

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

---

**J.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
City of Industry, CA, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 12-1181  
Issued: November 1, 2012**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 30, 2012 appellant filed a timely appeal from March 6 and June 25, 2012 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP) and a March 23, 2012 merit decision. 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 the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly denied appellant's September 9, 2011 request for reconsideration under 5 U.S.C. § 8128(a) as untimely; (2) whether OWCP properly denied authorization for right shoulder surgery; and (3) whether OWCP properly denied appellant's April 29, 2012 request for an oral hearing as untimely.

**FACTUAL HISTORY**

On May 30, 1991 appellant, then a 35-year-old distribution and window clerk, filed an occupational disease claim alleging that she suffered from a shoulder condition due to the wear

---

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

and tear and stress of her federal employment. OWCP accepted her claim for right rotator cuff tendinitis and C5-6 herniated disc. Appellant stopped work on July 10, 1991. She received disability compensation and was placed on the periodic rolls.

In a March 15, 1999 report, Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon and second opinion examiner, noted appellant's complaints of right flank, neck and left hip pain. He reviewed her medical records and related that her right upper extremity pain improved after surgery. Examination of the right shoulder revealed limited range of motion and increased sensation to the right thumb and index finger. Tinel's test was negative. A magnetic resonance imaging (MRI) scan of the right shoulder revealed mild acromioclavicular (AC) joint hypertrophy with no abnormality of the underlying subacromial/subdeltoid bursa and no rotator cuff tear. Dr. Dorsey diagnosed right shoulder mild AC joint degenerative disease and post-anterior cervical discectomy and fusion. He reported that appellant did not particularly complain of shoulder pain in and of itself, but noted that the pain appeared to radiate from the neck into her right shoulder. Dr. Dorsey explained that this type of pain was common with radiculopathy and would be expected to interfere with activity in terms of lifting, carrying and overhead activities. He opined that appellant did not require any further treatment on an industrial basis, but on a nonindustrial basis she may have some mild impingement syndrome on the right shoulder. This treatment included nonsteroidal anti-inflammatory agents but did not appear to be to the degree to require surgery.

In an April 1, 1999 duty status report, Dr. Ram Mudiya, a Board-certified orthopedic surgeon, authorized appellant to return to limited duty.

In an April 9, 1999 MRI scan report of the right shoulder, Dr. Gregory M. Henzie, a Board-certified diagnostic radiologist, observed intact osseous structures and glenoid labrum and a normally maintained glenohumeral joint. He did not find any joint effusion and rotator cuff tear. Dr. Henzie also noted mild AC joint hypertrophy and reported that appellant's supraspinatus muscle and tendon were normal in appearance. He diagnosed mild AC joint without abnormality.

On April 26, 1999 the employing establishment offered appellant a job as a modified distribution and window clerk.

On May 4, 1999 OWCP informed appellant that the offered position as a modified distribution and window clerk was found to be suitable and complied with her work capabilities. It gave her 30 days to accept the position or to provide reasons for not accepting it.

In a May 9, 1999 letter, appellant informed OWCP that she wanted to accept the job offer, but she was unable to distribute letter mail or box mail due to the repetitive motion which caused her bilateral nerve damage.

In a May 14, 1999 letter, appellant stated that Dr. L. Richard Van Meter, a Board-certified internist, advised her that the offered modified position was unacceptable because she would be required to dispatch and case mail. She believed that she could perform a regular window job as long as she did not have to lift more than 10 pounds. Appellant included a handwritten note from Dr. Van Meter, dated May 12, 1999, wherein he stated that she was unable to throw mail due to cervical spine disease and carpal tunnel syndrome.

In a June 22, 1999 letter, OWCP informed appellant that Dr. Van Meter's note was insufficient to establish that she was unable to perform the duties of the offered position because he did not provide any medical rationale or clinical findings to support his conclusion. It also reported that an on-site job analysis revealed that her duties were consistent with the medical restrictions provided by Dr. Mudiyam.

In a July 6, 1999 letter, appellant stated that she did not refuse any job offer and was willing to accept the modified position but that she was unable to case or dispatch mail as it did not fit within her job restrictions.

In a letter dated August 6, 1999, OWCP advised appellant that her refusal was not justified and stated that she had an additional 15 days to accept the position.

