

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 June 17, 2019 appellant, then a 35-year-old housekeeper, filed a traumatic injury claim (Form CA-1) alleging that on June 12, 2019 she sustained a back injury as a result of throwing trash into a trash compactor while in the performance of duty. She stopped work on June 13, 2019 and returned on June 23, 2019.

In a form report dated June 13, 2019, Dr. Stephen Kalmar, an emergency medicine specialist, diagnosed a work-related left shoulder injury and recommended work restrictions. An unsigned after visit summary dated June 13, 2019 noted that appellant had been seen for muscle injury, deep tissue injury, and acute left-sided thoracic back pain.

By letter dated June 18, 2019, Barbara Majcher, an advanced practice nurse, requested that appellant be excused from work from June 13 through 23, 2019, and noted a 10-pound work restriction after appellant's return to work. She explained that the reason for appellant's absence was a work-related deep tissue injury.

An x-ray of appellant's thoracic spine taken on June 13, 2019 demonstrated mild leftward curvature and no acute fracture or traumatic subluxation.

In an attending physician's report (Form CA-20) dated June 21, 2019, Dr. Asima Doriwala, a Board-certified internist, diagnosed muscle injury, deep tissue injury, and acute left thoracic back pain. She explained that the injury occurred on June 12, 2019 when appellant lifted a 30-pound garbage can at work and injured her left mid-back/scapular region. Dr. Doriwala checked a box marked "Yes," indicating her belief that the conditions found were caused or aggravated by an employment activity, explaining that the conditions were caused by lifting a heavy garbage can at work. She recommended work restrictions and a return to regular work on July 5, 2019.

In a development letter dated July 1, 2019, OWCP informed appellant that additional medical evidence was needed to establish her claim. It advised her of the type of factual and medical evidence needed, including medical evidence from a qualified physician which provided a diagnosis and a rationalized explanation as to how the employment incident caused the diagnosed condition. OWCP afforded appellant 30 days to submit the necessary evidence.

In a progress report dated June 13, 2019, Ms. Majcher diagnosed muscle injury, deep tissue injury, and acute-left sided thoracic back pain.

On June 21, 2019 Dr. Doriwala diagnosed deep tissue injury and left shoulder injury. She noted that appellant's symptoms had improved.

By letter dated July 16, 2019, Dr. Doriwala related that appellant sustained muscle injury and deep tissue injury of her left shoulder and left thoracic paraspinal region on June 12, 2019 when she lifted a heavy object at work in the performance of duty. She noted that an x-ray of appellant's thoracic spine demonstrated no acute skeletal abnormalities, thus supporting the diagnoses of muscle injury and deep tissue injury.

In a physical therapy referral dated July 18, 2019, Ms. Majcher diagnosed muscle injury, deep tissue injury, and acute left-sided thoracic back pain.

By decision dated August 1, 2019, OWCP denied appellant's traumatic injury claim, finding that she had not submitted medical evidence containing a medical diagnosis in connection with her accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

On September 3, 2019 appellant requested reconsideration of its August 1, 2019 decision. With the request she attached an undated narrative statement in which she described the incident of June 12, 2019. Appellant also attached a witness statement dated August 31, 2019.

In a letter dated August 23, 2019, Dr. Doriwala resubmitted the letter of July 16, 2019 with the addition of ICD-10 diagnostic codes including injury of unspecified body region (ICD-10 code T14.8XXA), unspecified injury (ICD-10 code T14.90XA), unspecified injury of left shoulder and upper arm (ICD-10 code S49.92XA), acute left thoracic back pain, and pain in the thoracic spine (ICD-10 code M54.6). She related that the twisting motion of appellant's body when lifting the heavy object placed a strain on appellant's muscle and deep tissue. Dr. Doriwala again noted appellant's muscle injury and deep tissue injury of the left shoulder and left thoracic paraspinal region and concluded that, "[t]hese injuries were caused by lifting a heavy object as part of her work activities."

In a report dated September 11, 2019, Dr. Doriwala diagnosed left-sided thoracic back pain of unspecified chronicity. She noted that appellant's left mid-back was still intermittently painful. On physical examination, Dr. Doriwala noted tenderness to palpation at the thoracic paraspinal region.

By decision dated September 25, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ 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 timely filed within the applicable time limitation of FECA,⁴ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to

³ *Id.*

⁴ *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

the employment injury.⁵ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an 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.⁸

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.⁹ 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 incident identified by the claimant.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted June 12, 2019 employment incident.

