

FACTUAL HISTORY

On February 20, 2013 appellant, then a 51-year-old retail and distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed tendinitis and a tear in her right rotator cuff as a result of her repetitive employment duties. She noted that her duties entailed repetitively sorting bundles and packages, casing letters and flats, lifting packages and bundles, reaching constantly, pushing and pulling heavy equipment, and lifting tubs. Appellant noted that she first became aware of her condition on December 1, 2011 and of its relationship to her employment on February 7, 2013. She sought treatment with Dr. James A. Hill, a Board-certified orthopedic surgeon, and Dr. James W. Atchison, Board-certified in physical medicine and rehabilitation. On September 10, 2013 appellant underwent a right shoulder arthroscopy and debridement of a glenoid labrum tear. By decision dated January 8, 2014, OWCP accepted the claim for right shoulder sprain and right superior glenoid labrum lesion. It paid appellant wage-loss compensation on the supplemental rolls as of September 11, 2013 and on the periodic rolls as of March 9, 2014.

By decision dated September 18, 2015, OWCP expanded acceptance of the claim to include right causalgia upper limb (right shoulder complex pain syndrome) and right shoulder rotator cuff tear.

On January 28, 2016 OWCP referred appellant, the case file, a series of questions, and a statement of accepted facts (SOAF) to Dr. James Elmes, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In his January 28, 2016 report, Dr. Elmes discussed appellant's right shoulder history, noting that she had four previous right shoulder surgeries from June 20, 2003 through February 5, 2005, as well as the most recent September 10, 2013 surgery following her occupational disease claim. He reviewed the medical and diagnostic reports of record and provided findings on physical examination. Dr. Elmes reported that appellant had no objective findings establishing residuals of her accepted right shoulder rotator cuff tear and complex regional pain syndrome. He noted that, while she complained of perceived right shoulder pain, the diagnostic studies and objective examination findings failed to provide support for her continued work-related conditions. Dr. Elmes reported that appellant could return to work without restrictions and recommended six weeks of work conditioning.

By letter dated February 17, 2016, OWCP provided Dr. Atchison and Dr. Hill a copy of Dr. Elmes' second opinion evaluation for review and comment on residuals of appellant's work-related condition and disability.

In a March 14, 2016 report, Dr. Atchison disagreed with Dr. Elmes' findings. He reported that appellant's physical examination findings pertaining to the right upper shoulder quadrant revealed that she experienced pain which provided objective support that she continued to suffer from residuals of her accepted right shoulder rotator cuff injury and complex regional pain syndrome. Dr. Atchison noted that, despite her right shoulder surgery, her symptoms did not change. Therefore, appellant's ongoing pain was a problem in that region which had been accepted, but was unresponsive to the appropriate treatment attempted. Dr. Atchison opined that appellant was capable of future work-related activities, but that it would be more likely to occur if

she completed a functional restoration program. He further recommended a functional capacity evaluation (FCE) to determine her true physical capabilities. Dr. Atchison concluded that a four-week interdisciplinary pain program with emphasis on functional restoration would benefit appellant in preparing her to return to work.

On October 26, 2016 OWCP found a conflict of opinion between the reports of Dr. Elmes and Dr. Atchison. It referred appellant, the case file, a SOAF, and a series of questions to Dr. Donald Kucharzyk, a Board-certified orthopedic surgeon, for an impartial examination to determine the nature and extent of her employment-related conditions and disability.

In a November 30, 2016 report, Dr. Kucharzyk provided extensive review and summary of appellant's medical history. He discussed an extensive right shoulder history which began in 2004 following injury from a motor vehicle accident. Dr. Kucharzyk noted that appellant had four right shoulder surgeries prior to the September 10, 2013 work-related right shoulder arthroscopy. He reported that appellant's examinations and follow up in the pain clinic in 2014 and 2015 revealed that her work-up was negative, more specifically, the neurologic examination of the upper extremities was negative for cervical pathology, and the only finding was decreased range to motion of the cervical spine. Dr. Kucharzyk related that her magnetic resonance imaging (MRI) scans from 2013 to 2015 were all negative and she was told she had chronic regional pain syndrome, which was never fully confirmed or fully diagnosed as she did not meet all of the criteria for the condition.

Dr. Kucharzyk opined that appellant's work-related right shoulder injuries had resolved and there was no evidence of shoulder pathology or reflex sympathetic dystrophy syndrome with chronic pain to the shoulder region. He explained that he did not find evidence of rotator cuff weakness or weakness to the supraspinatus, internal rotators or external rotators of the shoulder. Dr. Kucharzyk noted that neurological examination revealed normal findings. He further reported that radial, ulnar, median, and anterior interosseous nerve functions were intact and symmetrical, and sensory and motor examination were intact to both upper extremities. Dr. Kucharzyk reported that appellant required no further treatment to the right shoulder which would change her current pain pattern and condition. He recommended that appellant undergo an FCE.