Appellant did not accept the position within the 15 days provided and did not report to work on August 30, 1999.

By decision dated December 29, 1999, OWCP terminated appellant's compensation benefits effective January 3, 2000 on the grounds that she refused suitable work.

In a February 4, 2000 letter addressed to OWCP, appellant stated that she had not received her disability check for January 29, 2000 and that she had not received a December 27, 1999 letter<sup>2</sup> stating that her compensation would be terminated. She alleged that she never refused a job offer she was able to perform. Appellant stated that she sent several medical reports demonstrating that she was unable to perform the duties of a modified distribution clerk because it required casing mail. She requested a formal appeal of the December 29, 1999 decision.

In a February 26, 2000 letter, appellant informed OWCP that she wanted a review and stated that she never turned down a job offer that was within her physician's restrictions. She also requested that all of her medical files be sent to her treating physician.

In a March 9, 2000 letter addressed to OWCP, appellant stated that she had finally received the December 27, 1999 decision. She again reiterated that she had never refused to return to work. Appellant requested that OWCP pay her compensation for January and February 2000.

On March 17, 2000 OWCP was informed that appellant returned to modified duty on February 7, 2000.

Appellant continued to receive medical treatment from Dr. Van Meter and Dr. Mudiyam for chronic neck pain. She also underwent physical therapy and pain management treatments.

Appellant submitted various medical reports by Dr. Ramy N. Elias, a Board-certified orthopedic surgeon, beginning in October 10, 2007 regarding treatment for chronic neck pain. In a November 30, 2009 report, she complained that the pain began to radiate into her shoulder and

---

<sup>2</sup> The reference to December 27, 1999 appears to be a typographical error as OWCP's decision was issued on December 29, 1999.

low back. Dr. Elias observed tenderness in the right shoulder and greater tuberosity and subacromial space. He diagnosed status post cervical spine fusion with chronic pain, left hip pain secondary to iliac crest bone grafting and right shoulder and low back pain. In a June 28, 2010 report, Dr. Elias observed that an MRI scan of the shoulder revealed evidence of rotator cuff tendinitis but no full-thickness tear. Examination of the shoulder revealed normal visual inspection and tenderness of the greater tuberosity and subacromial space. Dr. Elias diagnosed right shoulder impingement syndrome with superior labral tear and status post cervical spine fusion. In an August 16, 2010 report, he noted appellant's complaints of worsening shoulder pain and related similar findings. Dr. Elias diagnosed right shoulder labral tear and impingement syndrome and recommended right shoulder arthroscopy with labral repair and subacromial decompression.

On September 24, 2010 appellant requested authorization for right shoulder arthroscopy.

Appellant stopped work in November 2010.

Appellant continued to receive treatment from Dr. Elias. In reports dated March 7, May 16 and August 8, 2011 reports, Dr. Elias noted her complaints of chronic neck pain and worsening right shoulder pain. Examination of the right shoulder revealed normal visual inspection and tenderness of the greater tuberosity and subacromial space upon palpation. Impingement, O'Brien, Hawkins and Neer signs were positive. Dr. Elias diagnosed right shoulder labral tear and subacromial impingement. He recommended an arthroscopy with subacromial decompression and labral repair because of the duration of appellant's symptoms and her failure with conservative treatment.

On September 9, 2011 appellant again requested reconsideration. She referenced denial of a claim for a foot injury, as well as the December 1999 decision terminating her compensation benefits on the grounds that she refused suitable work.

In September 28, November 9 and December 28, 2011 reports, Dr. Elias related appellant's complaints of chronic shoulder pain despite aggressive treatment. He noted that she was diagnosed with right shoulder impingement syndrome with superior labral tear and that he had requested authorization for surgical treatment of the right shoulder on multiple occasions. Dr. Elias stated that appellant was authorized to work modified duty but noted that she had not worked for several months because of a lack of available modified positions.

Appellant also submitted various medical reports cosigned by a physician's assistant and Dr. Gary L. Baker, a Board-certified internist, indicating that she was examined for an acupuncture follow-up visit and reexamination. Dr. Baker related her complaints of neck and low back pain that radiated to the right shoulder, elbow and wrist. Upon examination, he observed that appellant was in moderate distress and that her gait was normal. Range of motion of the cervical spine revealed severe reduction secondary to pain and myofascial trigger points were identified on palpation. Dr. Baker diagnosed cervical radiculopathy, postlaminectomy syndrome, chronic pain and status post right foot fracture. Appellant also included several acupuncture evaluation sheets for her neck pain.

