

FACTUAL HISTORY

On December 30, 2013 appellant, then a 48-year-old mail clerk working modified duty, filed a traumatic injury claim (Form CA-1) alleging that on December 28, 2013 she experienced left arm pain and numbness when she walked through the lobby helping customers and felt something pop in her shoulder. She stopped work on December 28, 2013.

A December 28, 2013 paramedic report by Michael Wheeler related that appellant was treated for acute onset of neck and left shoulder pain. The report noted that appellant was helping a customer at work and felt a pop in her shoulder and neck.

A December 28, 2013 emergency room record noted that appellant was evaluated for chronic neck pain and diagnosed with neck spasm by Dr. Carl Stilson, Board-certified in emergency medicine.

In a December 30, 2013 injury report, Dr. Edward Mittleman, a family practitioner, described the December 28, 2013 employment incident and the medical treatment that appellant had received. He reviewed appellant's history and noted that she had a previous workers' compensation injury involving her neck,³ which required surgery in July 2011. Upon physical examination of appellant's left shoulder, Dr. Mittleman observed crepitus and tenderness of the acromioclavicular joint. He provided range of motion findings. Dr. Mittleman diagnosed left shoulder supraspinatus tendinopathy (aggravation), left shoulder subacromial bursitis (aggravation), and left shoulder AC joint arthropathy (aggravation). He opined that the December 28, 2013 employment incident resulted in an aggravation of the pathology in appellant's left shoulder. Dr. Mittleman provided a duty status report (Form CA-17), which indicated that appellant could return to work with restrictions.

A December 30, 2013 left shoulder magnetic resonance imaging (MRI) scan report by Dr. Vikram Hatti, a Board-certified radiologist, showed no full-thickness tear of the rotator cuff, subacromial bursitis, acromioclavicular (AC) joint arthropathy, or supraspinatus tendinopathy.

In a January 31, 2014 attending physician's report (Form CA-20), Dr. Mittleman noted a history of injury that appellant was working in the lobby with a customer when something popped in her left shoulder. He provided physical examination findings and diagnosed supraspinatus tendinopathy and subacromial bursitis. Dr. Mittleman checked a box marked "yes" indicating that appellant's condition was caused or aggravated by the employment activity at the time of her employment incident.

By letter dated February 3, 2014, OWCP advised appellant that the evidence received was insufficient to establish her traumatic injury claim. It requested that she respond to the attached development questionnaire in order to substantiate the factual element of her claim and provide additional medical evidence to establish a diagnosed medical condition causally related to the alleged employment incident. Appellant was afforded 30 days to submit the necessary evidence.

³ The record reveals that OWCP previously accepted an April 29, 2009 claim for cervical spondylosis under OWCP File No. xxxxxx601 for which she received wage-loss compensation on the periodic rolls.

Appellant thereafter submitted a December 9, 2009 left shoulder MRI scan report by Dr. David Stoller, a Board-certified radiologist, who noted mild supraspinatus tendinosis with articular surface fraying, mild infraspinatus tendinosis, and moderate subscapularis tendinosis.

In a February 20, 2014 report, Dr. Mittleman reviewed appellant's work history and noted that appellant had a previous left shoulder injury. He accurately described the December 16, 2013 employment incident and the medical treatment that appellant had received. Dr. Mittleman provided physical examination findings and diagnosed aggravation of left shoulder impingement syndrome. He opined that in December 2013 appellant aggravated her left shoulder impingement and continued to be symptomatic at the time of the report. Dr. Mittleman authorized appellant to return to modified duty.

On February 28, 2014 OWCP received appellant's response to its development questionnaire. Appellant explained that she was in the lobby assisting customers when she suddenly felt something pop in her shoulder area and felt another pop higher up. She noted that her arm, hand, and face started to go numb. Appellant related that she notified a supervisor of the injury and they called an ambulance. She reported that she had a previous work-related shoulder injury.

OWCP denied appellant's traumatic injury claim in a decision dated March 11, 2014. It accepted that the December 28, 2013 employment incident occurred as alleged, but denied appellant's claim because the medical evidence of record was insufficient to establish that an injury was caused or aggravated by the accepted employment incident.

