

**United States Department of Labor
Employees' Compensation Appeals Board**

Y.H., Appellant)	
)	
and)	Docket No. 18-1618
)	Issued: January 21, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Buffalo, NY, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 22, 2018 appellant filed a timely appeal from a July 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 17, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is 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 March 2, 2017 appellant, then a 28-year-old sales/service distribution associate, filed a traumatic injury claim (Form CA-1), alleging that, while in the performance of duty on March 1, 2017, she was lifting a heavy parcel from the scale to the ground and felt a "crack" in the right side

¹ 5 U.S.C. § 8101 *et seq.*

of her neck. OWCP accepted her claim for strain of the cervical portion of trapezius muscles. Appellant returned to work in a limited-duty capacity on March 3, 2017 and continued to work until April 26, 2017 when she stopped completely.

On March 2, 2017 the employing establishment issued appellant an authorization for examination and/or treatment (Form CA-16) dated March 2, 2017, which indicated that she was authorized to seek medical treatment for neck strain.

Appellant was treated by a physician assistant on March 9 and June 5, 2017 for neck, upper back, and myofascial strain. She attended physical therapy on March 2, 2017.

Appellant came under the treatment of Dr. Michael D. Calabrese, a Board-certified family practitioner, on April 26 and June 5, 2017, for neck and right shoulder pain. She reported that while at work on March 1, 2017 she picked up a 50-pound package of parcels and, while moving it from the shelf to the floor, felt a pop in her neck and right shoulder area. Findings on examination revealed decreased range of motion, tenderness at the supraspinatus tendon, paraspinal muscle tenderness, palpable myospasms, decreased motor strength on the right side, and decreased pins sensation down the right arm. Dr. Calabrese diagnosed cervical sprain/strain, right shoulder sprain/strain, cervical radiculitis/radiculopathy, right shoulder impingement, palpable myospasms, probable cervical disc herniation, and probable right shoulder rotator cuff tear. He advised that appellant continued to be totally disabled as a direct result of the work-related accident on March 1, 2017.

On June 5, 2017 appellant filed a notice of recurrence (Form CA-2a), claiming that from March 1 until April 24, 2017 she continued to experience pain in her neck and right shoulder and had difficulty lifting packages. She believed that her condition was causally related to her employment injury on March 1, 2017. Appellant stopped work on April 26, 2017. Appellant's manager noted on the CA-2a form that appellant was placed in a modified assignment and that she complained of pain after working the modified assignment. He added that appellant had not been in contact with management or provided medical updates to the CA-2a.

Appellant submitted physical therapy notes dated June 30 to July 21, 2017.

In a development letter dated July 17, 2017, OWCP advised appellant that the evidence received to date was insufficient to establish her recurrence claim. It specifically noted that she failed to establish a worsening of her accepted work injury. In order to substantiate the factual elements of her claim, OWCP requested that she respond to the attached questionnaire. It afforded appellant 30 days for submission of the necessary evidence.

Appellant attended physical therapy from April 8 to August 9, 2017. She submitted laboratory results from April 26, 2017.

On July 19, 2017 Dr. Calabrese treated appellant in follow-up for neck and right shoulder pain. He noted a history of injury and findings on examination. Dr. Calabrese diagnosed cervical sprain/strain, right shoulder sprain/strain, cervical radiculitis/radiculopathy, right shoulder impingement, palpable myospasms, probable cervical disc herniation, and probable right shoulder rotator cuff tear. He noted that appellant was disabled from work.

On July 19, 2017 appellant was treated by a physician assistant who opined that appellant was totally disabled from work due to her accepted injury.

In an August 14, 2017 statement, appellant indicated that after her work injury she returned to a limited-duty position. She continued to have neck pain and weakness in the right shoulder. Appellant advised that she did not sustain any other injuries and had no hobbies. She indicated that her condition interfered with her ability to complete her housework and care for her child.

