

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

C.F., Appellant)	
)	
and)	Docket No. 14-273
)	Issued: April 16, 2014
DEPARTMENT OF AGRICULTURE,)	
INSPECTION OPERATIONS PROGRAM,)	
Morton, MS, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 20, 2013 appellant filed a timely appeal from July 8 and September 13, 2013 merit decisions of the Office of Workers' Compensation Programs (OWCP) which denied her recurrence claim and an October 17, 2013 nonmerit decision which denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a recurrence of a medical condition on May 13, 2013 causally related to her August 16, 2012 employment injury; and (2) whether OWCP properly denied her September 26, 2013 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 16, 2012 appellant, then a 53-year-old food inspector, alleged that she sustained an injury to her right elbow when she hit her arm on a rack in the performance of duty. She stopped work and returned to full duty on August 18, 2012.

In a handwritten August 17, 2012 attending physician's report, Dr. A. Archie Howard, Jr., a Board-certified family practitioner, stated that on August 16, 2012 appellant sustained a right elbow contusion when she bumped her arm at work. Examination findings noted tenderness to palpation of the right lateral elbow, no swelling, and full range of motion. Dr. Howard checked a box marked "yes" that appellant's condition was caused or aggravated by the described employment activity.

On May 14, 2013 appellant filed a notice of recurrence related to the August 16, 2012 employment injury. She did not claim wage-loss compensation and noted the date of recurrence as May 13, 2013. Appellant stated that she continued to feel pain and alleged that her right elbow never stopped hurting.

By letter dated May 23, 2013, OWCP accepted appellant's claim for right elbow contusion. With regard to her recurrence claim, it advised her that the evidence submitted was insufficient to establish her need for additional medical treatment due to a worsening of her work-related injury. OWCP explained that appellant's claim was accepted for a soft tissue injury that typically resolved within three to six weeks and noted that there was no medical evidence to demonstrate that she continued to suffer residuals of the accepted right elbow contusion. It requested additional evidence to support her recurrence claim, including a rationalized medical opinion from an attending physician explaining the causal relationship between her current condition and the accepted August 16, 2012 employment injury.

In a handwritten May 13, 2013 progress note, Dr. Howard related appellant's complaints of right elbow and arm pain. He provided examination findings and diagnosed right elbow pain. In an attached return to work note, Dr. Howard reported that appellant returned to work on May 20, 2013 without restrictions.

In a June 11, 2013 statement, appellant explained that her right elbow constantly hurt and that she still took pain medication. She believed her current condition was due to her original injury because the pain never really left and she still took pain medicine prescribed by Dr. Howard.

In a handwritten June 19, 2013 progress note, Dr. Howard stated that the original mechanism of injury was that she bumped her arm on a stand. He reported that the physical examination revealed tenderness to palpation and that x-rays were normal. Dr. Howard diagnosed right elbow contusion. He stated that appellant did not claim that her condition materially worsened but that the pain never went away or resolved. Dr. Howard recommended that appellant avoid pain exacerbating activity as much as possible.

In a decision dated July 8, 2013, OWCP denied appellant's recurrence claim. It found that the medical evidence was insufficient to establish that her current right elbow condition was causally related to the accepted August 16, 2012 employment-related injury.

On July 21, 2013 appellant submitted a request for reconsideration. She stated that her right elbow was still hurting and that she was in a lot of pain. Appellant described the August 16, 2012 incident and the medical treatment she received. She explained that it took her so long to go back to the doctor because she was trying to treat her arm herself using icy hot therapy and medication. Appellant stated that the pain continued to worsen to the extent that she was no longer able to perform all her work duties and needed a helper.

In a July 5, 2013 progress note, Dr. John Cope, a Board-certified orthopedic surgeon, stated that appellant was referred by Dr. Howard for further evaluation and treatment of her complaints of pain in her right elbow since August 2012 when she bumped it on a stand. He reviewed her history and conducted an examination. Dr. Cope observed pain to resisted wrist extension and tenderness over the lateral epicondyle. Range of motion was full. Dr. Cope diagnosed right elbow lateral epicondylitis.