Appellant disagreed with the denial of her claim. She continued to pursue reconsideration by OWCP and submitted various requests for reconsideration received on April 15 and October 6, 2014, and February 2, June 18, and December 16, 2015. In support of these requests for reconsideration, appellant submitted additional medical evidence, including various reports predating the December 28, 2013 employment incident regarding treatment for her complaints of ongoing neck pain radiating into her left arm and left shoulder. In reports dated December 29, 2009 to March 8, 2010, Dr. Jack H. Akmakjian, an orthopedic surgeon, provided examination findings and diagnosed cervical discogenic disease, cervical radiculopathy, cervical strain, lumbar discogenic disease, lumbar radiculopathy, chronic lumbar strain, and probable mild left shoulder impingement. He reported that appellant had worked for the employing establishment for the past 19 years and developed chronic neck pain radiating to her left shoulder. Dr. Akmakjian opined that it was "probable" that appellant's complaints were related to her employment. He requested acceptance of appellant's lumbar and left shoulder conditions be added to her current alleged March 11, 2009 employment injury claim.

OWCP also received a July 18, 2012 report by Dr. David T. Easley, a Board-certified orthopedic surgeon, who described appellant's repetitive duties as a mail carrier and noted that her claim was accepted for cervical sprain and spondylosis without myelopathy. He noted that appellant complained of continued neck pain and numbness and tingling in both upper extremities. Dr. Easley reviewed appellant's history and provided physical examination findings. He diagnosed status-post cervical fusion, two (2) level C5-7 and bilateral rotator cuff impingement. Dr. Easley opined that the medical probability was "greater than not" that appellant's residual shoulder problems were a result of cumulative trauma arising from her work.

He indicated in a July 30, 2012 work capacity evaluation form (Form OWCP-5c) that appellant could work with restrictions. It was noted that appellant could not do repetitive reaching or reaching above the shoulder due to her cervical and left shoulder symptoms.

In a March 19, 2014 letter, Dr. Mittleman indicated that prior to the December 28, 2013 employment incident appellant had preexisting left shoulder impingement. He noted that according to diagnostic testing she also had a downsloping (type 2) acromion and hypertrophic changes of the acromion. Dr. Mittleman explained that on December 18, 2013 appellant was raising her left upper extremity while assisting a customer, which caused the bony acromion “to repetitively come into contact with the supraspinatus pathologic tendon thereby producing repetitive irritation with inflammation and pain as a result.” He requested that her claim be accepted for aggravation of left shoulder impingement syndrome.

Appellant provided various CA-17 forms dated August 14, 2014 to December 9, 2015 by Dr. Basimah Khulusi, Board-certified in physical medicine and rehabilitation. She noted diagnoses of aggravation of cervical radiculopathy, left shoulder impingement, and status post cervical fusion surgery. Dr. Khulusi initially related that appellant could return to modified duty, but later reported that appellant was permanently, totally disabled.

OWCP received reports from Dr. Khulusi in support of appellant’s reconsideration requests dated September 26, 2014 to December 16, 2015. Dr. Khulusi noted that she had treated appellant for a previous April 29, 2009 claim and indicated that she reviewed appellant’s case record regarding the current December 28, 2013 claim. She referenced various medical reports, which noted appellant’s complaints of left shoulder pain, along with ongoing neck pain. Dr. Khulusi provided a detailed description of the December 28, 2013 employment incident and noted that appellant felt a pop in her shoulder followed by numbness and pain going up to her neck and down her left arm. She related that while attending to the customer’s needs on December 28, 2013, appellant ended up suffering an acute straining/spraining of the structures of her neck. Dr. Khulusi explained that the straining and spraining of appellant’s neck resulted in swelling that compromised the space for the nerve root on the left side of her neck and caused her to have worse radicular symptoms with pain going down appellant’s left shoulder into the left shoulder blade and down into the left arm into her fingers.

Dr. Khulusi opined that, on December 28, 2013, appellant sustained a severe aggravation of her neck condition caused by the work activities she performed, which also aggravated the symptoms she experienced with her neck condition. She reported that prior to the December 28, 2013 employment incident, appellant had been working eight hours per day, five days per week. Dr. Khulusi noted that even though she was working modified duty, having to work eight hours per day required a lot more significant level of activity of appellant’s body and neck than if she was not working. She requested that OWCP accept appellant’s claim for aggravation of left shoulder supraspinatus tendinopathy, aggravation of left shoulder subacromial bursitis, and aggravation of left shoulder AC joint arthropathy.