On January 13, 2012 OWCP referred appellant's request for right shoulder surgery to a district medical adviser. In a January 26, 2012 report, the district medical adviser reviewed her

history and noted that, in a March 15, 1999 report, she was diagnosed with right shoulder AC degenerative joint disease and that an April 9, 1999 MRI scan of the right shoulder revealed mild degenerative changes at the AC joint without any significant rotator cuff or labral pathology. He stated that, although appellant presently had right shoulder problems, a review of the medical records revealed that her shoulder problems did not appear related to her accepted 1991 employment injury. The medical adviser explained that Dr. Dorsey concluded in his March 15, 1999 report, eight years after her employment injury, that appellant did not require any more treatment for her right shoulder and pointed out that there was no documentation of any medical treatment for her right shoulder until November 30, 2009, almost 18 years after her injury. He also pointed out that no rotator cuff tear was seen in the April 9, 1999 MRI scan. For these reasons, the medical adviser opined that appellant's right shoulder problems, including rotator cuff tendinitis and possible labral tear, developed many years after her work-related injury. He concluded that her right shoulder surgery was not related to her work-related injury and recommended that her right shoulder surgery not be authorized on a work-related basis.

In a letter dated February 21, 2012, OWCP informed appellant that the medical adviser determined that right shoulder arthroscopy was not medically justified to be authorized since the medical evidence did not support that her current right shoulder condition was causally related to her accepted 1999 employment injury.

In a decision dated March 6, 2012, OWCP denied appellant's September 9, 2011 request for reconsideration as it was untimely filed and failed to present clear evidence of error. It determined that her reconsideration request was not filed within one year of the most recent December 29, 1999 decision and thus, she was not entitled to reconsideration as a matter of right. OWCP further found that appellant's request failed to present clear evidence of error.

Appellant submitted reports by Dr. Baker relating her complaints of back pain that radiated to bilateral lower extremities, neck pain that radiated to bilateral upper extremities and right shoulder pain. Dr. Baker diagnosed cervical radiculopathy, right foot pain, chronic pain, left elbow cubital tunnel, right foot plantar fasciitis and status post right foot fracture and a history of bilateral ulnar neuropathy.

Appellant also resubmitted the acupuncture evaluation sheets and another request for right shoulder arthroscopy.

By decision dated March 23, 2012, OWCP denied authorization for appellant's right shoulder surgery finding that it was not medically necessary to treat her accepted employment injury. It relied on the January 26, 2012 district medical adviser's report, which determined that her current right shoulder condition developed many years after her work-related injury and was not related to her accepted employment injury.

In an appeal form dated April 29, 2012, appellant submitted a request for reconsideration of the March 23, 2012 decision denying her request for right shoulder surgery. She alleged that her neck, right shoulder and right arm had never healed since the 1991 work-related injury and also related a new injury regarding her feet.

In an appeal form dated April 29, 2012, appellant also submitted a request for an oral hearing of the March 23, 2012 decision.

In February 29, April 11 and May 23, 2012 reports, Dr. Elias stated that he reviewed Dr. Harris' medical report and disagreed with his determination that appellant had a complete recovery in 1999 and, therefore, no additional treatment was warranted. He explained that exacerbation and progression of a patient's symptoms was not uncommon following a shoulder injury. Dr. Elias opined that appellant's right shoulder condition was exacerbated when she returned to work and had to perform repetitive work with her right arm. He stated that the medical evidence demonstrated that she had ongoing pain in her shoulder which worsened over the past couple of years. Dr. Elias noted that appellant failed extensive conservative treatment and continued to have right shoulder pain that was aggravated by overhead activity. He requested an appeal for right shoulder arthroscopy with subacromial decompression and labral repair because her right shoulder condition was directly attributable to her original 1991 injury. Dr. Elias conducted an examination and diagnosed right shoulder impingement syndrome and superior labral tear.

Appellant resubmitted Dr. Baker's November 2008 to February 2012 medical reports and an April 10, 2012 report regarding his treatment of appellant's neck and shoulder pain.

