

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

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**P.H., Appellant**

**and**

**U.S. POSTAL SERVICE, MAIN POST OFFICE,  
Atlanta, GA, Employer**  
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**Docket No. 15-1453  
Issued: August 4, 2016**

*Appearances:*  
*Frankie Sanders*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 25, 2015 appellant, through her representative, filed a timely appeal of a May 6, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed between April 23, 2014, the date of OWCP's most recent merit decision, and the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of appellant's claim.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

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

On appeal appellant's representative asserts that a conflict existed between the opinion of her attending physician and OWCP referral physician at the time her benefits were terminated on November 18, 2012. Appellant is requesting an impartial evaluation.

## FACTUAL HISTORY

On September 7, 2011 appellant, then a 57-year-old postal clerk, filed a traumatic injury claim (Form CA-1) alleging that she was injured when she fell from a chair at work that day. She stopped work and did not return. OWCP accepted right shoulder sprain and neck sprain caused by the September 7, 2011 employment injury.<sup>3</sup>

OWCP continued to develop the claim and in May 2012 referred appellant to Dr. Eric S. Furie, a Board-certified orthopedic surgeon, for a second opinion evaluation.<sup>4</sup> By decision dated November 8, 2012, it found that the weight of the medical evidence rested with the opinion of Dr. Furie, and terminated appellant's wage-loss compensation and medical benefits, effective November 18, 2012. Following a request for review of the written record, an OWCP hearing representative affirmed the termination on March 21, 2013.

In a June 19, 2013 decision, OWCP denied appellant's schedule award claim, and in a nonmerit decision dated November 20, 2013, denied her reconsideration request of the June 19, 2013 decision.

In a merit decision dated April 23, 2014, OWCP denied modification of the March 21, 2013 decision in which an OWCP hearing representative affirmed the termination of appellant's compensation benefits. Appellant retired on disability effective June 25, 2014.

On April 17, 2015 appellant requested reconsideration. In support of her request she submitted reports from Dr. Zouheir A. Shama, a surgeon, dated July 22 and December 4, 2014. In his reports, Dr. Shama described physical examination findings and discussed cervical and right shoulder magnetic resonance imaging (MRI) scan results. He diagnosed multilevel cervical stenosis and partial tear of right rotator cuff. Dr. Shama opined that appellant's accepted sprains

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<sup>3</sup> The record indicates that appellant has additional claims: No. xxxxxx196, accepted for a left knee strain and torn lateral meniscus that occurred on May 15, 1992; No. xxxxxx636, accepted for lumbar strain and lumbar subluxation that occurred on February 15, 2001; and an additional claim No xxxxxx128 that was denied. Under No. xxxxxx636, OWCP terminated appellant's benefits on June 4, 2012. This was affirmed by an OWCP hearing representative on January 30, 2013. In merit decisions dated January 31 and November 10, 2014 and July 16, 2015, OWCP denied modification of the prior decisions.

<sup>4</sup> In a June 26, 2012 report, Dr. Furie noted his review of the record and appellant's complaint of right shoulder and neck pain. He performed physical examination and diagnosed right rotator cuff tendinosis, cervical osteoarthritis, cervical stenosis, L5-S1 facet joint arthritis, and chronic right sternoclavicular joint anterior dislocation. Dr. Furie stated that the only diagnosis related to the September 7, 2011 employment injury was the rotator cuff tendinosis, for which appellant had no restrictions. He advised that she could perform her usual job.

should have been upgraded to include aggravation of her preexisting degenerative disc disease and to include a rotator cuff injury. He concluded that she continued to have residuals from the employment injury. Appellant also submitted an unsigned, unidentified physical performance test that includes no analysis of findings.

In a nonmerit decision dated May 6, 2015, OWCP denied appellant's reconsideration request. The decision noted that she did not assert that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. As to the evidence submitted, OWCP found that Dr. Shama's opinion of July 22, 2014 did not provide arguments not previously considered.

### **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>5</sup> Section 10.608(a) of OWCP regulations provides 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>6</sup> This section provides that the application for reconsideration must be submitted 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.<sup>7</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>8</sup>

### **ANALYSIS**

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated May 6, 2015 denying appellant's application for review.

The merit issue in this case is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective November 18, 2012. In a merit decision dated November 8, 2012, it terminated her benefits, effective November 18, 2012. The termination was affirmed by an OWCP hearing representative on March 21, 2013 and in a merit OWCP decision on April 23, 2014. Appellant requested reconsideration on April 17, 2015 and submitted additional medical evidence including a report from Dr. Shama dated July 22, 2014.

The Board finds that, as appellant did not assert that OWCP erroneously applied or interpreted the law or advance a relevant legal argument not previously considered by OWCP,

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.608(a).

<sup>7</sup> *Id.* at § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.608(b).

she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>9</sup>

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted additional medical evidence from Dr. Shama. Dr. Shama described physical examination and MRI scan findings. He diagnosed multilevel cervical stenosis and partial tear of right rotator cuff. Dr. Shama opined that appellant's accepted sprains should have been upgraded to include aggravation of her preexisting degenerative disc disease and to include a rotator cuff injury. He concluded that she continued to have residuals from the employment injury.

The Board finds that Dr. Shama's July 22, 2014 report, which had not previously been reviewed by OWCP, constitute relevant, and pertinent new evidence in regard to the matter of whether OWCP properly terminated appellant's benefits or whether she has any continuing disability. It is not necessary that the evidence be sufficient to establish the claim, only that it is new, relevant, and pertinent to the issue presented.<sup>10</sup>

As appellant submitted pertinent new and relevant evidence on reconsideration that was not previously considered by OWCP, she is entitled to a review of the merits of her claim under section 10.606(b)(3) of OWCP regulations.<sup>11</sup> The case shall therefore be remanded to OWCP to consider whether the Dr. Shama's reports, submitted by her on reconsideration, are sufficient to require further development. The Board will therefore set aside OWCP's May 6, 2015 decision. After this and such further development deemed necessary, OWCP shall issue an appropriate merit decision.

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for a merit review pursuant to section 8128(a) of FECA.

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<sup>9</sup> *Id.* at § 10.606(b)(3); *see R.M.*, 59 ECAB 690 (2008).

<sup>10</sup> *C.L.*, Docket No. 14-1904 (issued May 18, 2015).

<sup>11</sup> *Supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 6, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: August 4, 2016  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board