On June 13, 2019 Dr. Kalmar related a diagnosis of left shoulder injury. In reports and letters dated June 21 and July 16, 2019, Dr. Doriwala diagnosed deep tissue injury, left shoulder injury, muscle injury, and acute left thoracic back pain. An x-ray of the thoracic spine taken on June 13, 2019 demonstrated no acute fracture or traumatic subluxation. The Board has held that a medical report lacking a firm diagnosis and a rationalized medical opinion regarding causal relationship is of no probative value.¹¹ The Board has previously explained that a purported diagnosis of “injury” is not a firm diagnosis.¹² Likewise, pain is a symptom, but not a firm

⁵ *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *Id.*; *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁸ *K.L.*, Docket No. 18-1029 (issued January 9, 2019). See *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

⁹ *M.S.*, Docket No. 19-1096 (issued November 12, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁰ *R.S.*, Docket No. 19-1484 (issued January 13, 2020); *Leslie C. Moore*, 52 ECAB 132 (2000).

¹¹ *L.P.*, Docket No. 19-1812 (issued April 16, 2020); *P.C.*, Docket No. 18-0167 (issued May 7, 2019).

¹² See *J.L.*, Docket No. 18-1804 (issued April 12, 2019).

diagnosis.¹³ Therefore, these reports and letters, lacking firm diagnoses of any condition in connection with the incident of June 12, 2019 are insufficient to establish appellant's claim.

Appellant submitted letters and reports dated from June 13 to July 18, 2019 from Ms. Majcher, an advanced practice nurse. The Board has held that treatment notes signed by a nurse are not considered medical evidence as these providers are not considered "physician[s]" as defined under FECA.¹⁴

Appellant submitted an unsigned visit summary dated June 13, 2019. The Board has held that a report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence.¹⁵

The Board finds that appellant has not submitted rationalized, probative medical evidence sufficient to establish a diagnosed medical condition in connection with her June 12, 2019 employment incident.¹⁶ Appellant, therefore, has not met her burden of proof.

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 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 compensation at any time on his or her own motion or on application.¹⁷

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

¹³ *T.H.*, Docket No. 19-1891 (issued April 3, 2020); *M.V.*, Docket No. 18-0884 (issued December 28, 2018). The Board has consistently held that pain is a symptom, rather than 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).

¹⁴ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law); see also *B.B.*, Docket No. 09-1858 (issued April 16, 2010) (nurses are not considered physicians under FECA).

¹⁵ *T.H.*, *supra* note 13.

¹⁶ See *T.J.*, Docket No. 18-1500 (issued May 1, 2019); see *D.S.*, Docket No. 18-0061 (issued May 29, 2018).

¹⁷ 5 U.S.C. § 8128(a); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.²⁰ 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.²¹

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 September 3, 2019 request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advanced a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The underlying issue in this case is whether appellant submitted sufficient medical evidence to establish a diagnosed medical condition causally related to the accepted June 12, 2019 employment incident. She did not submit any relevant and pertinent new evidence with her September 3, 2019 request for reconsideration.

Appellant submitted an undated narrative statement in which she described the incident of June 12, 2019 and a witness statement dated August 31, 2019 with her request for reconsideration. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²² As the underlying issue on reconsideration is medical in nature, these statements do not establish entitlement to a review of the merits of appellant's claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

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

¹⁹ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the originally contested decision. 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.

²⁰ *Id.* at § 10.608(a); *M.S.*, 59 ECAB 231 (2007).

²¹ *Id.* at § 10.608(b); *O.P.*, Docket No. 19-0445 (issued July 24, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²² *S.H.*, Docket No. 19-1897 (issued April 21, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

Appellant also submitted a letter dated August 23, 2019 from Dr. Doriwala, which was substantially similar to her July 16, 2019 letter, except for the addition of ICD-10 diagnostic codes including injury of unspecified body region (ICD-10 code T14.8XXA), unspecified injury (ICD-10 code T14.90XA), unspecified injury of left shoulder and upper arm (ICD-10 code S49.92XA), acute left thoracic back pain, and pain in the thoracic spine (ICD-10 code M54.6). In a report dated September 11, 2019, Dr. Doriwala diagnosed left-sided thoracic back pain of unspecified chronicity. While this evidence is new, it is not relevant, as it is substantially similar to prior evidence of record. Providing additional medical evidence that either duplicates or is substantially similar to evidence of record does not constitute a basis for reopening a case.²³ Furthermore, as noted above, the submission of evidence or argument that does not address the particular issue involved does not constitute a basis for reopening a case, and as these reports do not contain firm medical diagnoses, they do not address the underlying issue in this case.²⁴ As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).²⁵

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.²⁶

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a medical condition causally related to the accepted June 12, 2019 employment incident. 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).

²³ *M.O.*, Docket No. 19-1677 (issued February 25, 2020).

²⁴ *See supra* note 22.

²⁵ *Id.*

²⁶ *See D.S.*, Docket No. 18-0353 (issued February 18, 2020).

ORDER

IT IS HEREBY ORDERED THAT the September 25 and August 1, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 1, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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