

FACTUAL HISTORY

On December 25, 2010 appellant, then a 35-year-old transportation security officer, filed a traumatic injury claim alleging that on December 21, 2010 a coworker began to bang on the left side of his neck and back causing burning and pain in his left neck and shoulder.

In a letter dated January 6, 2011, OWCP requested additional factual and medical evidence in support of appellant's claim. An emergency center note dated December 21, 2010 diagnosed contusion and pain in the left shoulder. In a report dated December 27, 2010, Dr. Joseph Vadas, Board-certified in physical medicine and rehabilitation, diagnosed stiffness of the left shoulder joint and exacerbation of a cervical and left shoulder injury. In a note dated January 10, 2012, Dr. Marcos V. Masson, a Board-certified orthopedic surgeon, noted that appellant had a previous left plexus stretch injury after pulling several 50- to 100-pound bags off a conveyor belt. A coworker began pounding appellant's left shoulder on December 21, 2010 and he experienced pain and a burning sensation in his left shoulder.

Dr. Masson completed a form report on January 7, 2011 and diagnosed left shoulder pain. He indicated with a checkmark "yes" that appellant's condition was caused by a coworker pounding on his shoulder.

By decision dated February 11, 2011, OWCP denied appellant's claim finding that he had not submitted sufficient evidence to establish that the employment incident occurred as alleged.

Dr. Masson completed a note on February 14, 2011 and reported appellant's history of injury. He advised that appellant had a diagnosis of left elbow enthesopathy and left axillary nerve injury.

Appellant, through his attorney, requested an oral hearing before an OWCP hearing representative on March 1, 2011. In a report dated March 4, 2011, Dr. Masson noted appellant's history of injury in August 2010 and his diagnosis of a left plexus stretch injury. He further noted that a coworker pounded on appellant's left shoulder three times on December 21, 2010 causing a recurrence of pain and burning sensation to his left shoulder that radiated to his neck and down to his left hand causing numbness. Dr. Masson stated that the event at work on December 21, 2010 appeared to have aggravated the original injury but did not cause permanent anatomic injury.

Appellant testified at the oral hearing on April 17, 2012 regarding the employment incident. He stated that a coworker struck him on the left shoulder causing pain. Appellant stated that the coworker used an open hand on his shoulder while standing behind appellant, who was seated. His coworker used a grasping pressing motion on his shoulder.

In a decision dated July 3, 2012, OWCP's hearing representative modified the February 11, 2011 decision to reflect that appellant established the December 21, 2010 employment incident. She also found that the medical evidence of record was insufficient to establish causal relation as none of the physicians based their opinion regarding the cause of his shoulder and neck pain on an accurate description of the incident. The hearing representative

found that appellant's coworker did not strike him on his left shoulder, rather he patted appellant lightly on the shoulder while greeting him.

Counsel requested reconsideration on August 29, 2012. In support of this request, he resubmitted the March 4, 2011 note from Dr. Masson.

By decision dated June 4, 2013, OWCP declined to reopen appellant's claim for consideration of the merits of his claim on the grounds that the medical report from Dr. Masson was cumulative and substantially similar to evidence already included in the record.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.² Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.³ Section 10.608 of OWCP's regulations provide that, when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁴

When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared. There is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request.⁵

ANALYSIS

Appellant filed a traumatic injury claim alleging that he sustained a left shoulder and neck injury when a coworker pounded on his shoulder on December 21, 2010. OWCP initially denied his claim on the grounds that he had not submitted sufficient factual evidence to establish that the employment incident occurred as alleged. Counsel requested an oral hearing and an OWCP hearing representative found that appellant established that a coworker patted him on the

² *Id.* at §§ 8101-8193, 8128(a).

³ 20 C.F.R. § 10.606.

⁴ *Id.* at § 10.608.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(a) (October 2011); *M.D.*, Docket No. 13-1344 (issued November 7, 2013).

shoulder on December 21, 2010. The medical evidence was found insufficient to establish that an injury resulted from the accepted employment incident.

Counsel requested reconsideration from the July 3, 2012 decision on August 29, 2012. OWCP issued a decision denying appellant's request for reconsideration on June 4, 2013 more than nine months after receiving the request. The Board, having duly considered the matter, finds that OWCP's delay of more than nine months in issuing a decision on appellant's reconsideration request effectively precluded him from appealing the most recent merit decision to the Board.⁶ Had OWCP acted upon his request within 90 days, he would have been able to seek review of OWCP's July 3, 2012 merit decision before the Board.

CONCLUSION

The Board finds that OWCP did not issue a timely decision on appellant's request for reconsideration. The case will be remanded to OWCP to issue an appropriate decision on the merits of the claim in order to preserve his appeal rights.

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 20, 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

⁶ See 20 C.F.R. §§ 501.2(c) and 501.3. For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. See 20 C.F.R. § 501.3(e) (2009).