In a July 16, 2013 initial evaluation report, Amanda Cox, a physical therapist, related appellant's complaints of ongoing right elbow pain for over a year as a result of hitting her elbow on an iron bar at work. Appellant stated that the pain initially improved but had increased over the last several months due to the repetitive motions that she performed at work. Upon examination, Ms. Cox observed tenderness to palpation along the lateral epicondyle and anterior forearm and pain at the end range flexion of the wrist and with supination of the forearm. Range of motion of the wrist and elbow was full. Ms. Cox recommended that appellant have 12 physical therapy treatments and described the treatment she would receive.

By decision dated September 13, 2013, OWCP denied modification of the July 8, 2013 decision. It determined that the medical evidence was insufficient to establish that appellant sustained a recurrence of her accepted August 16, 2012 employment injury.

On September 26, 2013 appellant requested reconsideration. In a September 20, 2013 report, Dr. Cope stated that her condition had significantly improved following an injection and physical therapy. Upon examination, he observed mild tenderness over the lateral epicondyle, negative long finger extension test. Dr. Cope diagnosed right elbow tenosynovitis. He noted that there was some question regarding the relationship of appellant's current symptoms to the August 2012 injury. Dr. Cope related that she informed him that she never completely got better following the original injury. Appellant explained that her symptoms never completely got better and had worsened and that she had seen Dr. Howard on several occasions for this same problem. Dr. Cope opined that this meant that her problem was currently related to the original fall. He also pointed out that appellant had injury symptoms of the same type that persisted unresolved since the job injury. Dr. Cope requested that workers' compensation cover physical therapy for the rest of her symptoms.

In a decision dated October 17, 2013, OWCP denied appellant's request for reconsideration finding that no evidence was submitted sufficient to warrant further merit review under 5 U.S.C. § 8128(a). It determined that the evidence submitted was cumulative in nature.

LEGAL PRECEDENT -- ISSUE 1

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician that the Secretary of Labor considers likely to cure,

give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.² OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to effect the purposes specified in FECA.³ The only limitation on OWCP's authority is that of reasonableness.⁴

A recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a need for further medical treatment, nor is an examination without treatment.⁵

To establish a recurrence of medical condition, a claimant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the claimed condition is causally related to the employment injury, and who, supports that conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.⁶

OWCP procedures state that, after 90 days of release from medical care (as stated by the physician or computed from the date of the last examination or the physician's instruction to return as needed), a claimant is responsible for submitting an attending physician's report that contains a description of the objective findings and supports a causal relationship between the claimant's current condition and the accepted condition. The medical evidence on causal relationship should be as conclusive as the evidence required to establish the original claim.⁷

ANALYSIS -- ISSUE 1

OWCP accepted that on August 16, 2012 appellant sustained a right elbow contusion as a result of hitting her arm on a rack in the performance of duty. She returned to full duty on August 18, 2012. On May 14, 2013 appellant filed a recurrence claim for medical treatment. Because she did not stop work or claim compensation for wage loss, she is claiming a recurrence of a medical condition. Accordingly, appellant has the burden of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the claimed condition is causally related to the employment injury.

Appellant submitted various reports dated August 16, 2012 to June 19, 2013 by her treating physician, Dr. Howard. In an August 17, 2012 attending physician's report, Dr. Howard stated that she sustained a right elbow contusion at work on August 16, 2012 and provided examination findings. He checked a box marked "yes" that appellant's condition was caused or aggravated by the August 16, 2012 employment incident. In a June 19, 2013 report, Dr. Howard

² 5 U.S.C. § 8103(a).

³ *Marjorie S. Geer*, 39 ECAB 1099 (1988).

⁴ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁵ 20 C.F.R. § 10.5(y).

