United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 15-1290**
	)	**Issued: September 23, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, St. Louis, MO, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2015 appellant, through counsel, filed a timely application from a January 7, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from September 15, 2014, the date of the most recent merit decision of OWCP, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 4, 2013 appellant, then a 42-year-old nurse, filed a traumatic injury claim (Form CA-1). She claimed that on August 23, 2013 she sustained a sprain or strain of her left shoulder when, assisting a patient in distress, the patient pulled on her left arm while helping him to a chair. A supervisor checked a box indicating that appellant was injured in the performance of duty. Appellant did not stop work.

In a report dated November 21, 2013, Dr. Richard C. Lehman, an orthopedic surgeon, stated that "based on the fact that appellant had two prior shoulder surgeries and on the fact that she has significant complaints of pain and there appears to be a substantial subjective component to her complaints of pain that are not substantially corroborated by her examination," he recommended an arthrogram and light-duty work.

On December 11, 2013 appellant filed for wage-loss compensation as a result of her light-duty assignment from November 23 through December 26, 2013.

On January 7, 2014 Dr. Lehman stated that by the time he saw appellant on November 21, 2013, there was no objective evidence of pathology in her left shoulder, and all of her x-rays and two magnetic resonance imaging (MRI) scans did not demonstrate acute pathology. He opined, "I do not believe that the patient's work injury aggravated her medical condition or caused her medical condition. I believe that the patient's medical condition is preexisting and that this minor irritation was temporary and, again by the time I saw her there did not appear to be any evidence of significant pathology. I do not believe that there was a significant aggravation. Again, I believe that the patient had preexisting breakdown of the shoulder, had a minor strain and again by the time appellant was evaluated her strain had been resolved."

In a report dated January 9, 2014, Dr. Lyndon Gross, a Board-certified orthopedic surgeon, stated his impression that appellant had left shoulder pain, and that it appeared that she had a strain of the left shoulder. He noted that she had a history of left shoulder surgeries.

By decision dated January 14, 2014, OWCP denied appellant's claim finding that he had not submitted sufficient evidence to establish that her medical condition was related to the event of August 23, 2013.

On January 21, 2014 appellant requested reconsideration of OWCP's January 14, 2014 decision. Later, the request was changed to a telephonic hearing before an OWCP hearing representative.

OWCP authorized the MRI scan of appellant's left shoulder, which had been taken on December 13, 2013. By letter dated December 19, 2013, Dr. Lehman stated that "the patient in my opinion has no pathology consistent with her subjective complaints. Appellant should be reevaluated objectively. The patient's scan was normal and there did not appear to be pathology as related to the MRI [scan] exam[ination]."

In an undated attending physician's report, Dr. Matthew W. Bradley, a Board-certified orthopedic surgeon, diagnosed appellant with hyperabduction of the left shoulder and stated

findings of left shoulder impingement. He stated that she had no history of preexisting injury and provided her with a subacromial injection. Dr. Bradley checked a box indicating that appellant's condition was not caused or aggravated by an employment activity.

A hearing was held on July 8, 2014. The hearing representative recommended to appellant and counsel that she submit a more detailed medical report. She held the record open for 30 days for the submission of new evidence.

In a report dated March 24, 2014, Dr. Bradley diagnosed appellant with left shoulder impingement. He noted that he was not a shoulder expert, and stated that he felt that she was tight anteriorly and "probably a little loose posteriorly" causing some of her posterior subluxation and impingement-type symptomology.

On June 25, 2014 Dr. Corey Solman, Jr., a Board-certified orthopedic surgeon, stated his impression of left shoulder pain with likely posterior instability and a possible posterior capsular tear. Regarding the factual background of appellant's condition, he stated, "[Appellant] had previous surgeries of the left shoulder in 2000 where she had a thermal capsulorrhaphy and then it failed and she had a capsular shift shortly after. Appellant actually had done very well following this until she injured it in August of 2013 when a patient actually pulled on the arm and possibly dislocated it again." Dr. Soloman recommended operative intervention.

By decision dated September 15, 2014, the hearing representative affirmed OWCP's prior decision dated January 14, 2014. She found that appellant had not submitted sufficient medical evidence to establish that her condition was aggravated or caused by the work event of August 23, 2013. In particular, the hearing representative noted that the additional reports submitted did not contain rationalized medical opinions on the cause of appellant's condition, and that they did not contain an accurate factual background. She reviewed the June 25, 2014 report of Dr. Solman.

On October 9, 2014 appellant, through counsel, requested reconsideration of the decision dated September 15, 2014. Counsel stated that along with this request, he was submitting medical reports of Dr. Solman, which he alleged had not previously been considered by OWCP.

In a July 8, 2014 letter, received by OWCP on October 9, 2014, Dr. Solman noted that on August 23, 2013 appellant was "working in her usual work capacity as a registered nurse at the [employing establishment]. Appellant was preventing a patient from falling and the patient while in her arms imparted a severe traction force to her left arm and injured it, likely dislocating it or subluxating it again."

