United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 17-0258**
	)	**Issued: March 5, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Bedford Park, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 12, 2016 appellant filed a timely appeal from a May 17, 2016 merit decision and a September 29, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from May 17, 2016, the date of OWCP's last decision, was November 13, 2016. Since using November 16, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is November 12, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that appellant submitted additional evidence after OWCP rendered its September 29, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a right shoulder injury causally related to the accepted April 1, 2016 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 3, 2016 appellant, then a 52-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on April 1, 2016, she experienced pain in her right elbow and arm when throwing parcels while in the performance of duty. She first received medical treatment and stopped work on April 3, 2016.

In a letter dated April 6, 2016, the employing establishment controverted the claim.

By development letter dated April 8, 2016, OWCP informed appellant that the evidence of record was insufficient to support her claim. It advised her of the necessary medical and factual evidence and afforded her 30 days to submit additional evidence.

In an April 3, 2016 Rush Oak Park Hospital report, Alexis Reitman, a physician assistant, related that appellant presented to the emergency department with pain that had begun on the previous Friday. She noted that appellant had thrown mail all day Friday in a lateral outward repetitive motion. Ms. Reitman diagnosed right shoulder strain.

Appellant submitted an April 15, 2016 narrative statement, in which she reported that, on the date of her claimed injury, she was working on a platform and repeatedly throwing parcels weighing approximately 1 to 30 pounds into containers located six-feet away. She reported pain and discomfort in her right shoulder and arm as she was performing her employment duties.

In an April 13, 2016 medical report, Dr. Asif Daud, Board-certified in family medicine, noted complaints of shoulder discomfort and limited range of motion. He diagnosed right rotator cuff tendinitis and opined that appellant could resume limited-duty work on April 23, 2016.

In an April 14, 2016 attending physician's report (Form CA-20), Dr. Daud diagnosed right shoulder rotator cuff tendinitis. He reported that appellant's injury occurred on April 1, 2016 when she felt discomfort and weakness in her right shoulder while transferring packages. Dr. Daud checked a box marked "yes" in response to whether the condition was caused or aggravated by the employment incident. He noted no history of a concurrent or preexisting injury.

In a May 3, 2016 medical report, Dr. Daud diagnosed right shoulder rotator cuff tendinitis. He restricted appellant from work through May 17, 2016 and referred her for an orthopedic evaluation.

By decision dated May 17, 2016, OWCP denied appellant's claim, finding that the medical evidence of record failed to establish that her diagnosed condition was causally related to the accepted April 1, 2016 employment incident.

On July 7, 2016 appellant requested reconsideration of the May 17, 2016 OWCP decision. In an accompanying statement, she reiterated that on April 1, 2016, she sustained an injury when she was throwing parcels into a six-foot container and experienced a burning sensation in her right arm and shoulder, rendering her unable to move her arm.

In support of her claim, appellant submitted medical reports dated June 8 and 22, 2016 from Dr. Surrenthia Parker, a Board-certified orthopedic surgeon. Dr. Parker reported that appellant presented with a history of right shoulder pain which began two months prior. She related appellant's allegations that she had injured her shoulder at work on April 1, 2016 when throwing a parcel into a container, causing a sensation in her shoulder and arm. Dr. Parker diagnosed right rotator cuff tendinitis and complete rotator cuff tear of the right shoulder upon review of a magnetic resonance imaging (MRI) scan. She recommended surgery and referred appellant to a shoulder specialist.

In a June 15, 2016 diagnostic report, Dr. Waseem Khan, a Board-certified radiologist, reported that a right shoulder MRI scan revealed a full thickness tear of the supraspinatus and infraspinatus tendons, moderate sized glenohumeral joint effusion, and mild acromioclavicular osteoarthrosis.

By decision dated September 29, 2016, OWCP denied appellant's request for reconsideration, finding that she neither raised substantive legal questions nor submitted relevant and pertinent new evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or on occupational disease.[6]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[7] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

[4] *Supra* note 2.

[5] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[6] *Michael E. Smith*, 50 ECAB 313 (1999).

[7] *Elaine Pendleton*, *supra* note 5 at 1143 (1989).

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence supporting such causal relationship.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. This medical opinion must include an accurate history of the employee's employment injury and must explain how the condition is related to the injury. The weight of medical evidence is determined by its reliability, probative value, convincing quality, care of analysis manifested, and medical rationale expressed in support of the physician's opinion.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not submitted sufficient medical evidence to support that her right shoulder injury is causally related to the accepted April 1, 2016 employment incident.[10]

On April 3, 2016 appellant sought emergency medical treatment at Rush Oak Park Hospital. While Ms. Reitman documented treatment of her right shoulder, physician assistants are not considered physicians as defined under FECA.[11] Consequently, this report is of no probative value and is insufficient to establish appellant's traumatic injury claim.[12]

The medical reports and forms dated April 13 through May 3, 2016 from Dr. Daud are also insufficient to support appellant's claim. In an April 14, 2016 Form CA-20, the physician described the April 1, 2016 work incident and diagnosed right shoulder rotator cuff tendinitis. Although Dr. Daud checked a box marked "yes" when asked whether the diagnosis was a result of the employment incident, the Board has held that reports that addresses causal relationship with a checkmark, without medical rationale explaining how the work incident caused the alleged injury, are of diminished probative value and insufficient to establish causal relationship.[13] He failed to discuss appellant's medical history or explain how repetitively throwing parcels of mail on April 1, 2016 would cause her injury.[14] Without explaining how,

[8] *See* 20 C.F.R. § 10.110(a); *John M. Tornello*, 35 ECAB 234 (1983).