By decision dated August 17, 2017, OWCP denied appellant's request for a recurrence of disability because the evidence was insufficient to establish that she was disabled due to a material change or worsening of her accepted work-related condition. It added that medical treatment would continue.

Appellant submitted laboratory results dated April 26, 2017 and a report from Dr. Calabrese dated June 5, 2017, previously of record.

In reports dated July 19, 2017 to April 26, 2018, Dr. Calabrese treated appellant in follow up for neck and right shoulder pain. Appellant reported sustaining a work-related injury on March 1, 2017. Findings on examination revealed decreased range of motion of the right shoulder, tenderness at the supraspinatus tendon and paraspinal muscle, palpable myospasms, decreased motor strength on the right side, and decreased pin sensation down the right arm. Dr. Calabrese diagnosed cervical sprain/strain, right shoulder sprain/strain, cervical radiculitis/radiculopathy, right shoulder impingement, palpable myospasms, probable cervical disc herniation, and probable right shoulder rotator cuff tear. He continued physical therapy and advised that appellant continued to be totally disabled as a direct result of the work-related accident on March 1, 2017.

Appellant attended physical therapy from August 11 to 25, 2017. In reports dated October 9, 2017 to June 7, 2018, a physician assistant noted that appellant was totally disabled from work.

On February 15, 2018 appellant requested reconsideration. She referenced a January 19, 2018 report from Dr. Calabrese who requested authorization for a magnetic resonance imaging (MRI) scan of the neck and right shoulder. Dr. Calabrese noted that appellant's neck and right shoulder injuries were caused by the sudden twisting movement while lifting the 50-pound box from the shelf to the floor. He advised that it was impossible for him to continue to treat appellant without diagnostic findings and requested authorization to obtain an MRI scan of the neck and right shoulder. Dr. Calabrese opined within a reasonable degree of medical certainty that appellant's injury occurred when she picked up a 50-pound package of parcels from a shelf and moved them to the floor and felt immediate pain.

An MRI scan of the cervical spine dated April 10, 2018 revealed marked straightening/slight reversal of cervical lordosis likely due to muscle spasm from appellant's injuries, no fracture, disc herniation, central, or foraminal stenosis. An MRI scan of the right shoulder dated April 10, 2018 revealed no evidence of fracture or labral tear, minimal sprain of the distal attachment of the supraspinatus tendon, possible minimal linear partial thickness tear, and subdeltoid fluid with soft tissue swelling.

On May 24, 2018 appellant was treated by Dr. Timothy McGrath, a Board-certified orthopedist, for right shoulder pain subsequent to a lifting injury that occurred at work on

March 1, 2017. She attended physical therapy for her shoulder and neck without significant improvement in her symptoms. Findings on examination revealed limited range of motion of the neck, no instability of the shoulders bilaterally, intact strength bilaterally, negative Hawkins impingement sign, and negative Neer impingement test. Dr. McGrath diagnosed impingement syndrome of the right shoulder, bursitis of the right shoulder, and radiculopathy of the cervical region. He noted that the MRI scan was consistent with right rotator cuff impingement syndrome, bursitis and probable cervical pathology subsequent to a lifting injury that occurred at work on March 1, 2017. Dr. McGrath recommended a cortisone injection and physical therapy.

By decision dated July 3, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written request for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

Section 10.608(b) provides that any request for reconsideration of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, OWCP reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.608(b).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

⁶ 20 C.F.R. § 10.608(a); *see also D.K.*, Docket No. 19-0637 (issued December 11, 2019); *M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

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 February 15, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Rather, she referenced a January 19, 2018 report from Dr. Calabrese. However, this does not show a legal error by OWCP, nor does it provide a new and relevant legal argument. The underlying issue in this case is whether appellant submitted sufficient medical evidence to establish that she had a recurrence of disability on April 26, 2017 due to a material change or worsening of her accepted work-related condition. That is a medical issue which must be addressed by relevant new medical evidence.⁸ Accordingly, the Board finds that appellant is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by OWCP, appellant submitted laboratory results dated April 26, 2017 and a June 5, 2017 report from Dr. Calabrese. However, this evidence is duplicative of evidence previously submitted and considered by OWCP. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁹ Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

