United States Department of Labor
Employees' Compensation Appeals Board

L.A., Appellant	)	
and	)	**Docket No. 19-0820**
	)	**Issued: December 6, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Denver, CO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 4, 2019 appellant filed a timely appeal from a January 2, 2019 merit decision and a February 5, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a right upper extremity condition causally related to the accepted factors of her federal employment; and

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the January 2, 2019 decision, OWCP and the Board on appeal received additional evidence. However, the Board's *Rules of Procedure* provides: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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

FACTUAL HISTORY

On September 29, 2018 appellant, then a 48-year-old mail handler assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained an injury to her right arm while in the performance of duty. She indicated that she first became aware of her condition on August 15, 2018 and first realized it was caused or aggravated by factors of her federal employment on August 16, 2018. Appellant explained that she delayed reporting her condition because she thought she would get better. She did not stop work.

On September 26, 2018 Dr. Darla Draper, Board-certified in family medicine examined appellant and noted her employment duties that required her to lift, pull and push cages filled with heavy products, as well as operate machinery. She reported appellant feeling pain in her right shoulder and lateral elbow, and, had pain with gripping and writing with her right hand. Dr. Draper diagnosed appellant with lateral epicondylitis of the right elbow, pain of the right hand, a right shoulder sprain and a thoracic myofascial strain. She opined that appellant's injuries were work related and recommended that she wear a sling during six hours of her workday and prohibited the use of her right upper extremity. Dr. Draper also recommended that appellant began physical therapy to treat her condition.

On September 28, 2018 appellant was seen by Dr. Jennifer Pula, Board-certified in internal medicine. Dr. Pula recounted that appellant believed her condition began when she moved from the night shift to the day shift, which required more lifting. Dr. Pula acknowledged appellant's lateral epicondylitis of her right elbow and the sprain of her right shoulder, noted that her healing was in its beginning stages and maintained her previous work restrictions. The same day, appellant was seen by Diane Kiel, an occupational therapist. Ms. Kiel provided that appellant had reached 35 percent of her recovery goal.

On October 5, 2018 Dr. Pula updated her work restrictions based on her therapy progress.

On October 19, 2019 appellant was seen by Jordan Maas, a physician assistant, for a follow-up appointment. Ms. Maas acknowledged appellant's lateral epicondylitis of her right elbow and noted improvements with therapy. She opined that appellant's description of her work duties did not seem to correlate with the criteria for epicondylitis. As a result, Ms. Maas updated appellant's work restrictions and recommended that a job-site analysis be conducted in order to pinpoint the cause of appellant's injury.

In a development letter dated October 24, 2018, OWCP notified appellant of the deficiencies of her claim. It advised her of the factual and medical evidence necessary to establish her claim and afforded her 30 days to submit the necessary evidence.

In response, appellant submitted an October 31, 2018 statement, wherein she noted that her primary work duties required her to work on a High-Speed Tray Sorter (HSTS). She explained that the average loaded HSTS weighs around 17.5 pounds, but could weigh up to 30 pounds and sorts anywhere from 800 to 1200 letter trays per hour. She indicated that working with the HSTS

required a lot of repetitive motion in moving letter trays, working the feed-belt and de-sleeving the letter trays. Appellant also indicated that she was required to lift sacks filled with mail, transport equipment and dump sacks filled with priority and first-class mail. She stated that she works the HSTS an average of 40 hours per week and performs the other duties for the remainder of her five-day workweek, including overtime hours. Appellant further noted that because of the hours she works, she did not have any other outside activities that she believed contributed to her injuries.

On November 2, 2018 appellant was seen by Cheryl Liedtke, a physician assistant, for a reevaluation of her injury. Ms. Liedtke acknowledged appellant's lateral epicondylitis of her right elbow and noted that appellant was experiencing more pain in her right shoulder and back due to her use of a scanner as a part of her restricted work duties. She also ordered a work site evaluation after noting that an evaluation had not yet been conducted after Mr. Maas' earlier recommendation. Ms. Liedtke recommended that appellant complete her therapy and return for a follow up after the work-site evaluation.