Dr. Solman stated, "In my medical opinion the injury of August 23, 2013 is the prevailing factor in the development of her pathology and need for further treatment.… [Appellant's] injury and explanation of mechanism injury correlates with her shoulder pain and the location of potential pathologies. Again, these opinions are based on my experience [as] a shoulder specialist and are given within a high degree of medical certainty. The employment factors included in this causal relationship are [appellant's] need to help move patients and when this patient was being helped, the patient nearly fell and grabbed [appellant's] arms and as she was trying to prevent the patient from falling a traction force was placed on the left arm causing the

injury stated above. The injury is thus the prevailing factors in the development of the labral and capsular abnormalities and instability that has ensued since the time of the injury."

In a report dated August 6, 2014, Dr. Solman noted that he performed a Cortisone injection on appellant's left shoulder on that day to relieve her of pain.

By decision dated January 7, 2014, OWCP declined appellant's request for reconsideration without reviewing the merits of her case. It stated that Dr. Solman's letter dated July 8, 2014 was cumulative and substantially similar to the information in his June 25, 2014 report, and that he did not explain how his conclusion was unequivocal despite the fact that she had subsequent nonindustrial as well as work-related incidents related to the left shoulder.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's 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.[2] Section 10.608(b) of OWCP's regulations provide that 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.[3]

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.[4] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[5] While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[6]

ANALYSIS

OWCP issued a September 15, 2014 decision denying appellant's claim for compensation. On October 9, 2014 appellant, through counsel, requested reconsideration of this decision. OWCP denied the request for reconsideration on January 7, 2015 without reviewing the merits of her claim. In the present appeal, the Board does not have jurisdiction over the September 15, 2014 decision.

[2] 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

[3] *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

[4] *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

[5] *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

[6] *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

The issue presented on appeal of the January 7, 2015 decision 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 her claim. In her October 9, 2014 request for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The relevant issue upon reconsideration was whether appellant submitted sufficient medical evidence to establish that her left shoulder condition was aggravated or caused by the work incident of August 23, 2013. A claimant may be entitled to review by submitting new and relevant evidence. The Board finds that appellant submitted new and relevant evidence with her reconsideration request, such that OWCP improperly declined to reopen her claim for a review of the merits.

With her reconsideration request of October 9, 2014, appellant submitted a letter from Dr. Solman dated July 8, 2014, stating that she was "working in her usual work capacity as a registered nurse at the [employing establishment]. She was preventing a patient from falling and the patient while in her arms imparted a severe traction force to her left arm and injured it, likely dislocating it or subluxating it again." Dr. Solman noted, "In my medical opinion the injury of August 23, 2013 is the prevailing factor in the development of her pathology and need for further treatment.… [Appellant's] injury and explanation of mechanism injury correlates with her shoulder pain and the location of potential pathologies. Again, these opinions are based on my experience [as] a shoulder specialist and are given within a high degree of medical certainty. The employment factors included in this causal relationship are [appellant's] need to help move patients and when this patient was being helped, the patient nearly fell and grabbed her arms and as she was trying to prevent the patient from falling a traction force was place on the left arm causing the injury stated above. The injury is thus the prevailing factors in the development of the labral and capsular abnormalities and instability that has ensued since the time of the injury."

As noted above, the requirement for OWCP to reopen a case for merit review is submission of new and relevant evidence. Such evidence submitted on reconsideration, if relevant and not previously considered, requires OWCP to reopen a case for merit review. Here, the letter from Dr. Solman dated July 8, 2014 was not previously considered by OWCP. This letter contains an opinion from Dr. Solman on the issue of causal relationship.

It is correct that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.[7] The decision of OWCP characterized Dr. Solman's July 8, 2014 letter as duplicative of his previous reports. However, the only report from Dr. Solman reviewed by OWCP prior to its decision on January 7, 2015 was that of June 25, 2014. That report contained a history of injury, but did not include an opinion on the issue of causal relationship. Hence, the July 8, 2014 report is not duplicative of Dr. Solman's earlier report. Reopening a claim for merit review does not require a claimant to submit all evidence that might be necessary to discharge his or her burden of proof.[8] If OWCP should determine that the new evidence submitted lacks

[7] *Supra* note 4.

[8] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschanz*, 39 ECAB 1382 (1988).

probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[9]

As such, the report of Dr. Solman dated July 8, 2014 constituted relevant and pertinent evidence not previously considered by OWCP, such that it required OWCP to reopen the case for merit review.

The Board accordingly finds that appellant met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3) in her reconsideration request of October 9, 2014. Appellant submitted relevant and pertinent evidence not previously considered. Thus, pursuant to 20 C.F.R. § 10.608, OWCP improperly denied merit review.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2015 decision of the Office of Workers' Compensation Programs is establish and remanded for further proceedings consistent with this opinion, to be followed by an appropriate decision.

Issued: September 23, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[9] *See Dennis J. Larsen*, 41 ECAB 933 (1990).