Appellant also submitted reports dated July 19, 2017 to April 26, 2018 from Dr. Calabrese, who treated her in follow-up for neck and right shoulder pain after a work-related injury on March 1, 2017. Dr. Calabrese noted findings on examination and diagnosed cervical sprain/strain, right shoulder sprain/strain, cervical radiculitis/radiculopathy, right shoulder impingement, palpable myospasms, probable cervical disc herniation, and probable right shoulder rotator cuff tear. He advised that appellant continued to be totally disabled as a direct result of the work-related accident on March 1, 2017. On January 19, 2018 Dr. Calabrese noted a history of injury and requested authorization for an MRI scan of the neck and right shoulder. However, as noted above, while these reports are new, they are not relevant as they are similar to his reports dated April 26 to July 19, 2017 previously submitted and considered by OWCP in its earlier decision dated August 17, 2017 and found deficient. Evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁰ Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

⁷ 20 C.F.R. § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁹ *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹⁰ *See id.*

Appellant underwent physical therapy from August 11 to 25, 2017. From October 9, 2017 to June 7, 2018, she was treated by a physician assistant. The Board has held that treatment notes signed by a physician assistant,¹¹ or physical therapist¹² are not considered medical evidence as these providers are not physicians under FECA¹³ and are not competent to render a medical opinion under FECA. Thus, this evidence is irrelevant and not sufficient to warrant a merit review.

Appellant submitted MRI scans of the cervical spine and right shoulder dated April 10, 2018. The Board has held that reports of diagnostic tests lack probative value and they do not provide an opinion on causal relationship between appellant's employment duties and a diagnosed condition.¹⁴ Therefore, they are not relevant and are not sufficient to warrant a merit review.

In a May 24, 2018 report, Dr. McGrath treated appellant for right shoulder pain that occurred subsequent to a lifting injury that occurred at work on March 1, 2017. He diagnosed impingement syndrome of the right shoulder, bursitis of the right shoulder, and radiculopathy of the cervical region. Dr. McGrath noted that the MRI scan was consistent with right rotator cuff impingement syndrome, bursitis and probable cervical pathology subsequent to a lifting injury that occurred at work on March 1, 2017. This evidence is not relevant, however, as the underlying issue is whether appellant sustained a recurrence of disability on April 26, 2017 due to a worsening of her work-related condition. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵ Therefore, this evidence does not constitute a basis for reopening appellant's claim. Accordingly, 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).

The Board, thus, 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.¹⁶

¹¹ See *S.E.*, Docket No. 08-2214 (issued May 6, 2009) (reports of a physician assistant have no probative value as medical evidence).

¹² *V.W.*, Docket No. 16-1444 (issued March 14, 2017) (where the Board found that physical therapy reports do not constitute competent medical evidence because a physical therapist is not a "physician" as defined under FECA).

¹³ See *S.D.*, Docket No. 19-1240 (issued December 11, 2019); *David P. Sawchuk*, 57 ECAB 316 (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).

¹⁴ See *J.M.*, Docket No. 17-1688 (issued December 13, 2018).

¹⁵ *M.M.*, Docket No. 10-0224 (issued October 6, 2010).

¹⁶ See *L.A.*, Docket No. 18-1226 (issued December 28, 2018) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

On appeal appellant reiterates that she stopped work on April 26, 2017 due to a worsening of her work-related injury. As explained above, the Board lacks jurisdiction of the merits of the case and finds that OWCP properly denied merit review of her claim.

CONCLUSION

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).

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 21, 2020
Washington, DC

Patricia H. Fitzgerald, 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