

FACTUAL HISTORY

Appellant, a 58-year-old letter carrier, has an accepted occupational disease claim (Form CA-2) for right shoulder impingement syndrome, right rotator cuff tear/sprain, and right elbow enthesopathy, which arose on or about July 26, 2013. OWCP paid her wage-loss compensation for temporary total disability, effective March 10, 2014.³ She returned to full-time work with restrictions on June 3, 2014. Appellant stopped work, effective September 30, 2014, and subsequently filed a claim for compensation (Form CA-7) for wage loss beginning October 1, 2014.⁴

On March 10, 2015 appellant underwent right shoulder arthroscopic surgery, which OWCP authorized. Additionally, OWCP paid her wage-loss compensation for temporary total disability beginning March 10, 2015.⁵

In a July 27, 2015 development letter, OWCP advised appellant of the need to submit medical evidence to support her claimed disability for the period October 1, 2014 through March 9, 2015. Appellant was afforded 30 days to submit the requested medical evidence.

OWCP subsequently received a July 17, 2015 report from Dr. Louis D. Zegarelli, a Board-certified family practitioner. Dr. Zegarelli noted a history of a work-related right shoulder injury on or about July 26, 2013. He reported that appellant had been unable to work between March 10 and June 2, 2014 because of her accepted work injury.⁶ Dr. Zegarelli further noted that appellant was “cautiously” returned back to work approximately June 3, 2014, and she continued to work with “significant difficulty” until her symptoms grew so severe that she was unable to continue. He indicated that appellant was taken off work, effective October 1, 2014, and due to the severity of her condition, she underwent right shoulder surgery on March 10, 2015. Dr. Zegarelli explained that he was dictating the note to assist appellant in her attempt to obtain work-related benefits for the period October 1, 2014 through March 9, 2015. He diagnosed status post right shoulder surgical intervention (March 10, 2015) for internal derangement, documented posterior labral tear, as well as impingement syndrome.

By decision dated September 14, 2015, OWCP denied appellant’s claim for wage-loss compensation for the period October 1, 2014 to March 9, 2015. With respect to Dr. Zegarelli’s July 17, 2015 report, it noted that there was no objective evidence to support why appellant was unable to perform her duties from October 1, 2014 to March 9, 2015.

³ Appellant stopped work on January 29, 2014 and used a combination of annual and sick leave to cover her absence through March 7, 2014.

⁴ Appellant’s September 30, 2014 work stoppage coincided with her receipt of social security disability benefits.

⁵ OWCP placed appellant on the periodic compensation rolls, effective June 28, 2015.

⁶ Although he characterized appellant’s injury as work related, Dr. Zegarelli did not mention the type of work appellant performed or otherwise address how she injured her right shoulder. He also did not mention that appellant had initially stopped work on January 29, 2014.

Appellant requested reconsideration in an appeal request form received by OWCP on October 22, 2015. She submitted additional medical evidence including an October 4, 2015 report in which Dr. Zegarelli indicated that the objective pathology, which was well documented in appellant's medical records, ultimately required surgical intervention on March 10, 2015 and supported her inability to work during the period October 1, 2014 to March 9, 2015.

In a decision dated January 20, 2016, OWCP denied modification of its September 14, 2015 decision, finding that appellant failed to establish a recurrence of disability.⁷ Dr. Zegarelli's latest opinion was insufficient to establish a worsening of appellant's condition such that she could no longer perform her light/limited-duty assignment on or after October 1, 2014.

On September 7, 2016 appellant again requested reconsideration.⁸ The request was accompanied by a June 6, 2016 progress note from Dr. Zegarelli. Dr. Zegarelli provided findings of his examination on that date and diagnosed right shoulder impingement syndrome associated with work activities (status postsurgical intervention), mixed anxiety/depression associated with chronic pain/frustration, right shoulder internal derangement with documented posterior labral tear associated with work activities (status postsurgical intervention), and right shoulder rotator cuff tear tendinopathy associated with work activities (status postsurgical intervention).

