

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

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W.O., Appellant )

and )

DEPARTMENT OF THE TREASURY, )  
INTERNAL REVENUE SERVICE, Fresno, CA, )  
Employer )

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**Docket No. 11-965  
Issued: December 20, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 7, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) nonmerit decision dated September 8, 2010, denying his request for reconsideration. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision was OWCP's June 11, 2009 decision which denied compensation for disability from April 28, 2008 to April 29, 2009. Because more than 180 days elapsed from this decision to the filing of this appeal on March 7, 2011, the Board lacks jurisdiction to review the merits of this claim.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> See 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

## **FACTUAL HISTORY**

On March 30, 1999 appellant, then a 46-year-old tax examiner, filed an occupational disease claim alleging that he sustained pain in the left hand and shoulder while loading boxes into pallets in the performance of duty. OWCP accepted the claim for left shoulder tendinitis, left wrist tendinitis and left shoulder arthroscopy.

On April 28, 2009 appellant underwent left shoulder arthroscopic subacromial decompression and arthroscopic debridement of the anterior superior labral tears and a partial thickness tear of the supraspinatus in the glenohumeral joint. He was placed on the periodic rolls for wage-loss compensation.

Appellant filed CA-7 form for intermittent disability for the period April 28, 2008 to April 29, 2009.

In a report dated May 28, 2009, Dr. Thomas O'Laughlin, a Board-certified internist and treating physician, noted that appellant was in "10 years of fairly severe shoulder pain secondary to bony spurs aggravated by continued repetitive motion secondary to his employment." He opined that appellant "repetitively aggravated his shoulder symptoms at work and his pain levels have risen to a point where he has been unable to tolerate continued work activity and we concurred that it was time for him to medically retire." Dr. O' Laughlin opined that appellant's disability was due to his work-related condition. He noted that appellant's condition was not solely pain restricted as his "disability over the last 14 months has been supported by his objective findings such as diminished range of motion in abduction, cross arm and circular rotational motions and diffuse weakness of the left upper extremity associated with muscular hardening, the extensor muscles of the shoulder on the left and some present on the right as well."

In a June 11, 2009 decision, OWCP denied appellant's claim for a recurrence of disability for the period April 28, 2008 to April 29, 2009. It found he had not submitted medical evidence, with objective findings to support total disability during the time period in question.

OWCP subsequently received physical therapy reports and nurses notes.

In reports dated June 10, 2009, Dr. O' Laughlin recommended continued physical therapy and placed appellant off work. He noted that appellant was in a six months' recovery period.

In a report dated July 10, 2009, Dr. O' Laughlin placed appellant "off work completely" for another six weeks. Regarding the period of disability at issue he stated as follows:

"Lastly, the patient asked me to write a letter and this is the fourth one I have addressed regarding the time we have placed this man off work. He is currently being compensated and the same is exactly true why we kept him off previously from the period of April 28, 2008 to April 29, 2009 that is an entire year that this man went without pay because of his work[-]related disability and yet the [D]epartment of [L]abor is using a double talk in order to avoid paying him and I would like to be clear that there is no other reason that this man was placed off

work other than to manage his escalating pain syndrome and diminishing functional status that was evidenced in myofascial muscular spasms that were readily palpable, objective findings of worsening muscular strain leading directly to his pain syndrome and worsening subluxation and crepitation of the shoulder joint with worsening range of motion, clear objective findings of this patient's need for the surgical repair that was just performed....”

Dr. O’Laughlin provided a disability certificate placing appellant off work for six weeks from July 27, 2009. He submitted additional reports.

Appellant returned to work on April 12, 2010.

By letter dated June 10, 2010, appellant requested reconsideration. He noted that, during the period April 28, 2008 to April 29, 2009, he was under the care of his physicians. Appellant explained that his surgery, which was performed on April 28, 2009, was a result of recurring damage to his shoulder and was work related. He noted that he used over 200 hours of annual leave and over 100 hours of sick leave as a result of his employment injury.

OWCP received another copy of the April 28, 2009 operative report.

By decision dated September 8, 2010, OWCP denied appellant’s request for reconsideration without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>3</sup> OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(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.”<sup>4</sup>

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review 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.<sup>5</sup>

### ANALYSIS

In the instant case, appellant disagreed with the denial of his claim for compensation for disability from April 28, 2008 to April 29, 2009 and requested reconsideration.

The underlying issue is medical in nature, whether appellant was disabled from April 28, 2008 to April 29, 2009 due to his accepted shoulder condition. The Board finds that the case is not in posture for decision.

On June 10, 2010 appellant requested reconsideration. He argued that he was disabled from April 28, 2008 to April 29, 2009 due to his escalating shoulder complaints which ultimately led to the accepted April 28, 2009 surgery. Appellant submitted evidence, including the April 28, 2009 surgical report, as well as physical therapy and nurses notes, which were duplicative of evidence already of record. This does not constitute relevant new medical evidence.<sup>6</sup>

In support of his request for reconsideration, appellant also submitted an additional report from Dr. O’Laughlin, dated July 10, 2009. While Dr. O’Laughlin had previously submitted reports to the record, which were vague as to appellant’s disability status during the time period in question, this report provided relevant medical opinion regarding appellant’s disability during the period April 28, 2008 to April 29, 2009. He explained that he had taken appellant off work for one year to manage his escalating pain syndrome and diminishing functional status. Dr. O’Laughlin also recounted appellant’s objective findings supporting disability. This opinion directly addressed the grounds upon which OWCP denied appellant’s claim.

For these reasons, the Board finds that Dr. O’Laughlin’s July 10, 2009 report constituted relevant and pertinent new evidence not previously considered by OWCP. It satisfied one of the three standards for obtaining a merit review of appellant’s case. The Board finds that he is entitled to a merit review. The Board will set aside OWCP’s September 8, 2010 decision denying appellant’s request for reconsideration and will remand the case for a merit review. After such further development of the evidence as might be necessary, OWCP shall issue an appropriate final decision.

### CONCLUSION

The Board finds that OWCP abused its discretion by denying appellant’s request for further review of the merits of his claim under 5 U.S.C. § 8128(a).

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<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> 5 U.S.C. § 8101(2) of FECA provides that the term “physician” includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners with the scope of their practice as defined by applicable state law.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 8, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: December 20, 2011  
Washington, DC

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

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

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