

FACTUAL HISTORY

On October 24, 2014 appellant, then a 52-year-old mine, safety and health inspector, filed a traumatic injury claim (Form CA-1) alleging that on October 8, 2014 he slipped and fell during an equipment inspection and sustained injuries to his right calf, elbow, shoulder, and neck. He did not stop work.

By letter dated December 8, 2014, OWCP advised appellant that his claim was originally received as a simple, uncontroverted case which resulted in minimal or no time loss from work. It indicated that appellant's claim had been administratively handled to allow medical payments up to \$1,500.00, but the merits of the claim had not been formally adjudicated. OWCP advised that, because appellant had explained that he was having difficulty obtaining medical care for his claimed injury, his claim would be formally adjudicated. It requested that appellant submit a comprehensive medical report from his treating physician which included a reasoned explanation as to how his employment had contributed to his injuries.

Appellant was treated by Dr. Richard T. Rutherford, a Board-certified family practitioner, on December 13, 2014 for knee, neck, and shoulder injuries. He reported that on October 8, 2014 he fell off a piece of equipment at work and injured his right knee, neck, and right shoulder. Dr. Rutherford noted an essentially normal examination in the upper and lower extremities and diagnosed gastroesophageal reflux disease, hyperlipidemia, coronary artery disease, cervical root lesions, pain in the right shoulder joint, and neuralgia. In a workers' compensation form dated December 13, 2014, he noted that on October 8, 2014 appellant had fallen off a piece of equipment at work and injured his right shoulder and neck. Dr. Rutherford noted that appellant could return to work without restrictions.

In a decision dated January 15, 2015, OWCP denied appellant's claim because the evidence submitted was insufficient to establish that the claimed medical conditions were causally related to the established work-related events.

In an appeal request form dated May 27, 2015, appellant requested reconsideration and submitted additional evidence. He submitted a magnetic resonance imaging (MRI) scan of the right shoulder dated March 5, 2015 which revealed tendinopathy, a partial thickness tear of the supraspinatus tendon, and mild glenohumeral arthritis. An electromyogram (EMG) dated April 29, 2015 revealed possible mild radial and median sensory neuropathy with possible injury to right trapezius.

Appellant submitted evidence from Dr. Roy C. Terry, a Board-certified orthopedist, who treated him on February 19, 2015 for injuries sustained when he fell off a piece of equipment on October 8, 2014. Appellant reported pain in the right shoulder, neck, head, and upper back, with right arm numbness. In an April 2, 2015 report, Dr. Terry treated appellant for persistent pain in the right shoulder, neck, and arm. He noted reviewing the January 15, 2015 OWCP decision.

Dr. Terry opined that appellant sustained an injury causally related to an accident in which he fell off a piece of equipment. Appellant reported that when he fell he tried to prevent the fall by grabbing with his arm. Dr. Terry opined that this action caused problems with his right shoulder, right paracervical muscles, right cervical nerve roots, brachial plexus; as well as

the symptomology which exists and was continually exhibited from this area. He noted awaiting further studies to support the actual anatomic changes which may have occurred at the time of this injury. Dr. Terry noted that appellant's problems emanated from this injury and that his diagnosed conditions were real. Examination revealed tenderness on the right paracervical region, no gross atrophy about his shoulders, no evidence of gross neurologic deficit of the forearm or hand, and limitation of right shoulder motion. Dr. Terry diagnosed shoulder pain and neck pain.

Appellant also submitted photographs of a trackhoe excavator. He submitted a statement from Ressie Jackson, a coworker, who witnessed him climbing onto the trackhoe when he slipped off the equipment and struck his right side, shoulder, and lower leg.

By decision dated September 3, 2015, OWCP denied appellant's request for reconsideration as the evidence was insufficient to warrant a merit review. It found that the evidence submitted was duplicative or repetitious.

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)(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 that:

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

“(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 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)(3) will be denied by OWCP without review of the merits of the claim.⁴

ANALYSIS

OWCP's September 3, 2015 decision denied appellant's reconsideration request, without conducting a merit review.

However, with his May 27, 2015 reconsideration request, appellant submitted relevant and pertinent new evidence not previously considered by OWCP. He submitted a new April 2,

² *Id.* at § 8128(a).

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.608(b).

2015 narrative report from a new orthopedic physician, Dr. Terry, who treated him for pain in the right shoulder, neck, and arm. Dr. Terry noted reviewing the January 15, 2015 OWCP decision and opined that appellant sustained an injury causally related to an accident which occurred when he fell off a piece of equipment. Appellant reported that when he fell he tried to prevent the fall by grabbing with his arm. Dr. Terry opined that this action caused problems with his right shoulder, right paracervical muscles, right cervical nerve roots, and brachial plexus. He noted awaiting further studies to support the actual anatomic changes which occurred at the time of this injury. Dr. Terry opined that appellant's problems emanated from this injury and that examination revealed tenderness on the right paracervical region, no gross atrophy about his shoulders, no evidence of gross neurologic deficit of the forearm or hand with limited range of motion of the right shoulder. He diagnosed shoulder pain and neck pain.

This medical evidence is new and relevant as the physician opined that appellant was injured on October 8, 2014. Although OWCP's September 3, 2015 decision found that the evidence was duplicative, this medical report is from a specialist in orthopedics and had not been previously considered by OWCP in rendering a decision. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.⁵ The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(3)(iii), this new evidence from Dr. Terry is sufficient to require reopening appellant's case for further review on its merits.

Therefore, the case must be remanded for a merit review. Following this and such other development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that OWCP, in its decision dated September 3, 2015, improperly denied appellant's request for reconsideration of his case on its merits.

⁵ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further development in accordance with this decision.

Issued: June 2, 2016
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