On January 13, 2017 OWCP referred appellant for an FCE which she underwent on March 16, 2017. On April 5, 2017 it referred the FCE report to Dr. Kucharzyk for review and comment.

In an April 28, 2017 addendum report, Dr. Kucharzyk reported that appellant's employment-related right shoulder injuries had resolved. He noted that she had no other associated work-related diagnoses and the right shoulder was quiescent requiring no further treatment. Dr. Kucharzyk noted that the FCE was inconclusive and invalid.

On May 10, 2017 OWCP notified appellant of a proposal to terminate her wage-loss compensation and medical benefits because her work-related injuries and disability had resolved. It found that the weight of the medical evidence rested with Dr. Kucharzyk, serving as the impartial medical examiner, who had determined that appellant was not experiencing residuals or disability connected to the February 7, 2013 occupational injury, as her conditions had ceased. Appellant was afforded 30 days to submit additional information.

In medical reports dated August 18, 2016 through May 16, 2017, Dr. Hill diagnosed bilateral rotator cuff tendinitis with complex regional pain syndrome. He reported that appellant continued to experience pain and discomfort in her bilateral shoulders and limited range of motion in the cervical spine with several tender trigger areas in the trapezius. Dr. Hill noted that appellant's work-related condition of complex regional pain syndrome had not resolved and was ongoing. He reported that appellant was unable to return to work in any capacity as her employment duties involved repetitive activities with the upper extremities.

By decision dated June 13, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that same date, finding that the medical evidence of record established that she no longer had residuals related to the accepted work-related medical condition or continued disability as a result of the February 7, 2013 work injury. It found that the weight of the medical evidence rested with the opinion of Dr. Kucharzyk serving as the referee physician.

On December 13, 2017 appellant requested reconsideration of OWCP's decision. She argued that she was not offered the opportunity to participate in a rehabilitation class to learn another skill in order to perform her duties despite her limitations. Appellant argued that she did not learn that her benefits had been terminated until after she met with a rehabilitation specialist and was unable to return to her previous job because of the weight requirements and repetitive motions.

In support of her claim, appellant submitted medical reports dated May 16 through September 21, 2017 from Dr. Hill. In his reports, Dr. Hill noted a diagnosis of bilateral rotator cuff tendinitis with complex regional pain syndrome which he treated *via* epidural steroid injections. He reported that an August 20, 2017 MRI scan of the left shoulder revealed a high grade partial tear of her supraspinatus, some mild glenohumeral arthritic changes, and a longitudinal tear of the long head of the biceps. On September 11, 2017 appellant underwent a left shoulder arthroscopy, loose body removal, and debridement of rotator cuff and glenoid labrum tear.

By decision dated March 13, 2018, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review. It noted that the medical evidence submitted was cumulative and substantially similar to documentation previously considered and already contained in the case file.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.³ Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.⁴ To require it to reopen a

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *A.D.*, Docket No. 18-0497 (issued July 25, 2018).

case for merit review under FECA section 8128(a), its regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

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).⁷

In her timely request for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant argues that she continued to experience residuals of her employment-related injuries and was unable to perform her regular employment duties. The underlying issue in this case was whether she had continuing residuals or disability due to the accepted February 7, 2013 employment injury after June 13, 2017. That is a medical issue which must be addressed by pertinent and relevant medical evidence.⁸ Appellant further argues that she was not provided an opportunity to participate in a rehabilitation class to learn a different skill. The Board notes that this argument has no reasonable color of validity as it has no bearing on the underlying issue.⁹ Appellant's request for reconsideration 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 by OWCP. Consequently, she was 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 her reconsideration request, appellant submitted medical reports from Dr. Hill dated May 16 to September 21, 2017. The Board notes that these reports are substantially similar to those previously of record which were evaluated in OWCP's June 13, 2017 merit decision.¹⁰ Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.¹¹ To the extent that Dr. Hill reported that appellant continued to suffer from her work-related complex regional pain syndrome, this assessment was previously considered by OWCP in its June 13, 2017 decision when determining that the weight of the

⁵ *D.K.*, 59 ECAB 141 (2007).

⁶ *K.H.*, 59 ECAB 495 (2008).

⁷ *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

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

⁹ *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁰ This evidence is cumulative and substantially similar to evidence that was already contained in the case file and previously considered. *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

¹¹ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

medical evidence remained with Dr. Kucharzyk.¹² Furthermore, to the extent that his reports submitted on reconsideration focused on evaluation and treatment of appellant's left shoulder, this condition was not alleged by appellant in this claim or accepted as work related. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹³ A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence.¹⁴ In this case, appellant failed to submit relevant and pertinent new medical evidence addressing the underlying issue of continued disability.¹⁵

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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).

¹² *A.H.*, Docket No. 17-0652 (issued April 25, 2018).

¹³ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁴ 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. *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁵ *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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