

course training. Appellant's supervisor and professor of military science, noted with a checkmark "yes" that appellant was injured in the performance of duty.

Appellant underwent physical therapy from October 8 to 15, 2012.

By letter dated May 29, 2013, OWCP advised appellant of the type of factual and medical evidence needed to establish his claim. It requested that he submit a physician's reasoned opinion addressing the relationship of his claimed condition and specific employment factors. OWCP also requested that appellant provide a line of duty determination from the military science officer of the ROTC program.

Appellant was treated by Dr. Kevin Bell, a Board-certified family practitioner, on October 5, 2012 for right upper extremity discomfort. He reported injuring his right upper extremity while participating in ROTC. Dr. Bell noted limited range of motion of the right upper extremity and good strength of biceps and triceps. He diagnosed limb pain and acute situational stress. Dr. Bell recommended physical therapy to evaluate and treat the right arm pain possibly related to his neck, post-traumatic stress, and acute situational depression. In a prescription note dated October 5, 2012, he diagnosed right upper extremity pain and left knee and neck pain and recommended physical therapy. Appellant was treated by Dr. Mark Eavenson, a chiropractor, from October 9 to 17, 2012 for cervical strain, possible right rotator cuff tear and left knee internal derangement. Dr. Eavenson noted findings of limited range of motion of the left knee, no sensory loss or motor weakness, and positive varus and valgus pain.

In a decision dated July 9, 2013, OWCP denied appellant's claim, finding that he did not meet the requirements for establishing that he sustained an injury while performing his ROTC duties.

On July 11, 2013 appellant requested an oral hearing which was held on November 25, 2013.

In a February 10, 2014 decision, an OWCP hearing representative vacated the July 9, 2013 decision and remanded the case for further development. She noted that appellant's sworn testimony regarding the incident and the agency's initial acknowledgment that appellant's injury was in the performance of duty was sufficient to establish the incident occurred in the performance of duty. The hearing representative remanded the matter for OWCP to request that the agency provide a detailed statement confirming whether appellant was performing his ROTC duties at the time of the injury.

In a statement dated October 17, 2012, a professor of military science alleged that appellant failed to provide timely notification to the ROTC department of his injuries, but he acknowledged that appellant sustained an injury in the line of duty and his injuries were the proximate result of performance of scheduled military training.

In a decision dated February 21, 2014, OWCP denied appellant's claim as he failed to submit any medical evidence containing a medical diagnosis in connection with the alleged injury or events.

On February 27, 2014 appellant requested an oral hearing which was held on July 28, 2014. He submitted a report from Dr. Bell dated October 5, 2012, a physical therapy report dated October 8, 2012, and a statement from the professor of military science dated October 17, 2012, all previously of record. Also submitted were physical therapy notes dated October 17, 2012. Appellant submitted a June 19, 2012 report from Dr. Rodney Lupardus, a Board-certified family practitioner, dated June 19, 2012, who treated him for hypogonadism. Dr. Lupardus noted physical examination revealed mild tenderness of the lumbar muscles bilaterally without spasm and the neurological examination revealed no focal deficits. He diagnosed hypogonadism, allergic rhinitis, tonsillar hypertrophy with possible obstructive sleep apnea and acne.

In a decision dated September 22, 2014, an OWCP hearing representative affirmed the decision dated February 21, 2014 as modified. It noted that appellant established fact of injury, but, he failed to establish a causal relationship between the September 22, 2012 work incident and a diagnosed medical condition.

On December 11, 2014 appellant, through counsel, requested reconsideration. He referenced an October 23, 2014 report from Dr. Greg Harbach, a Board-certified orthopedist, and asserted that based on this new evidence the prior decision should be vacated and overturned. In the October 23, 2014 report, Dr. Harbach noted that appellant presented with right shoulder and left knee pain with an onset of symptoms in 2012. He noted appellant's symptoms were consistent with patellofemoral syndrome. Appellant reported that his symptoms started two years ago when he was in ROTC while participating in an obstacle training course and injured his knee and shoulder. Dr. Harbach noted findings on examination of right shoulder pain, mild tenderness to palpation over the acromioclavicular joint, mildly positive Hawkins test, positive Neer test, good strength with internal and external rotation against resistance, negative drop arm test, there was no sign of scapular winging noted, he was neurovascularly intact distally with no skin lesions, abrasions, or contusions. He noted x-rays of the right shoulder revealed no fractures or other major bony abnormalities and type II acromion and mild arthritic changes of the acromioclavicular joint. Dr. Harbach diagnosed left shoulder pain, acromioclavicular joint arthritis, and impingement syndrome. He recommended an anti-inflammatory and physical therapy.

In a March 2, 2015 decision, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² 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)(3) of the implementing federal regulations, which provides that a claimant may

² 5 U.S.C. § 8128(a).

obtain review of the merits of his or her written application for reconsideration if the request, including all supporting documents, sets forth arguments and contain 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 the (OWCP); or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

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.⁴

ANALYSIS

OWCP denied appellant’s traumatic injury claim, finding that the medical evidence did not demonstrate that the claimed medical condition was causally related to the established work-related events. Thereafter, it denied appellant’s reconsideration request, without conducting a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. In his December 11, 2014 request for reconsideration, counsel referenced an October 23, 2014 report from Dr. Harbach and asserted that based on this new evidence, the prior decision should be vacated and overturned. These assertions do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant submitted medical evidence establishing that his right shoulder and left knee conditions were causally related to the September 22, 2012 work incident. That is a medical issue which must be addressed by relevant new medical evidence.⁵ However, appellant did not submit any new and relevant medical evidence in support of his claim.

Appellant submitted an October 23, 2014 report from Dr. Harbach who noted that appellant presented with right shoulder and left knee pain with an onset of symptoms in 2012. He reported that his symptoms started two years ago when he was in ROTC while participating in obstacle training course and injured his knee and shoulder. Dr. Harbach noted findings on examination of right shoulder pain and mild tenderness to palpation over the acromioclavicular joint. He noted x-rays of the right shoulder revealed no fractures but type II acromion and mild arthritic changes of the acromioclavicular joint. Dr. Harbach diagnosed left shoulder pain,

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.608(b).

⁵ *See Bobbie F. Cowart, 55 ECAB 746 (2004).*

acromioclavicular joint arthritis, and impingement syndrome of the left shoulder. He recommended an anti-inflammatory and physical therapy. Although this report is new, it is not relevant because Dr. Harbach merely repeats the history of injury as reported by appellant without providing his own opinion regarding whether the diagnosed medical condition was causally related to the September 22, 2012 work incident. Therefore, this new evidence is irrelevant and is insufficient to warrant reopening the case for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant 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 constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Appellant did not submit any evidence or argument in support of his reconsideration request that warrants reopening of his claim for a merit review under 20 C.F.R. § 10.606(b)(3).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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