United States Department of Labor
Employees' Compensation Appeals Board

R.G., Appellant	)	
	)	**Docket No. 18-1045**
and	)	**Issued: February 1, 2019**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Dunnellon, FL, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 24, 2018 appellant filed a timely appeal from a December 21, 2017 merit decision and a January 30, 2018 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 that her right shoulder conditions were causally related to the accepted factors of her federal employment; and

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted new evidence on appeal. 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 October 27, 2017 appellant, then a 49-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that repetitive motion required by her federal employment duties caused or aggravated calcification of the right shoulder and rotator cuff, and bicep tenodesis. She alleged that she first became aware of the conditions on October 27, 2014 and their relationship to her federal employment on April 20, 2017. Appellant stopped work on July 17, 2017.

In an accompanying undated statement, appellant related that she went to her primary care physician on October 27, 2014 because she had a lot of neck and shoulder pain that had worsened over time. She noted her work duties which involved: sorting letters and flats for several hours; lifting heavy tubs filled with magazines, catalogs, newspapers, and soft packages; and pushing heavy pallets.

In support of her claim, appellant submitted medical reports dated March 28 and April 17, 2013, October 27, 2014, and May 31, 2016 from Dr. Nikhil Shah, a family practitioner, who examined appellant and provided the impressions of pain in the right neck, right shoulder, and right upper arm.

Appellant also submitted a June 21, 2016 report from Dr. Nirav Gupta, a Board-certified orthopedic surgeon, who noted appellant's complaint of neck and right arm/shoulder pain for the past year, which she experienced while lifting. Dr. Gupta discussed his examination findings and assessed appellant as having pain in unspecified shoulder, and cervicalgia.

Appellant further submitted various diagnostic scan reports. In a July 1, 2016 cervical spine magnetic resonance imaging (MRI) scan report, Dr. Lance P. Trigg, a Board-certified radiologist, provided an impression of mild degenerative changes which did not appear to create obvious encroachment. He also provided an impression of possible slight cervical thoracic dextroscoliosis. In a cervical spine x-ray report dated July 1, 2016, Dr. Trigg noted an impression of some degree of underlying cervical spondylosis, and no fracture or mass effect.

Dr. Dana M. Allen, a Board-certified radiologist, in a July 1, 2016 right shoulder MRI scan report, found no evidence of high-grade rotator cuff tear, high-grade labrum tear, or synovitis. He found mild rotator cuff tendinosis, peritendinitis, intact biceps, and calcific tendinitis of the subscapularis.

In a July 5, 2016 report, a certified physician assistant, examined appellant's right shoulder and assessed right shoulder joint pain.

Dr. Kevin W. Farmer, an attending Board-certified orthopedic surgeon, indicated in an October 31, 2017 letter, that appellant had been under his care since April 20, 2017 for the treatment of her right shoulder, which included surgery performed on July 17, 2017. He noted that she had reported pain for the past year with repetitive overhead activity at work. Dr. Farmer related that appellant denied injury or trauma.

OWCP, by development letter dated November 15, 2017, advised appellant of the deficiencies of her claim and indicated that further medical evidence was necessary to establish her claim. It afforded her 30 days to submit the additional medical evidence.

OWCP received hospital progress notes, reports, and diagnostic test results regarding appellant's right shoulder conditions and resultant surgeries. In an April 13, 2017 progress note, Dr. Michael S. Smith, a Board-certified orthopedic surgeon, examined appellant and diagnosed acute pain of the right shoulder, tear of the right rotator cuff, unspecified tear extent, biceps tendinitis of the right shoulder, myofascial pain on the right side, and calcific tendinitis.

Dr. Cooper Dean, a Board-certified radiologist, indicated on April 13, 2017 that a right shoulder x-ray revealed an impression of a component of calcific tendinitis along the anterior aspect of the greater tuberosity.

An April 14, 2017 right shoulder MRI scan report from Dr. Ivan C. Davis, a Board-certified radiologist, noted an impression of long head biceps calcific peritendinitis, supraspinatus, infraspinatus, subscapularis, and intra-articular long head biceps tendinosis; focal, partial-thickness bursal-sided tear of the supraspinatus tendon; mild undersurface fraying of the subscapularis tendon; and mild acromioclavicular osteoarthritis.

