

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

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**K.P., Appellant**

**and**

**U.S. POSTAL SERVICE, NORTH COUNTY  
BRANCH, St. Louis, MO, Employer**

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**Docket No. 13-2094  
Issued: February 12, 2014**

*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 September 19, 2013 appellant filed a timely appeal of a May 21, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As more than 180 days elapsed from issuance of the most recent merit decision of May 2, 2012 to the filing of this appeal the Board has no jurisdiction over the merits of the case, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On appeal appellant asserts that OWCP did not properly review the medical evidence submitted with his February 23, 2013 reconsideration request which warranted a merit review.

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

## **FACTUAL HISTORY**

On December 22, 2011 appellant, then a 59-year-old letter carrier, filed an occupational disease claim alleging that his job duties caused a right rotator cuff tear. By decision dated May 2, 2012, OWCP denied the claim finding that the medical evidence did not establish that the claimed right shoulder condition was caused by his employment duties.

On February 23, 2013 appellant requested reconsideration. In statements dated February 8, 2013, he contended that his right rotator cuff was beyond repair and that he needed surgery for his left rotator cuff. Appellant quoted reports from an attending orthopedic surgeon, Dr. Surena Namdari. In a July 19, 2012 report, Dr. Delaine M. Yowell, an attending osteopath, advised that appellant presented that month with a history of bilateral shoulder pain. The imaging studies demonstrated extensive tendon damage, muscle atrophy and degenerative changes, with a full thickness tear of the left rotator cuff. Dr. Yowell diagnosed left rotator cuff tear that he attributed to appellant's job duties as a letter carrier. In a January 10, 2013 report, Pat Willis, a registered nurse, quoted from a report by Dr. Namdari.

In a May 21, 2013 decision, OWCP denied merit review on the grounds that the evidence submitted by appellant was irrelevant and immaterial. It noted that the instant claim was for a right shoulder condition, not the left, and that the discussion of Dr. Namdari's reports, without supportive medical documentation, was not a basis for reopening the claim for merit review.

## **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>2</sup> Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>3</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

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<sup>2</sup> *Id.* at § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.608(a).

<sup>4</sup> *Id.* at § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.608(b).

## ANALYSIS

The only decision before the Board is the May 21, 2013 decision denying appellant's application for review. Because more than one year elapsed from the most recent merit decision dated May 2, 2012 to the filing of this appeal on September 19, 2013, the Board lacks jurisdiction to review the merits of his claim.<sup>6</sup>

OWCP denied appellant's claim for a right shoulder condition in the May 2, 2012 decision. It found that the medical evidence did not establish causal relationship. Appellant requested reconsideration on February 23, 2013 asserting that Dr. Namdari supported his claim. He also submitted reports from Dr. Yowell and Ms. Willis. The Board finds the evidence submitted is insufficient to warrant merit review.

Appellant argued that Dr. Namdari's opinion established his claim. He did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered. Consequently, he was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>7</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted a July 19, 2012 report from Dr. Yowell, an attending osteopath, who described appellant's history with regard to his shoulders and generally addressed the causal relationship to the left shoulder. As noted, the instant claim pertaining to the claimed right shoulder condition. This report is therefore irrelevant to the underlying decision denying appellant's right shoulder condition and insufficient to warrant merit review.

The January 10, 2013 report from Ms. Willis, a registered nurse quoted from Dr. Namdari. Her comments on the evidence without supportive documentation, is not probative medical evidence. A medical report is not probative if there is no indication that the person completing the report is a "physician" as defined in section 8102(2) of FECA. 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.<sup>8</sup> A nurse is not a physician under FECA and is not competent to render a medical opinion.<sup>9</sup> Ms. Willis' report therefore does not constitute probative medical evidence or a basis for reopening the claim for merit review.

As appellant did not submit relevant and pertinent new evidence not previously considered by OWCP, it properly denied his reconsideration request.<sup>10</sup>

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<sup>6</sup> *Id.* at § 501.3(e).

<sup>7</sup> *Id.* at § 10.606(b)(2).

<sup>8</sup> 5 U.S.C. § 8102(2); *see Roy L. Humphrey*, 57 ECAB 238 (2005).

<sup>9</sup> *G.G.*, 58 ECAB 389 (2007).

<sup>10</sup> *Id.*

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).<sup>11</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 21, 2013 is affirmed.

Issued: February 12, 2014  
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

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<sup>11</sup> The Board notes that appellant requested reconsideration before OWCP simultaneously with his appeal to the Board. Following the docketing of an appeal with the Board, OWCP does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction.<sup>11</sup> Any decision rendered by OWCP on the same issues for which an appeal is filed is null and void.<sup>11</sup> In the instant case, because appellant had filed an appeal with the Board of OWCP's May 21, 2013 decision, the Board assumed jurisdiction over the case. OWCP's January 18, 2014 decision denying merit review is null and void. See *Russell E. Lerman*, 43 ECAB 770 (1992).