OWCP also received a February 5, 2016 right shoulder arthrogram that revealed severe tendinopathy or possibly partial thickness tearing along the undersurface of the supraspinatus tendon. The arthrogram also showed mild degenerative joint disease of the acromioclavicular joint, mild scattered bone marrow edema of the humeral head, and subchondral cyst formation. Additionally, OWCP received a June 6, 2016 report from Janice P. Ingram, Ed.D., a licensed professional counselor. Dr. Ingram detailed the course of health and behavioral counseling she provided for appellant on that date. She also noted a diagnosis of seasonal affective disorder and she described her treatment plan for appellant.

⁷ A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. 20 C.F.R. § 10.5(x). Recurrence of disability also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed her established physical limitations. *Id.* Generally, a withdrawal of a light-duty assignment would constitute a recurrence of disability where the evidence established continuing injury-related disability for regular duty. *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6a(4) (June 2013). A recurrence of disability does not apply when a light-duty assignment is withdrawn for reasons of misconduct, nonperformance of job duties or other downsizing or where a loss of wage-earning capacity determination is in place. 20 C.F.R. §§ 10.5(x), 10.104(c) and 10.509; *see* Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b. Absent a change or withdrawal of a light-duty assignment, a recurrence of disability following a return to light duty may be established by showing a change in the nature and extent of the injury-related condition such that the employee could no longer perform the light-duty assignment. *Theresa L. Andrews*, 55 ECAB 719, 722 (2004).

⁸ Appellant utilized the appeal request form that accompanied OWCP's latest merit decision.

By decision dated September 28, 2016, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁹ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁰ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹¹ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.¹² When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS

OWCP issued a decision on January 20, 2016 denying appellant's claimed recurrence of disability for the period October 1, 2014 to March 9, 2015. Appellant requested reconsideration of this decision in a form received by OWCP on September 7, 2016. As noted above, the Board does not have jurisdiction over OWCP's January 20, 2016 decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), thereby warranting further merit review. In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant also did not advance a new and relevant legal argument not previously considered by OWCP.

In connection with her latest request for reconsideration, appellant submitted a June 6, 2016 progress note from Dr. Zegarelli, an attending physician, who reported the findings of his examination on that date and diagnosed several right shoulder conditions and mixed anxiety/depression associated with chronic pain/frustration. OWCP also received a June 6, 2016 report from Dr. Ingram, who diagnosed seasonal affective disorder. Lastly, it received a February 5, 2016 right shoulder arthrogram, which contained several diagnoses including severe

⁹ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application.” 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.607.

¹¹ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of the OWCP decision for which review is sought. Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹² 20 C.F.R. § 10.606(b)(3).

¹³ *Id.* at § 10.608(a), (b).

tendinopathy or possibly partial thickness tearing along the undersurface of the supraspinatus tendon. However, the additional evidence did not specifically address the primary issue of whether appellant was disabled from work during the period October 1, 2014 to March 9, 2015.

Although the above-noted medical evidence was not previously of record, the Board finds that the submission of this evidence would not require OWCP to reopen appellant's case for a review of the merits as none of this evidence is relevant to the main issue of the present case, *i.e.*, whether appellant submitted medical evidence showing that her work-related condition worsened such that she was unable to work in her light/limited-duty position for the period October 1, 2014 to March 9, 2015. The submission of evidence or argument that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ None of the medical evidence received since the January 20, 2016 decision discussed how appellant's accepted work-related right upper extremity condition(s) materially worsened to the point that she was unable to work for the period October 1, 2014 to March 9, 2015. These reports were produced during a period after the claimed period of total disability and none of them contains an opinion regarding whether appellant was able to work between October 1, 2014 and March 9, 2015. Moreover, the report from Ms. Ingram is of no probative value as she is a licensed professional counselor, which is not included in the definition of the term "physician" under FECA.¹⁵

The underlying issue in this case is whether the medical evidence of record shows that appellant sustained a recurrence of disability for the period October 1, 2014 to March 9, 2015. That is a medical issue which must be addressed by relevant medical evidence.¹⁶ A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence in this case. There is no medical evidence of record explaining why her work-related conditions prevented her from working between October 1, 2014 and March 9, 2015.

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, 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 of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁵ Section 8101(2) of FECA provides that the term physician includes surgeons, podiatrist, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See* 5 U.S.C. § 8101(2); *T.D.*, Docket No. 15-1846 (issued September 23, 2016) (a licensed professional counselor is not considered a physician as defined under FECA).

¹⁶ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2017
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board