

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

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**M.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pittsburgh, PA, Employer**

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**Docket No. 16-1353  
Issued: December 12, 2016**

*Appearances:*  
*Thomas R. Uliase, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 17, 2016 appellant, through counsel, filed a timely appeal of a March 14, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated November 4, 2015, to 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 to review the merits of the 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 reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal counsel contends that there was an unresolved conflict of medical opinion evidence.

## FACTUAL HISTORY

On July 26, 2005 appellant, then a 31-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on July 26, 2005 while in the performance of duty she dislocated her right shoulder pulling a heavy tray off the top of a cage. She underwent a right shoulder magnetic resonance imaging (MRI) scan on August 11, 2015 which demonstrated no fracture or dislocation, but moderate rotator cuff tendinitis. OWCP accepted her claim on October 19, 2005 for closed dislocation of the right shoulder. On December 1, 2005 appellant underwent right shoulder surgery to repair multidirectional instability with a Bankart lesion anteriorly and disruption of the posterior capsule, posterior and inferior. She returned to light-duty work on April 28, 2006.

Appellant filed a recurrence of disability claim (Form CA-2a) on June 24, 2006, alleging that on June 22, 2006 she stopped work due to symptoms of her accepted right shoulder condition. On August 16, 2006 OWCP accepted a recurrence of disability and paid compensation. Appellant underwent an anterior inferior capsular shift and rotator interval closure surgery on September 25, 2006. OWCP expanded the accepted condition to include brachial neuritis or brachial plexopathy on the right on November 1, 2007.

On September 10, 2009 appellant underwent a repeat anterior inferior shift and rotator interval closure on her right shoulder. In a report dated January 30, 2013, Dr. John M. Fenlin, a Board-certified orthopedic surgeon, and appellant's attending physician, examined appellant and found that her right shoulder subluxed inferiorly at rest. He noted that she was capable of active elevation to 90 degrees and passive elevation to 150 degrees. Dr. Fenlin noted that appellant could be passively subluxed anterior, posterior, and inferior. On February 6, 2013 he opined that she was unable to work and that surgery was not recommended. Dr. Fenlin found that appellant could not reach, reach above the shoulder, twist, bend, stoop, operate a motor vehicle, perform repetitive movements of the wrists or elbows, push, pull, or lift, more than one pound and restricted her squatting, kneeling, and climbing. He recommended minimal use of the right upper extremity.

OWCP referred appellant for a second opinion evaluation with Dr. Stanley Askin, a Board-certified orthopedic surgeon, on June 30, 2014. In a report dated July 11, 2014, Dr. Askin reviewed appellant's history of injury and medical history including the accepted conditions of closed dislocation of the right shoulder and brachial plexopathy on the right. He performed a physical examination and noted that her right deltoid muscle was visibly atrophied and that her right humeral head was relatively anterior and inferiorly subluxed compared with the left. Appellant had limited range of motion in her right shoulder. She had positive Phalen's test, Tinel's sign and Roos' sign on the right which Dr. Askin found suggestive of carpal tunnel

syndrome. Dr. Askin noted that appellant's brachial plexus injury no longer appeared to be present. He diagnosed nonemployment-related carpal tunnel syndrome.

Dr. Askin found that appellant continued to experience residuals of her accepted right shoulder condition which inhibited normal function of the right shoulder. He indicated that she could work with restrictions on movements of her right shoulder including using her right arm at or above shoulder height. Dr. Askin opined that appellant was capable of performing medium-duty work activities as long as she could keep her right arm against her side. He found that her right shoulder condition was permanent, but that her nonemployment-related carpal tunnel syndrome could be treated with surgery. Dr. Askin did not recommend any additional right shoulder surgery and found that appellant had reached maximum medical improvement. He provided work restrictions including no reaching above the shoulder with right arm and pushing, and pulling up to 10 pounds with her right arm. Dr. Askin indicated that appellant could lift up to 50 pounds with her right arm at her side.

In a note dated December 4, 2014, Dr. Barbara Frieman, a Board-certified orthopedic surgeon, examined appellant's right shoulder finding 30 degrees of forward elevation and 20 degrees of abduction. She noted that appellant's right humeral head sat anterior to the glenoid, and that she had a clearly dislocated shoulder. Dr. Frieman noted that appellant had some numbness and tingling in her median nerve distribution at rest because of her anterior dislocation. She examined right shoulder x-rays and found appellant's right shoulder was anteriorly dislocated. Dr. Frieman diagnosed three failed instability operations, right shoulder with permanent anterior subluxation, and recurrent dislocation of the right shoulder. She opined that appellant was permanently disabled from work at the employing establishment. Dr. Frieman completed a work capacity evaluation (Form OWCP-5c) on December 4, 2014 finding appellant could not reach, reach above the shoulder, twist, bend, stoop, operate a motor vehicle, perform repetitive movements of the wrists or elbows, push, pull, or lift more than one pound, and restricted her squatting, kneeling, and climbing.