In a July 13, 2017 progress note, Dr. Farmer reported examination findings and diagnosed calcific tendinitis of the right shoulder, incomplete tear of the right rotator cuff, and biceps tendinopathy, right.

In operative notes dated July 17, 2017, Dr. Larry D. Waldrop, an orthopedic surgeon, and Dr. Farmer indicated that Dr. Farmer had performed a right shoulder open subpecoralis biceps tenodesis, right shoulder arthroscopic major debridement/rotator cuff debridement and trephination, and right shoulder arthroscopic subacromial decompression/acromioplasty. Appellant's preoperative and postoperative diagnoses were right shoulder biceps tendinopathy, labral fraying, and impingement. In a November 8, 2017 operative note, Dr. Farmer noted that appellant's preoperative and postoperative diagnosis was right shoulder adhesive capsulitis.

In an October 17, 2017 progress note, Dr. Jason L. Zaremski, a Board-certified physiatrist, discussed examination findings and assessed appellant as having adhesive capsulitis of the right shoulder.

Dr. Florian F. Dibra, an orthopedic surgeon, indicated in a November 7, 2017 progress note that appellant's postoperative recovery was limited by frozen shoulder development.

In a November 8, 2017 attending physician's report (Form CA-20), Dr. Farmer again noted appellant's history that she had experienced pain during the past year while performing repetitive overhead activities at work. He diagnosed an incomplete tear of the right rotator cuff. Dr. Farmer placed a checkmark in the box marked "yes" indicating that the diagnosed condition could be caused by the employment activity of repetitive overhead motions. He advised that appellant was totally disabled from July 17, 2017 through approximately January 17, 2018. Dr. Farmer noted that she could return to light-duty work on approximately January 17, 2018.

Progress notes dated July 17 and 28, September 19, October 10, and November 21, 2017 from certified physician assistants and a licensed nurse practitioner, addressed appellant's right shoulder conditions and preoperative and postsurgery treatment.

By decision dated December 21, 2017, OWCP denied appellant's occupational disease claim finding that she failed to submit a rationalized medical opinion explaining how her diagnosed right shoulder conditions were causally related to the accepted factors of her federal employment.

Appellant requested reconsideration on January 9, 2018. She submitted additional medical records from Dr. Farmer. In a progress note dated April 22, 2017, Dr. Farmer again diagnosed calcific tendinitis of the right shoulder and incomplete tear of the right rotator cuff. In a January 2, 2018 letter, he restated the history of his own treatment of appellant and her claim that her repetitive overhead work activities caused her right shoulder conditions.

By decision dated January 30, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a), finding that the evidence submitted was irrelevant, repetitious, and cumulative.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[4]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; 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. The medical evidence must include a physician's rationalized opinion on the issue of whether there is causal relationship between the claimant's diagnosed condition and the implicated employment factors. 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

[3] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[5]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that her right shoulder conditions were causally related to the accepted factors of her federal employment.

Appellant submitted a series of reports from her physician, Dr. Farmer. In a November 8, 2017 attending physician's report (Form CA-20), Dr. Farmer diagnosed incomplete tear of the right rotator cuff and checked a box marked "yes" that the condition "could" be caused by the employment activity of repetitive overhead motion. He advised that appellant was totally disabled from July 17, 2017 through approximately January 17, 2018. The Board finds that Dr. Farmer's opinion on causal relationship is speculative in nature. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.[6] Moreover, the Board has held that a checkmark on a form report, without supporting rationale, is of limited probative value, and is insufficient to establish a claim.[7] Dr. Farmer did not explain why performing repetitive overhead activities would cause or contribute to appellant's diagnosed condition and resultant disability from work and thus his opinion is insufficient to establish appellant's claim.

Dr. Farmer's October 31, 2017 report noted that he had been treating appellant's right shoulder since April 20, 2017, which included surgery he performed on July 17, 2017. While he repeated the history of injury as reported by appellant, that her shoulder pain was due to repetitive overhead activity at work, he did not provide his own opinion regarding whether her condition was work related. To the extent that Dr. Farmer is providing his own opinion, he failed to provide a rationalized opinion regarding causal relationship between appellant's right shoulder condition and the accepted employment factors.[8]

While Dr. Farmer's remaining progress note dated July 13, 2017 found that appellant had calcific tendinitis and an incomplete tear of the right rotator cuff and operative notes dated July 17 and November 8, 2017 noted that she had biceps tendinopathy, labral fraying, impingement, and adhesive capsulitis of the right shoulder that required surgery, he failed to offer a specific opinion as to whether the diagnosed conditions and resultant surgery and manipulation procedure were caused or aggravated by the accepted employment factors. The Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's condition is of no

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

[6] *V.B.*, Docket No. 17-1847 (issued April 4, 2018); *D.D.*, 57 ECAB 734, 738 (2006); *Kathy A. Kelley*, 55 ECAB 206 (2004).