On November 8, 2018 appellant was seen by Dr. Scott Richardson, Board-certified in emergency medicine. Dr. Richardson's report referenced appellant's lateral epicondylitis of her right elbow and her right shoulder sprain. Appellant also informed Dr. Richardson that she was experiencing constant pain in her right elbow and declined to undergo massage therapy. Dr. Richardson opined that appellant's condition was roughly 50 percent healed. He recommended that appellant continue her physical therapy as scheduled and instructed that she perform no lifting, pushing or pulling over five pounds.

In a November 13, 2018 medical report, Dr. Craig Davis, a Board-certified orthopedic surgeon, noted that appellant's arm had good range of motion, but she experienced pain at the extremes. He opined that her treatment was reasonable and appropriate and administered a steroid injection to the tender spot just posterior to her medial epicondyle. Dr. Davis further recommended that appellant not use her right hand for three days and afterwards return to work under the work restrictions recommended by her occupational provider.

On November 30, 2018 Dr. Richardson modified appellant's work restrictions to allow her to lift, push and pull up to 10 pounds with her right arm.

In a December 3, 2018 note, Dr. Pula reported that appellant informed her that she kept getting sent home from work early due to her work restrictions preventing her from lifting. Appellant demonstrated that she could lift 20 pounds in her therapy session and sought to have her work restrictions modified to reflect her progress. Dr. Pula's updated her work restrictions to allow her to lift, push and pull up to 20 pounds for eight hours a day.

On December 17, 2018 appellant was seen by Dr. Nancy Strain, Board-certified in family medicine, who assessed lateral epicondylitis of the right elbow, right shoulder sprain and thoracic myofascial sprain. Appellant informed Dr. Strain that she was doing fine with her 20-pound work restriction and that she had begun to work more. Dr. Strain maintained appellant's work restrictions and therapy treatment schedule.

Appellant also submitted therapy notes dated October 8 to December 20, 2018 from Kyle Ahlenstorf, an occupational therapist documenting her physical therapy sessions.

By decision dated January 2, 2019, OWCP denied appellant's occupational disease claim, finding that the evidence submitted was insufficient to establish that her medical condition was causally related to the accepted factors of her federal employment.

Appellant resubmitted the medical reports from Drs. Draper, Pula, Richardson, and Davis, as well as Ms. Liedtke's report, which were previously of record. She also resubmitted therapy notes from Ms. Kiel and Mr. Ahlenstorf.

On January 28, 2019 appellant requested reconsideration of OWCP's January 2, 2019 decision. In an attached statement, she explained that she did not understand what information she was required to provide in order to establish her claim.

By decision dated February 5, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] 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 the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[4] These are the essential elements of every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[5]

OWCP's regulations define the term "occupational disease or illness" as a condition "produced by the work environment over a period longer than a single workday or shift."[6] To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.

[3] *Supra* note 1.

[4] *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

[5] *K.V.*, *id.*; *M.E.*, *id.*; *K.B.*, Docket No. 17-1997 (issued July 27, 2018).

[6] 20 C.F.R. § 10.5(q).

Causal Relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[7] A physician's opinion on whether there is causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background.[8] 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.[9]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a right upper extremity condition causally related to the accepted factors of her federal employment.

In her September 27, 2018 report, Dr. Draper diagnosed pain of the right hand, lateral epicondylitis of the right elbow, a right shoulder sprain and a thoracic myofascial strain. She noted appellant's description of her work duties and opined that her condition was the result of a work-related injury. While Dr. Draper provided an affirmative opinion on causal relationship, her opinion is insufficiently rationalized as it is largely based on appellant's belief as to what caused her injuries, rather than by an independent analysis of the cause of the condition. Further, she did not explain the process by which appellant's employment factors caused or contributed to the diagnosed conditions.[10] A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted incident resulted in the diagnosed condition is insufficient to meet appellant's burden of proof.[11] Accordingly, the Board finds that Dr. Draper's medical report is of limited probative value on this issue of causal relationship.

In her September 28, October 5, and December 3, 2018 medical reports, Dr. Pula diagnosed epicondylitis of the right elbow and a right elbow sprain, however, she did not offer her own opinion as to the cause of appellant's conditions. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[12] A medical opinion must provide an explanation as to how the specific employment factors physiologically caused or aggravated the diagnosed conditions.[13] Thus, Dr. Pula's medical reports are of no probative value on the issue of causal relationship.