The employing establishment provided an investigative memorandum to OWCP. OWCP referred the contents of this report to Dr. Askin on December 30, 2014 and requested a supplemental report. In a report dated January 16, 2015, Dr. Askin repeated his earlier findings and conclusions. On February 2, 2015 he reviewed the surveillance tapes and found that these presented evidence that appellant's assertion of a painful right shoulder within constraints of motion was not a truthful presentation. Dr. Askin found that appellant had better function than she represented during his second opinion examination and could reasonably be expected to return to work without any imposed restrictions.

On February 13, 2015 OWCP provided Dr. Askin with appellant's date-of-injury position description and asked if she could perform the duties of this position. Dr. Askin opined that appellant could perform heavy work without restrictions.

OWCP issued a notice of proposed termination on May 12, 2015 proposing to terminate appellant's wage-loss compensation and medical benefits due to her accepted right shoulder conditions. It found, based on Dr. Askin's reports, that appellant had no disability for work and no medical residuals requiring further treatment. OWCP allowed appellant 30 days for a response.

Counsel responded on May 20, 2015 and requested an additional 30-day extension because he planned to provide additional medical evidence. No evidence was received within the time allotted.

By decision dated July 2, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective July 2, 2015.

Dr. Frieman examined appellant on June 25, 2015 and submitted notes diagnosing anterior dislocation of humerus and chronic instability of the right arm as well as pain in the shoulder joint. She found that appellant was totally disabled from any work involving her right upper extremity including repetitive reaching, lifting, pushing, or pulling. Dr. Frieman opined that appellant could not elevate her arm against gravity and found that she had some brachial plexus irritation associated with her subluxation.

Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on July 8, 2015. Appellant testified at the oral hearing on September 15, 2015 and described the duties of her date-of-injury position. She noted that she had not viewed the surveillance video, but agreed that she mowed the lawn with pain. Following the oral hearing, appellant submitted a June 25, 2015 attending physician's report (Form CA-20) from Dr. Frieman indicating that appellant was totally disabled. Dr. Frieman also completed a May 25, 2015 work capacity evaluation (Form OWCP-5c).

In a letter dated October 22, 2015, counsel contended that Dr. Frieman's June 25, 2015 attending physician's report created a conflict of medical opinion evidence with Dr. Askin's reports.

By decision dated November 4, 2015, OWCP's hearing representative affirmed the July 2, 2015 termination decision finding that the weight of the medical opinion evidence rested with Dr. Askin.

Counsel requested reconsideration on December 15, 2015. In support of this request, he submitted Dr. Frieman's June 25, 2015 report and work restrictions as well as her work restriction evaluations and form reports dated December 3 and 4, 2014, and May 25, 2015. Counsel contended that there was a conflict of medical opinion evidence between Dr. Frieman and Dr. Askin requiring an impartial medical examiner to resolve.

By decision dated March 14, 2016, OWCP declined to reopen appellant's claim for consideration of the merits finding that she submitted repetitious evidence and argument in support of her request for reconsideration.

### **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.<sup>3</sup> Section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides that a claimant may

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<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8128(a).

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.<sup>4</sup> Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not 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.<sup>5</sup> Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.<sup>6</sup>

### ANALYSIS

The Board finds that appellant submitted a timely request for reconsideration on December 15, 2015, within one year of the November 4, 2015 OWCP hearing representative's decision. The Board further finds that appellant failed to submit relevant, new legal argument not previously reviewed in support of this request which would require OWCP to reopen appellant's claim for consideration of the merits in accordance with 20 C.F.R. § 10.606(b)(3).

In support of the December 10, 2015 request for reconsideration, counsel argued that Dr. Frieman's June 25, 2015 note created a conflict with the reports of Dr. Askin, OWCP's second opinion physician. The Board notes that this is not a new argument as counsel presented this contention on October 22, 2015 prior to the November 4, 2015 decision of OWCP's hearing representative. As this argument has been previously considered by OWCP, it is repetitious or duplicative and, thus is insufficient to warrant further merit review.<sup>7</sup>

The Board further finds that the medical evidence submitted in support of appellant's December 10, 2015 request for reconsideration is repetitive or cumulative of the evidence in the record at the time of the November 4, 2015 decision. Counsel previously submitted work restriction evaluations as well as the June 25, 2015 report from Dr. Frieman before the November 4, 2015 decision of OWCP's hearing representative. The documents dated December 3 and 4, 2014, May 25, and June 25, 2015 do not contain additional medical evidence, and are instead merely a restatement of Dr. Frieman's findings and conclusions which were included in the record at the time of the last merit decision. As this evidence is repetitious, it cannot be considered new evidence and does not require OWCP to reopen appellant's claim for consideration of the merits.<sup>8</sup>

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<sup>4</sup> 20 C.F.R. § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.608.

<sup>6</sup> *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

<sup>7</sup> *See P.O.*, Docket No. 15-0852 (issued September 28, 2016); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

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

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 14, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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