[7] *V.B., id.*; *D.S.*, Docket No. 15-1930 (issued January 30, 2016).

[8] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

probative value on the issue of causal relationship.[9] For the reasons set forth above, the Board finds that Dr. Farmer's reports and progress and operative notes are insufficient to meet appellant's burden of proof.

Similarly, the reports of Drs. Shah, Gupta, Smith, Zaremski, and Dibra are of limited probative value on the issue of causal relationship. The physicians diagnosed myofascial pain, biceps tendinitis, calcific tendinitis, and adhesive capsulitis of the right shoulder; tear of the right rotator cuff; frozen right shoulder; and cervicalgia, but failed to offer an opinion addressing whether the diagnosed conditions were caused or aggravated by the accepted work factors.[10] Thus, the Board finds that this evidence is insufficient to meet appellant's burden of proof.

Further, the diagnostic studies of record from Drs. Trigg, Allen, Dean, and Davis are of limited probative value. The Board has held that reports of diagnostic tests lack probative value as they do not provide an opinion on causal relationship between the accepted employment factors and a diagnosed condition.[11]

The reports and progress notes from certified physician assistants and a licensed nurse practitioner have no probative medical value in establishing appellant's claim. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA.[12] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[13]

The Board finds that appellant has failed to submit rationalized, probative medical evidence sufficient to establish a right shoulder injury causally related to the accepted factors of her federal employment. Appellant therefore has not met her burden of proof.

On appeal appellant contends that she sustained a work-related right shoulder injury. The Board finds that the weight of the medical evidence does not establish that appellant's right shoulder conditions for which she underwent surgery on July 17 and November 8, 2017, were caused or contributed to by the accepted employment factors.

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.

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

[10] *Id.*

[11] *See J.M.*, Docket No. 17-1688 (issued December 13, 2018).

[12] 5 U.S.C. § 8101(2). This subsection defines a physician as surgeons, podiatrist, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.

[13] *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner 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).

LEGAL PRECEDENT -- ISSUE 2

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[14] A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[15] Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).[16] This section provides that the application for reconsideration must be submitted in writing and 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.[17] Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[18]

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).

In her January 9, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, appellant 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).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered with her January 9, 2018 request for reconsideration. The underlying issue in this case is whether appellant submitted sufficient medical evidence establishing a right shoulder condition causally related to her accepted distribution clerk duties. Appellant submitted a new progress note dated April 22, 2017 from Dr. Farmer who diagnosed calcific tendinitis of the right shoulder and incomplete tear of the right rotator cuff. This evidence, however, essentially reiterated Dr. Farmer's diagnosis of calcific tendinitis of the right shoulder and incomplete tear of the right rotator cuff set forth in his prior report of record. In addition, this evidence failed to address the underlying issue of causal relationship. Evidence or argument that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.607(a).

[16] *Id.* at § 10.608(a).

[17] *Id.* at § 10.606(b)(3).

[18] *Id.* at § 10.608(b).

basis for reopening a case.[19] Moreover, the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[20]

Similarly, Dr. Farmer's new report dated January 2, 2018 is repetitious and irrelevant to the critical issue of causal relationship. Dr. Farmer reiterated his history of appellant's treatment and the history of injury as reported by appellant set forth in his October 31, 2017 report.[21] For the reasons set forth above, the Board finds that Dr. Farmer's progress notes are insufficient to warrant reopening appellant's claim for further merit review. The Board accordingly finds that appellant has not met 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.[22]

CONCLUSION

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

[19] *A.A.*, Docket No. 18-0031 (issued April 5, 2018); *James W. Scott,* 55 ECAB 606 (2004).

[20] *A.A., id.*; *D'Wayne Avila,* 57 ECAB 642 (2006).

[21] *Supra* note 20.

[22] *See A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *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).

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2018 and December 21, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 1, 2019
Washington, DC

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

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

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