Appellant also submitted March 26, April 10 and 23 and June 24, 2012 acupuncture sheets for treatment of neck pain that radiated to her shoulders.

In a June 21, 2012 statement, appellant, through her representative, Guillermo Mojarro, alleged that OWCP lost some of her medical records and that its decisions were not based on a complete and accurate factual and medical background. Mr. Mojarro related that in termination cases OWCP had the burden of proof to justify termination and stated that she submitted thousands of medical reports establishing that the modified job offer was not suitable for her.

In a decision dated June 25, 2012, OWCP denied appellant's request for an oral hearing as it was untimely filed. It determined that her April 29, 2012 request for an oral hearing was not submitted within the 30-day time limitation. OWCP exercised its discretion and determined that appellant's claim could equally be addressed by requesting reconsideration and submitting evidence not previously considered.

### **LEGAL PRECEDENT -- ISSUE 1**

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his application for review within one year of the date of that decision.<sup>3</sup> The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>4</sup> The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board.<sup>5</sup>

---

<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997); *Leon D. Faidley, id.* at 111 (1989).

## **ANALYSIS -- ISSUE 1**

In its March 6, 2012 decision, OWCP denied appellant's September 9, 2011 request for reconsideration of the December 29, 1999 decision finding that it was untimely filed and failed to present clear evidence of error. The underlying issue of the December 29, 1999 decision was whether her claim should be disallowed on the grounds that she refused a suitable job offer. The Board finds, however, that OWCP improperly determined that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

On December 29, 1999 OWCP issued a decision disallowing appellant's claim because she refused to accept a position that was found to be suitable. Accordingly, appellant had until December 28, 2000 to make a timely request for reconsideration.<sup>6</sup> OWCP determined that she submitted a request for reconsideration on September 9, 2011, which was not within the one-year time limitation. The Board finds, however, that appellant submitted a request for reconsideration of the December 29, 1999 decision and submitted evidence and argument in support of her request, within the required one-year time period.

The record contains letters dated February 4 and 26 and March 9, 2000, where appellant informed OWCP that she was requesting a review of the December 1999 decision. She explained that she did not refuse a job offer for suitable employment and alleged that she was unable to perform the modified job position because it required casing mail. Although the February 4 and 26 and March 9, 2000 letters do not mention the word "reconsideration," the Board has found that there may be a request for reconsideration in situations where a letter does not contain the word "reconsideration."<sup>7</sup> No special form is required as long as the request is made in writing, identifies the decision and specific issue to be considered and is accompanied by relevant and pertinent new evidence not previously considered.<sup>8</sup> In this case, appellant explicitly stated that she wanted a review of the December 29, 1999 decision and specifically addressed the issue of whether she refused a suitable job offer. She also submitted various reports regarding her treatment for cervical and right shoulder pain. Thus, the Board finds that appellant's February 6 and 26 and March 9, 2000 letters, submitted with the various medical reports, constituted a timely request for reconsideration.<sup>9</sup>

Appellant filed a request for reconsideration within one year of the December 29, 1999 OWCP decision. The Board finds that OWCP improperly denied her reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed. OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(2).<sup>10</sup> Since it erroneously reviewed the evidence

---

<sup>6</sup> OWCP regulations provide that the one-year time limitation for requesting reconsideration begins to run on the date of the original OWCP decision. 20 C.F.R. § 10.607(a); *see A.F.*, 59 ECAB 714 (2008).

<sup>7</sup> *Jack D. Johnson*, 57 ECAB 593 (2006); *Vicente P. Taimanglo*, 45 ECAB 504 (1994).

<sup>8</sup> *Id.*

<sup>9</sup> *C.M.*, Docket No. 11-1988 (issued June 6, 2012).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2) of OWCP's regulations provide that an application for reconsideration must be in writing and set forth arguments and contain evidence that either: (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.

submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of this evidence under the proper standard of review for a timely reconsideration request.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8103(a) of FECA provides for the furnishing of services, appliances and supplies prescribed or recommended by a qualified physician, which OWCP, under authority delegated by the Secretary, considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening in the amount of monthly compensation.<sup>11</sup> In interpreting the section 8103(a), the Board has recognized that OWCP has broad discretion in approving services provided under FECA to ensure that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time.<sup>12</sup> OWCP has administrative discretion in choosing the means to achieve this goal and the only limitation on the OWCP's authority is that of reasonableness.<sup>13</sup> Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>14</sup>

