ORDERED THAT the September 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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