

OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 20, 2016 appellant, a 70-year-old materials handler leader, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder injury on August 29, 2016 as a result of pulling a battery that weighed approximately 2,000 pounds. He stated that he pulled the battery from a stand-up electric forklift and when it rolled too far, he stopped it with his left hand and arm. Appellant claimed to have injured his left rotator cuff. He stopped work on the date of injury and then returned to work the same day.

Dr. Eric J. Kress, a Board-certified family practitioner, examined appellant on October 4 and 5, 2016. He noted that appellant presented with left shoulder pain and back pain down the left leg. Dr. Kress determined that appellant's left shoulder was injured on August 24, 2016 when he tried to stop a 2,000-pound battery from rolling away. Upon physical examination, he found decreased range of motion, tenderness, bony tenderness, crepitus, pain, spasms, and decreased strength. Appellant exhibited no swelling. Dr. Kress diagnosed acute pain of his left shoulder.

On January 9, 2017 the employing establishment controverted appellant's claim and submitted statements from appellant's supervisor and coworkers dated October 2, 20, 21, 22, and December 3, 2016 indicating that appellant was injured while working on a piece of equipment he was not qualified to operate or service and arguing that he failed to timely report his injury.

In a January 13, 2017 development letter, OWCP advised appellant of the deficiencies of his claim and attached a questionnaire for his completion. It afforded him 30 days to submit additional evidence and respond to its inquiries in order to establish his claim.

In response, appellant submitted a January 23, 2017 narrative statement indicating that, upon receiving a verbal order to pull the batteries out of the upright/stand-up forklift, he pulled on a battery and it began rolling out too far and fast. His reaction was to stop the battery with his left hand and arm. Appellant felt pain and told others around him, including the person who gave the order. He reiterated that the battery weighed approximately 2,000 pounds. Appellant stated that he sustained no other injuries after this incident.

In a December 20, 2016 report, Dr. Justin Jacobson, a Board-certified orthopedic surgeon, diagnosed "[left] complete rotator cuff tear or rupture of left shoulder, not specified as traumatic" and primary osteoarthritis of the left shoulder. He noted that appellant presented with complaints of pain and nonpainful clicking or triggering in the left shoulder that occurred constantly. Dr. Jacobson determined that the onset was sudden with injury which occurred on August 29, 2016 caused by reaching out to stop a 2,000-pound battery from rolling. He indicated that appellant felt a sharp pain, but was able to continue work. Dr. Jacobson noted that appellant's symptoms were aggravated by motion and he also noted that nothing relieved his symptoms. Appellant's pain was sharp, moderate to severe, and constant and he noted that he could not move the arm like he did before the surgery.

By decision dated February 15, 2017, OWCP accepted that the August 29, 2016 employment incident occurred as alleged, but denied the claim because the medical evidence of record failed to establish causal relationship between appellant's diagnosed conditions and the August 29, 2016 work incident.

On March 31, 2017 appellant requested reconsideration and indicated that he was tentatively scheduled to meet with a Dr. Christopher Price on May 8, 2017 to obtain an examination and evaluation of his left shoulder. He also resubmitted the December 20, 2016 report from Dr. Jacobson.

By decision dated April 12, 2017, OWCP denied appellant's request for reconsideration without conducting a merit review because he failed to advance a relevant legal argument or submit any relevant and pertinent new evidence. It found that no new evidence had been submitted and the December 20, 2016 report from Dr. Jacobson was repetitious.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁴

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁵ The second component is whether the employment incident caused a personal injury. An employee may establish that an injury occurred in the performance of duty as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.⁶

Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment incident must be based on a complete factual and medical background. Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s).

³ *Supra* note 1.

⁴ 20 C.F.R. § 10.115(e), (f); *see Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁵ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a left shoulder condition causally related to the accepted August 29, 2016 employment incident.

In an October 5, 2016 report, Dr. Kress diagnosed acute pain of the left shoulder and determined that appellant's left shoulder was injured on August 24, 2016 when he tried to stop a 2,000-pound battery from rolling away. The Board finds that Dr. Kress' diagnosis of left shoulder pain is a description of a symptom rather than a clear diagnosis of the medical condition.⁷ Moreover, the Board has held that the mere fact that appellant's symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between his condition and his employment factors.⁸ Therefore, the Board finds that Dr. Kress' report is insufficient to establish that appellant sustained an employment-related injury.

In his December 20, 2016 report, Dr. Jacobson diagnosed "[left] complete rotator cuff tear or rupture of left shoulder, not specified as traumatic" and primary osteoarthritis of the left shoulder. He noted that the onset was sudden with injury which occurred on August 29, 2016 caused by reaching out to stop a 2,000-pound battery from rolling. Dr. Jacobson opined that appellant's left shoulder conditions were causally related to the August 29, 2016 battery incident at work. However, the fact that a condition manifests itself during a period of employment is not sufficient to establish causal relationship.⁹ Temporal relationship alone will not suffice.¹⁰ The Board finds that Dr. Jacobson failed to provide sufficient medical rationale explaining how pulling a 2,000-pound battery at work on August 29, 2016 either caused or contributed to appellant's conditions. A physician's opinion must be supported by medical rationale, explaining the nature of the relationship between the diagnosed conditions and appellant's specific employment factor(s).¹¹ Thus, the Board finds that the report from Dr. Jacobson is insufficient to establish that appellant sustained an employment-related injury on August 29, 2016.

As appellant has not submitted any rationalized medical evidence to support his claim that he sustained a left shoulder injury causally related to the accepted August 29, 2016 employment incident, he has failed to meet his burden of proof to establish entitlement to compensation benefits.

⁷ The Board has consistently held that pain is a symptom, not a compensable medical diagnosis. *See P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

⁸ *See Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁹ 20 C.F.R. § 10.115(e).

¹⁰ *See D.I.*, 59 ECAB 158, 162 (2007).

¹¹ *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

Appellant may submit new evidence or argument 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

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹³ 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.¹⁴ A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.¹⁵ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request without reopening the case for a review on the merits.¹⁶

ANALYSIS -- ISSUE 2

Appellant's March 31, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

With respect to the third above-noted requirement under section 10.606(b)(3), appellant did not submit any new evidence with his reconsideration request. He resubmitted a December 20, 2016 report from Dr. Jacobson which was previously reviewed by OWCP in its February 15, 2017 decision. As the report repeats evidence already in the case record, it is duplicative and does not constitute relevant and pertinent new evidence.¹⁷

¹² 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 own motion or on application.” 5 U.S.C. § 8128(a).

¹³ 20 C.F.R. § 10.607.

¹⁴ *Id.* § 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 OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, 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.

¹⁵ *Id.* at § 10.606(b)(3).

¹⁶ *Id.* at § 10.608(a), (b).

¹⁷ *See D.K.*, 59 ECAB 141 (2007).

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a left shoulder condition causally related to the accepted August 29, 2016 employment incident. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 12 and February 15, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 19, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board