

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

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T.E., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,** )  
**VETERANS HEALTH ADMINISTRATION,** )  
**SYRACUSE VETERANS MEDICAL CENTER,** )  
**Syracuse, NY, Employer** )

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**Docket No. 14-43**  
**Issued: March 13, 2014**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 16, 2013 appellant, through counsel, filed a timely appeal from a September 16, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for further merit review. As more than 180 days elapsed from the last merit decision of February 7, 2013 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

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

## **FACTUAL HISTORY**

On December 17, 2012 appellant, then a 46-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 8, 2011 she slipped on water on the floor and injured her right shoulder. The employing establishment advised that the incident occurred in the canteen prior to her tour of duty. No evidence was submitted with the claim.

In a December 27, 2012 letter, OWCP advised appellant of the deficiencies in her claim. It requested additional factual and medical evidence. Appellant was accorded 30 days in which to provide the information.

OWCP received appellant's statement of January 24, 2013, a witness statement of January 14, 2013 and a March 8, 2011 Veterans Administration Police report. Dr. P. James Newman, a Board-certified orthopedic surgeon, dated October 11, 2012 and from Dr. James Watts, a Board-certified internist, submitted reports dated March 13 to December 28, 2012 and a physical therapy note dated March 16, 2012.

By decision dated February 7, 2013, OWCP denied appellant's claim. It found that the medical evidence did not establish that she sustained a right shoulder condition causally related to the incident at work. OWCP noted that appellant also attributed her shoulder condition to an injury on June 25, 2012, as reflected by the report of Dr. Newman.

In a February 11, 2013 letter, appellant's counsel requested a telephonic hearing before an OWCP hearing representative, which was held on June 11, 2013. In an April 2, 2013 report, Dr. Newman stated that appellant was under his care for a right shoulder injury that occurred at work on June 25, 2012 while lifting a laundry bag and putting it down a laundry chute. He opined that her right shoulder rotator cuff tear was supported by diagnostic testing and physical examination findings. Dr. Newman opined that the June 25, 2012 incident of lifting the laundry bag and tossing it into the chute was a precipitating event causing the tear to appellant's right shoulder and the need for treatment.

At the June 11, 2013 hearing, OWCP's hearing representative noted that appellant had a separate claim, xxxxxx003, for a June 25, 2012 injury to her right shoulder. At the hearing, appellant's counsel stated that he wished to withdraw the hearing request and file the medical evidence with appellant's June 25, 2012 claim. In a June 13, 2013 letter, he requested that the Branch of Hearings and Review dismiss his appeal as the issue would be pursued under the separate claim. On June 24, 2013 the Branch of Hearings and Review accepted appellant's request for withdrawal of the hearing request.

In a September 3, 2013 letter, appellant's attorney indicated that a request for reconsideration was filed on June 12, 2013 and that he had a receipt documenting the request.<sup>2</sup>

By decision dated September 16, 2013, OWCP denied appellant's request for reconsideration without further review of the merits.

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<sup>2</sup> A copy of the June 12, 2013 request is not of record.

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must: (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.<sup>4</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, it will deny the application for reconsideration without reopening the case for review on the merits.<sup>6</sup>

## ANALYSIS

OWCP denied appellant's claim as the medical evidence failed to establish that her right shoulder condition was causally related to a March 8, 2011 incident. As noted, the Board does not have jurisdiction to review the merits of the case.<sup>7</sup> The only issue before the Board is whether OWCP properly denied appellant's reconsideration request.

The Board finds that appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not previously considered. The Board finds, therefore, that she has not submitted a new and relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to a review of the merits based on the first or second requirements under 20 C.F.R. § 10.606(b)(2).

The Board further finds that appellant also did not submit relevant and pertinent new evidence not previously considered. Dr. Newman's April 2, 2013 report, while new, did not address the March 8, 2011 incident. He discussed a right shoulder injury that occurred at work on June 25, 2012, which was adjudicated by OWCP under a separate claim. Dr. Newman's report is therefore irrelevant and immaterial to the claim of injury on March 8, 2011. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup> The Board finds, therefore, that Dr. Newman's April 2, 2013 report is insufficient to reopen appellant's claim for a merit review. Appellant did not submit relevant or pertinent new evidence not previously considered by OWCP. She is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(2).

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<sup>3</sup> Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> 20 C.F.R. § 501.3(e).

<sup>8</sup> *R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

Because appellant did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant or pertinent new evidence not previously considered by OWCP, it did not abuse its discretion in denying appellant's request for reconsideration.<sup>9</sup>

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 16, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2014  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> Appellant submitted new evidence on appeal. The Board lacks jurisdiction to review such evidence for the first time on appeal. 20 C.F.R. § 501.2(c).