⁶ *T.Y.*, Docket No. 12-393 (issued August 3, 2012).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5.b (May 2003).

noted tenderness to palpation upon examination and that x-rays were normal and diagnosed right elbow contusion. He reported that appellant did not claim that her condition materially worsened but that the pain never went away or resolved. Dr. Howard provided an accurate history of the August 16, 2012 employment injury and diagnosed right elbow contusion, however, he did not provide any medical explanation or rationale. The Board has held that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion is of diminished probative value and is insufficient to establish a claim.⁸ Dr. Howard's reports, therefore, are insufficient to establish appellant's recurrence claim.

Appellant also submitted a July 5, 2013 progress note by Dr. Cope, who noted that appellant was treated for right elbow pain since August 2012. Upon examination, he observed pain to resisted wrist extension and tenderness over the lateral epicondyle. Dr. Cope diagnosed right elbow lateral epicondylitis. Although he provided examination findings and a diagnosis, Dr. Cope does not describe the cause of appellant's right elbow condition nor relate her current condition to the August 16, 2012 employment injury. The Board has found that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.⁹

The additional physical therapy report is likewise insufficient to establish appellant's claim as physical therapists are not considered physicians under FECA.¹⁰

On appeal, appellant alleges that her case was not supposed to be looked at as a recurrence but as a new claim. The Board notes that, if she is no longer claiming a recurrence injury, appellant may file a new traumatic injury or occupational disease claim with OWCP. She has not submitted sufficient medical evidence to establish that her current condition is causally related to the August 16, 2012 employment injury. Accordingly, the Board finds that appellant has failed to establish a recurrence of the August 16, 2012 employment injury.¹¹

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.¹² OWCP's regulations provide that OWCP may

⁸ *D.D.*, 57 ECAB 734, 738 (2006); *Deborah L. Beatty*, 54 ECAB 340 (2003).

⁹ *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

¹⁰ *R.M.*, 59 ECAB 690 (2008); section 8101(2) of FECA provides as follows: the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

¹¹ See *K.K.*, Docket No. 13-217 (issued March 18, 2013).

¹² 5 U.S.C. § 8128(a); see also *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise her right through a request to the district Office.¹³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.¹⁴

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.¹⁵ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁶ 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.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by OWCP; and she has not submitted relevant and pertinent new evidence not previously considered by OWCP.

By decisions dated July 8 and September 13, 2013, OWCP denied appellant's recurrence claim finding that the evidence did not establish that she experienced a recurrence of the August 16, 2012 employment injury. On September 16, 2013 appellant requested reconsideration and submitted a new September 20, 2013 report by Dr. Cope. This report, however, did not provide any new and relevant evidence to the underlying medical issue regarding an employment-related recurrence of medical condition beginning May 14, 2013. Dr. Cope merely repeated what appellant informed him that she never completely got better following the original injury. The previously submitted medical evidence had discussed appellant's complaints that her symptoms never resolved following the August 16, 2012 employment injury. Thus, the Board finds that Dr. Cope's report only provided cumulative evidence with respect to the medical issue of causal relationship.

Appellant did not meet any requirements of 20 C.F.R. § 10.606(b)(2). She did not submit any evidence along with her request for reconsideration to show that OWCP erroneously applied

¹³ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹⁴ *Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁵ *Id.* at § 10.607(a).

¹⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

or interpreted a specific point of law or advances a relevant legal argument not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to reopen the case for review of the merits.

The Board finds that appellant failed to submit relevant and pertinent new evidence, a relevant legal argument not previously considered by OWCP or evidence or argument which shows that OWCP erroneously applied or interpreted a specific point of law. Therefore, OWCP properly refused to reopen her case for further consideration of the merits of her claim under 5 U.S.C. § 8128.

CONCLUSION

The Board finds that appellant failed to establish a recurrence of a medical condition on May 13, 2013 causally related to her August 16, 2012 employment injury. The Board also finds that OWCP properly denied her September 26, 2013 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 17, September 13 and July 8, 2013 merit decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 16, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board