By decisions dated July 14 and December 30, 2014, and May 1 and September 16, 2015, and March 15, 2016, OWCP denied modification of its March 11, 2014 decision. It found that the medical evidence of record lacked sufficient medical rationale to establish that appellant’s

medical conditions were causally related to the accepted December 28, 2013 employment incident.

On May 11, 2016 appellant requested reconsideration.

Appellant submitted an April 28, 2016 report from Dr. Khulusi who asserted that she had properly explained the mechanism of injury of how the December 28, 2013 traumatic event aggravated appellant's previous neck injury and neck symptoms, including pain radiating into her left shoulder. She further asserted that appellant had met the requirement of FECA Procedure Manual, Chapter 2, which required that appellant furnish medical evidence in the form of a comprehensive medical report from a physician that addressed the description of the mechanism of injury. Dr. Khulusi opined that on December 28, 2013 appellant suffered a traumatic event on the job that had been documented in the emergency room of the hospital. She requested that OWCP accept appellant's claim for acute cervical sprain/strain and temporary aggravation of cervical radiculopathy.

In a decision dated August 5, 2016, OWCP denied further merit review of appellant's claim under 5 U.S.C. § 8128(a). It found that the medical evidence submitted was cumulative and substantially similar to evidence that was previously reviewed.

On September 22, 2016 appellant again requested reconsideration.

In a September 1, 2016 report, Dr. Khulusi explained the difference between "cause of injury" and "mechanism of injury" and asserted that OWCP's claims examiner could not tell the difference between the two categories. She requested that OWCP refer back to her explanation about appellant's mechanism of injury in her narrative reports dated January 12 and December 16, 2015. Dr. Khulusi referenced FECA Procedure Manual, Part 2, Chapter 2 and requested that OWCP refer appellant's claim to a second opinion examiner. She related that appellant's neurosurgeon, who had performed appellant's neck fusion surgery, recommended that appellant be permanently disabled, but instead of following his recommendations OWCP had sent appellant back to work. Dr. Khulusi opined that appellant should not have been working on December 28, 2013 because she was at a very high risk of getting injured from doing her work activities.

By decision dated October 4, 2016, OWCP denied appellant's reconsideration request, finding that it neither raised substantive legal questions, nor included new and relevant evidence sufficient to warrant further merit review of appellant's claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁴

⁴ 5 U.S.C. § 8128(a)

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument 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; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

A request for reconsideration must also be received by OWCP within one year of the date of its decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim.

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by OWCP; nor she has not submitted relevant and pertinent new evidence not previously considered by OWCP.

In support of her September 22, 2016 reconsideration request, appellant submitted a September 1, 2016 report by Dr. Khulusi, which was not previously submitted. She asserted that OWCP's claims examiner could not tell the difference between cause of injury and mechanism of injury and referred OWCP back to her explanation of mechanism of injury in her reports dated January 12 and December 16, 2015. Dr. Khulusi referenced FECA Procedure Manual, Part 2, Chapter 2 and requested that OWCP refer appellant's claim to a second opinion examiner. She opined that appellant should not have been working on December 28, 2013 because she was at a very high risk of getting injured from doing her work activities. The Board notes that Dr. Khulusi merely reiterated findings and conclusions from her prior reports, dated September 26, 2014 to April 28, 2016, which had been previously reviewed by OWCP. The Board has held that evidence that is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.⁹

On appeal appellant argues the merits of her claim. As noted above, however, the Board does not have jurisdiction over the merits of appellant's claim. The Board finds that appellant failed to show that OWCP erroneously applied or interpreted a specific point of law and failed to

⁵ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ 20 C.F.R. § 10.607(a).

⁷ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *See S.H.*, Docket No. 17-0022 (issued May 2, 2017).

advance a point of law not previously considered by OWCP and her submissions did not constitute pertinent and relevant evidence not previously considered.¹⁰

Consequently, appellant has not met any of the regulatory requirements and OWCP properly declined her request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).¹¹

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).

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 19, 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

¹⁰ *Supra* note 5.

¹¹ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).