[9] *James Mack*, 43 ECAB 321 (1991).

[10] *See Robert Broome*, 55 ECAB 339 (2004).

[11] 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The Board has held that a report signed by a physician assistant lacks probative value as medical evidence as physician assistants are not considered physicians under FECA. *R.M.*, Docket No. 16-1845 (issued March 6, 2017); *see also David P. Sawchuk*, 57 ECAB 316, 320, n.11 (2006).

[12] *See Sheila A. Johnson*, 46 ECAB 323, 327 (1994); *see Merton J. Sills*, 39 ECAB 572, 575 (1988).

[13] *See Calvin E. King, Jr.*, 51 ECAB 394 (2000); *see also Frederick E. Howard, Jr.*, 41 ECAB 843 (1990).

[14] Any medical opinion evidence appellant may submit to support her claim should reflect a correct history and offer a medically sound explanation by the physician of how the specific employment incident, in particular physiologically, caused or aggravated her right shoulder injury. *M.R.*, Docket No. 14-0011 (issued August 27, 2014).

physiologically, the movements involved in the employment incident caused or contributed to the diagnosed condition, Dr. Daud's opinion is of limited probative value and insufficient to meet her burden of proof.[15]

On appeal, appellant argues that her injury was work related. Her belief, however sincerely held, does not constitute the medical evidence necessary to establish a firm medical diagnosis and causal relationship.[16]

The Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference of causal relationship.[17] An award of compensation may not be based on surmise, conjecture, speculation, or on the employee's own belief of causal relation.[18] In the instant case, the record lacks rationalized medical evidence establishing causal relationship between the April 1, 2016 employment incident and her right shoulder rotator cuff tendinitis. Thus, appellant has failed to meet her burden of proof.

Appellant may submit this additional evidence, together with a written request for reconsideration, to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP 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.[19] Section 10.608(b) of OWCP's regulations provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[20]

ANALYSIS -- ISSUE 2

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).

[15] *See L.M.*, Docket No. 14-0973 (issued August 25, 2014); *R.G.*, Docket No. 14-0113 (issued April 25, 2014); *K.M.*, Docket No. 13-1459 (issued December 5, 2013); *A.J.*, Docket No. 12-0548 (issued November 16, 2012).

[16] *See S.H.*, Docket No. 17-1447 (issued January 11, 2018); *H.H.*, Docket No. 16-0897 (issued September 21, 2016.

[17] *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[18] *D.D.*, 57 ECAB 734 (2006).

[19] 20 C.F.R. § 10.606(b)(3); *see also D.K.*, 59 ECAB 141 (2007).

[20] *Id.* at § 10.608; *see also K.H.*, 59 ECAB 495 (2008).

The issue presented on appeal was 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 her request for reconsideration, she did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a new and relevant legal argument not previously considered by OWCP. Rather, appellant argued that her injury was employment related and described her employment duties.[21] The underlying issue in this case, however, was whether she sustained a right shoulder injury causally related to the accepted April 1, 2016 employment incident. That is a medical issue which must be addressed by pertinent and relevant medical evidence.[22]

While appellant submitted new medical evidence, those reports are not relevant to the underlying issue of causal relationship. Dr. Parker's June 8 and 22, 2016 reports described the April 1, 2016 employment incident and diagnosed right rotator cuff tendinitis and complete rotator cuff tear of the right shoulder. Her reports are substantially similar to the previously submitted medical evidence of record. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.[23] Dr. Parker did not address the relevant issue in this claim and failed to state any opinion regarding the cause of appellant's diagnosed condition.

Dr. Khan's June 15, 2016 diagnostic report is also insufficient to warrant merit review as the physician merely interpreted imaging studies with no discussion of the April 1, 2016 employment incident or cause of appellant's injury. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[24] In this case, while appellant submitted new evidence, it was not relevant and pertinent in addressing causal relationship pertaining to her alleged right shoulder injury.[25]

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

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right shoulder injury causally related to the accepted April 1, 2016 employment incident. The Board also finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[21] *Sherry A. Hunt*, 49 ECAB 467 (1998).

[22] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[23] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

[24] *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[25] *M.C.*, Docket No. 14-0021 (issued March 11, 2014); *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated September 29 and May 17, 2016 are affirmed.

Issued: March 5, 2018
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