[7] *K.V.*, *supra* note 4; *A.D.*, 58 ECAB 149 (2006); *D. Wayne Avila*, 57 ECAB 642 (2006).

[8] *K.V.*, *supra* note 4; *Michael S. Mina*, 57 ECAB 379 (2006); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams, id.*

[10] *See D.L.*, Docket No. 15-0866 (issued November 23, 2015); *J.S.*, Docket No. 14-0818 (issued August 7, 2014).

[11] *D.L., id.; G.M.*, Docket No. 14-2057 (issued May 12, 2015).

[12] *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

[13] *See V.T.*, Docket No. 18-0881 (issued November 19, 2018).

Similarly, Dr. Richardson's November 8 and 30, 2018 medical reports did not offer an opinion on the cause of appellant's conditions. Also, Drs. Davis and Strain did not offer an opinion on causal relationship between appellant's right upper extremity conditions and the accepted factors of her employment. Accordingly, these medical opinions are of no probative value on the issue of causal relationship.[14]

Appellant also submitted multiple medical reports authored by physician assistants and her occupational therapist. These reports do not constitute competent medical evidence because physician assistants and occupational therapists are not considered a "physician" as defined under FECA.[15] Certain healthcare providers such as physician assistants, nurse practitioners, occupational therapists, and social workers are not considered "physician[s]" as defined under FECA.[16] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to compensation benefits.[17] As such, these reports are of no probative value and are found to be insufficient to establish appellant's claim.[18]

The fact that a condition manifests itself during a period of employment is insufficient to establish causal relationship.[19] Temporal relationship alone will not suffice. Entitlement to FECA benefits may not be based on surmise, conjecture, speculation, or on the employee's own belief of a causal relationship.[20] As the record lacks rationalized medical evidence establishing causal relationship between the accepted employment factors and appellant's claimed conditions, appellant has not met her burden of proof.

Appellant may submit new evidence 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.

[14] *Supra* note 12.

[15] 5 U.S.C. § 8101(2); *Sean O Connell*, 56 ECAB 195 (2004) (physician's assistants); *see R.S.*, Docket No. 16-1303 (issued December 2, 2016) (occupational therapists are not considered physicians as defined under FECA); *see also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

[16] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[17] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or physical therapist will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

[18] *See K.C.*, Docket No. 16-1181 (issued July 26, 2017).

[19] *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *Daniel O. Vasquez*, 57 ECAB 559 (2006).

[20] *S.G.*, Docket No. 18-1373 (issued February 12, 2019); *D.D.*, 57 ECAB 734 (2006).

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.[21] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[22] 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.[23] A timely application 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.[24] 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.[25]

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).

Appellant's request for reconsideration did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. In her statement accompanying her request for reconsideration, appellant argued that she did not understand what evidence was necessary in order to support her claim. Accordingly, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

In support of her request for reconsideration, appellant resubmitted copies of the medical reports of Drs. Draper, Pula, Richardson, and Davis, as well as reports from Ms. Liedtke, Ms. Kiel, and Mr. Ahlenstorf, which were already of record and previously considered by OWCP. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[26]

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[21] 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).

[22] 20 C.F.R. § 10.607.

[23] *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 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.

[24] *Id.* at § 10.606(b)(3).

[25] *Id*.

[26] *See L.R.,* Docket No. 18-0400 (issued August 24, 2018).

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case.[27] The various reports submitted by appellant did not provide any relevant and pertinent new evidence or any opinion regarding why appellant's employment factors should be accepted as causally related to her diagnosed conditions. Therefore, OWCP was not required to reopen appellant's claim for reconsideration of the merits in accordance with the third above-noted requirement under section 10.606(b)(3).[28] Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[29]

On appeal appellant submitted new medical evidence she contends would meet her burden of proof to establish causal relationship. However, as previously noted, the Board is precluded from reviewing evidence for the first time on appeal.[30]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right upper extremity condition causally related to the accepted factors of her federal employment. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[27] 20 C.F.R. § 10.606(b)(3); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[28] *C.R.*, Docket No. 18-1569 (issued March 7, 2019); *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

[29] *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

[30] *Supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the February 5 and January 2, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 6, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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