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.<sup>15</sup> Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.<sup>16</sup> Therefore, in order to prove that the surgical procedure is warranted, appellant must submit evidence to show that the procedure was for a condition causally related to the employment injury and that the surgery was medically warranted. Both of these criteria must be met in order for OWCP to authorize payment.<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

On September 24, 2010 appellant requested authorization for right shoulder arthroscopy based on the medical reports of Dr. Elias. By decision dated March 23, 2012, OWCP denied her request for right shoulder arthroscopy finding that the medical evidence failed to establish that her current right shoulder condition was causally related to her accepted 1991 work-related injury. The Board finds that OWCP did not abuse its discretion in denying appellant's request for right shoulder surgery.

---

<sup>11</sup> 5 U.S.C. § 8103; see *Thomas W. Stevens*, 50 ECAB 288 (1999).

<sup>12</sup> *W.T.*, Docket No. 08-812 (issued April 3, 2009); *A.O.*, Docket No. 08-580 (issued January 28, 2009).

<sup>13</sup> *D.C.*, 58 ECAB 629 (2007); *Mira R. Adams*, 48 ECAB 504 (1997).

<sup>14</sup> *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>15</sup> See *Debra S. King*, 44 ECAB 203, 209 (1992).

<sup>16</sup> *Id.*; see also *Bertha L. Arnold*, 38 ECAB 282 (1986).

<sup>17</sup> See *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

OWCP accepted that in 1991 appellant sustained right rotator cuff tendinitis and C5-6 herniated disc as a result of her employment in the performance of duty. Appellant stopped work and received disability compensation before returning to modified duty in February 2000. She continued to receive medical treatment and underwent physical therapy and pain management rehabilitation for her chronic cervical and neck pain. In October 2007, appellant began to receive treatment from Dr. Elias for chronic neck pain. In November 2009, Dr. Elias first noted her complaints of right shoulder pain. Examination of the right shoulder revealed normal visual inspection and tenderness of the greater tuberosity and subacromial space upon palpation. Dr. Elias diagnosed right shoulder labral tear and subacromial impingement. He recommended an arthroscopy with subacromial decompression and labral repair because of the duration of appellant's symptoms and her failure to improve with conservative treatment. Dr. Elias did not, however, explain whether or how her right recent shoulder condition was related to her 1991 employment injury or how the right shoulder surgery was medically necessary to treat appellant's accepted conditions. The Board has held 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.<sup>18</sup> A well-rationalized opinion explaining how appellant's current complaints of right shoulder pain are related to her original accepted injury is especially warranted in this case when the medical reports do not mention any complaints of right shoulder pain or reveal a right shoulder rotator cuff tear from 1999 until November 2009. Furthermore, in a March 15, 1999 report, Dr. Dorsey diagnosed right shoulder mild AC joint degenerative disease and observed that an MRI scan of the right shoulder did not reveal any rotator cuff tear. He concluded that appellant did not require further treatment for her right shoulder. Accordingly, the Board finds that the medical evidence is insufficient to establish that her current right shoulder condition was causally related to the accepted 1991 employment injury.

OWCP referred appellant's claim to the district medical adviser, who concluded that her right shoulder surgery was not related to her work-related injury and recommended that her right shoulder surgery not be authorized. The medical adviser agreed that she suffered from right shoulder problems but stated that the medical record did not demonstrate that her current shoulder problems were related to her accepted employment injury. He noted that in a March 15, 1999 report, appellant was diagnosed with right shoulder AC degenerative joint disease and that an April 9, 1999 MRI scan of the right shoulder revealed mild degenerative changes at the AC joint without any significant rotator cuff. For these reasons, the medical adviser concluded that her right shoulder problems, including rotator cuff tendinitis and possible labral tear, developed many years after her work-related injury.

The Board finds that medical adviser's report represented the weight of the medical evidence as it was well rationalized and based on an accurate factual and medical history. The medical adviser reviewed appellant's history and conducted an examination. He determined that the record revealed that she also suffered from right shoulder degenerative joint disease beginning in 1999 and no longer had a right rotator cuff tear. The medical adviser concluded that the medical evidence established that appellant's current right shoulder condition was not related to the accepted 1991 employment injury. Thus, the Board finds that his report constitutes

---

<sup>18</sup> *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

the weight of the medical evidence to establish that her current right shoulder condition is not related to her accepted injury and that the requested surgery is not medically necessary.

