

FACTUAL HISTORY

On February 17, 2010 appellant, then a 57-year-old letter carrier, filed a traumatic injury claim alleging that he hurt his right shoulder on December 4, 2009 when he lifted a package. He did not stop work.² The employing establishment noted that appellant could not remember the exact date of injury. Hospital records dated February 16, 2010 from Dr. Neal Tishman, an osteopath specializing in family medicine, noted a right rotator cuff injury and excused appellant from work for one day.

OWCP informed appellant in a February 24, 2010 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit a statement describing the employment incident and medical reports offering a physician's reasoned opinion as to how the identified incident caused the purported condition.

In a February 18, 2010 duty status report signed by Dr. Tishman, appellant reiterated that he lifted a parcel on December 4, 2009 when he injured his right shoulder. On examination, Dr. Tishman observed right shoulder pain. He diagnosed a probable right shoulder rotator cuff injury and released appellant to restricted duty effective February 18, 2010. In a March 15, 2010 duty status report, Dr. Randall C. Morgan Jr., a Board-certified orthopedic surgeon, noted pain with motion of the right shoulder and diagnosed subacromial impingement. He released appellant to full-time work on March 15, 2010.³

By decision dated March 31, 2010, OWCP denied appellant's claim, finding the evidence insufficient to establish that he actually experienced the claimed employment incident at the time, place and in the manner alleged.

Appellant requested reconsideration on August 28, 2010. He did not submit additional evidence or offer any arguments in support of his request.

By decision dated September 13, 2010, OWCP denied appellant's request for reconsideration on the basis that he did not present new evidence or legal contentions warranting further merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP regulations provide that the evidence or argument submitted by a claimant must either: (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 Where the request for

² Appellant was placed on modified assignment.

³ Appellant provided the same history of injury in both reports.

⁴ 5 U.S.C. § 8128(a).

⁵ *E.K.*, Docket No. 09-1827 (issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

On August 28, 2010 appellant requested reconsideration. He did not, however, submit any new and pertinent evidence. Furthermore, appellant did not contend that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP.⁷ As none of the three standards was met, OWCP properly denied his application for reconsideration without reopening the case for a review on the merits.

Appellant contends on appeal that the evidence was sufficient to establish that his right shoulder injury was job related and that OWCP must authorize medical treatment of the condition. As noted, the Board lacks jurisdiction to review the merits of the case. The sole question before the Board is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) without further merit review. As explained above, appellant did not provide evidence or argument satisfying any of the three regulatory criteria for reopening a claim. Therefore, he is not entitled to reconsideration under section 8128(a) of FECA.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) without further merit review.

⁶ *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.608(b).

⁷ See *Charles A. Jackson*, 53 ECAB 671 n.14 (2002); *Daniel O'Toole*, 1 ECAB 107 (1948) (request for reconsideration predicated on legal premise should contain at least an assertion of an adequate legal premise having some reasonable color of validity).

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board