Following the March 23, 2012 decision, appellant submitted additional reports by Dr. Elias, who stated that her right shoulder condition was directly attributable to her original 1991 injury and explained that her right shoulder condition was exacerbated when she returned to work and had to perform repetitive work with her right arm. Dr. Elias noted that the medical evidence demonstrated that she had ongoing pain in her shoulder, which worsened over the past couple of years. He reported that appellant failed extensive conservative treatment and continued to have right shoulder pain that was aggravated by overhead activity. Although Dr. Elias concludes that her current right shoulder condition was directly related to her 1991 employment injury, he does not provide any medical rationale to support his conclusion of causal relationship.<sup>19</sup> The Board finds that he fails to adequately explain, with medical rationale, how appellant's current right shoulder condition is causally related to the 1991 employment injury and not a degenerative joint disease as diagnosed by Dr. Dorsey. Thus, Dr. Elias' reports are insufficient to overcome the special weight given to the medical adviser's report.

On appeal, appellant alleges that her right shoulder condition continued to worsen since the 1991 injury and did not resolve. The medical evidence she submitted, however, does not provide a rationalized medical opinion explaining how her current right shoulder condition was causally related to her accepted 1991 injury. Thus, appellant has not met her burden of proof to establish her claim.

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 3**

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.<sup>20</sup> Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>21</sup> A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.<sup>22</sup> Although that is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may within its discretionary powers grant or

---

<sup>19</sup> The Board has found that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale. *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>20</sup> 5 U.S.C. § 8124(b)(1).

<sup>21</sup> 20 C.F.R. §§ 10.616, 10.617.

<sup>22</sup> *Id.* at § 10.616(a).

deny appellant's request and must exercise its discretion.<sup>23</sup> OWCP's procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).<sup>24</sup>

### **ANALYSIS -- ISSUE 3**

On March 23, 2012 OWCP denied appellant's request for authorized right shoulder surgery. Appellant requested an oral hearing in an appeal form dated April 29, 2012 and received on May 15, 2012, which was more than 30 days after OWCP issued its March 23, 2012 decision.<sup>25</sup> Section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing.<sup>26</sup> The Board finds that OWCP properly determined that appellant's request for an oral hearing was not timely and, thus, she was not entitled to a hearing as a matter of statutory right under section 8124(b)(1) of FECA.

Although appellant's request for a review of the written record was untimely, OWCP has the discretionary authority to grant the request and it must exercise such discretion. In its June 25, 2012 decision, it properly exercised its discretion by notifying her that it had considered the matter in relation to the issue involved and indicated that additional argument and evidence could be submitted with a request for reconsideration. The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.<sup>27</sup> In this case, the evidence of record does not indicate that OWCP abused its discretion in its denial of appellant's request an oral hearing. Accordingly, the Board finds that OWCP properly denied her request for an oral hearing.

### **CONCLUSION**

The Board finds that OWCP improperly found that appellant's request for reconsideration of OWCP's December 29, 1999 decision was untimely filed. The Board also finds that OWCP did not abuse its discretion in denying her request for surgical authorization and that OWCP properly denied her request for an oral hearing pursuant to 5 U.S.C. § 8124(b)(1).

---

<sup>23</sup> *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

<sup>24</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011); *see R.T.*, Docket No. 08-408 (issued December 16, 2008).

<sup>25</sup> The 30-day period for determining the timeliness of an employee's request for an oral hearing or review commences the day after the issuance of OWCP's decision. *See Donna A. Christley*, 41 ECAB 90 (1989). The Board notes that appellant did not submit a written request for an oral hearing by April 22, 2012, 30 calendar days after OWCP's March 23, 2012 decision.

<sup>26</sup> *William F. Osborne*, 46 ECAB 198 (1994).

<sup>27</sup> *Samuel R. Johnson*, 51 ECAB 612 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 25 and March 23, 2012 decisions of the Office of Workers' Compensation Programs are affirmed. The March 6, 2012 decision is set aside and remanded for action consistent with this decision.

Issued: November 1, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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