

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

K.W., Appellant	)	
	)	
and	)	<b>Docket No. 16-1656</b>
	)	<b>Issued: December 15, 2016</b>
U.S. POSTAL SERVICE, LOGISTICS & DISTRIBUTION CENTER, Charlotte, NC, Employer	)	
	)	
	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On August 15, 2016 appellant timely appealed from a May 26, 2016 merit decision and a July 27, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish an injury in the performance of duty on June 15, 2015; and (2) whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On June 15, 2015 appellant, then a 43-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging a left shoulder condition which arose on or about June 14, 2015

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

(File No. xxxxxx624). He explained that he had gone home from work and fell asleep, and when he awoke he felt pain in his shoulder. In a separate June 15, 2015 statement requesting medical attention, appellant indicated that he aggravated his shoulder “last night when [offloading bulk mail container]” (BMC).

On July 7, 2015 appellant filed a traumatic injury claim (Form CA-1) and advised OWCP that he wished to withdraw the June 15, 2015 Form CA-2, noting that he should have filed a Form CA-1 instead.<sup>2</sup> He claimed to have suffered a left shoulder strain at 3:00 a.m. on June 15, 2015 while offloading BMCs of mail.<sup>3</sup>

In a June 15, 2015 hospital emergency room (ER) report, Dr. Patrick R. Burnside, a specialist in emergency medicine, advised that appellant had complaints of left shoulder and neck pain. He noted that he had experienced preexisting bursitis problems with the left shoulder. Dr. Burnside related that appellant denied any acute injury or trauma, but noted that he was offloading a truck, which may have triggered the pain. He reported complaints of left superior shoulder pain radiating into the neck and that the pain began the day before, but had since worsened.

In a July 2, 2015 report, Alvin Haymond, a physician assistant (PA-C), noted that appellant began experiencing left shoulder pain on May 15, 2015, due to an injury. Appellant related that he was pushing a cart that had a bad wheel, causing him to strain his left shoulder while trying to stabilize the cart. He reported having burning and aching pain, which he rated as a seven on a scale of one to ten. Mr. Haymond advised that radiographic studies of the left shoulder were normal. He diagnosed left shoulder impingement syndrome and prescribed a course of physical therapy. Mr. Haymond advised that appellant should undergo subacromial injections and possibly a magnetic resonance imaging (MRI) scan in the event conservative management did not resolve his symptoms.

On August 9, 2015 appellant returned to the hospital ER after having recently aggravated his left shoulder at work while pulling a cart with mail. He complained of left shoulder pain for the past two days after injuring his existing shoulder injury from two months ago. Dr. Caleb C. Gerhart, an emergency medicine specialist, diagnosed rotator cuff syndrome.

In an August 19, 2015 report, Dr. John Temple, Board-certified in orthopedic surgery, noted that appellant had sustained a work-related injury in May of that year when he was working for the employing establishment and moving a large box of mail. Appellant reported that the box was stuck under another box and that as he pulled, he felt a traction injury on his left side, up into his left trapezial region and around his left scapular region. Dr. Temple advised that the injury was initially treated as an impingement problem and that his shoulder symptoms had completely resolved. However, appellant was currently having severe pain around his cervical spine and thoracic spine, extending to the medial aspect of his scapula. Dr. Temple reported that appellant underwent physical therapy, but continued to experience pain in his spine. He noted that x-rays of his left shoulder showed no acute bony abnormality. Dr. Temple advised that

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<sup>2</sup> On July 27, 2015 OWCP granted appellant’s request to withdraw his occupational disease claim (File No. xxxxxx624).

<sup>3</sup> Appellant’s regular work hours were 11:00 p.m. to 7:50 a.m.

appellant's condition was totally spine-related based on his examination and current symptoms. He prescribed a course of steroids and changed appellant's physical therapy program to focus on a cervical and thoracic spine rehabilitation program.

On August 25, 2015, the employing establishment offered appellant a limited-duty assignment scanning placards and trucks, which he accepted.

By letter dated October 2, 2015, OWCP advised appellant that it required additional factual and medical evidence to determine whether he was eligible for FECA benefits. It asked appellant to submit a comprehensive medical report from his treating physician. OWCP also indicated that there were several discrepancies in the factual portion of the claim, noting that appellant provided different dates of injury and different mechanisms of injury to different medical providers. Additionally, it noted that appellant initially had filed a Form CA-2 with a June 14, 2015 date of injury, which he had since withdrawn. OWCP asked appellant to address the noted discrepancies, and to provide statements from individuals who may have witnessed the alleged June 15, 2015 injury.

On October 15, 2015 appellant signed and returned OWCP's October 2, 2015 development questionnaire.

In a September 18, 2015 report, Dr. Leo Spector, Board-certified in orthopedic surgery, advised that appellant had left-sided neck/scapular pain and pain between his shoulder blades, stemming from a June 15, 2015 work-related injury. He noted that x-rays of the cervical and thoracic spine taken that day showed spondylosis at C4-5, C5-6, and C6-7 with straightening of his cervical lordosis. Dr. Spector opined that the tests revealed no obvious acute abnormalities in the cervical or thoracic spine. He diagnosed left scapular pain and left shoulder pain. Dr. Spector recommended that appellant undergo a cervical spine and a left shoulder MRI scan.

OWCP also received physical therapy treatment records covering the period July 30 through October 6, 2015.

By decision dated November 4, 2015, OWCP denied the claim, finding that appellant had failed to meet his burden of proof to establish fact of injury.

In a November 3, 2015 report, received by OWCP on November 16, 2016, Dr. Spector advised that appellant continued to have pain in his neck and mid-shoulder blade region. He reported that appellant had undergone a cervical MRI scan on October 29, 2015, which showed evidence of mild left foraminal stenosis at C5-6 and mild-to-moderate left-sided foraminal stenosis at C6-7. A left shoulder MRI scan revealed mild subacromial/subdeltoid bursitis and synovitis, with low-grade partial-thickness tearing of the anterior supraspinatus undersurface and mild-to-moderate degenerative changes at the acromioclavicular (AC) joint. Dr. Spector recommended that appellant continue working with restrictions and resume physical therapy. He further recommended a referral for a left C6 and left C7 selective nerve root block.

On March 31, 2016 appellant requested reconsideration. In a March 31, 2016 letter, he advised OWCP that one of his doctors listed the wrong date of injury in his report, which he had since corrected. Appellant also submitted a copy of a "request for correction/amendment of health information" which he sent to Mr. Haymond, asking him to change the date of injury from May to June 15, 2015.

By decision dated May 26, 2016, OWCP denied modification of the November 4, 2015 decision. It found that the record contained several discrepancies, including providing different dates of injury and different mechanisms of injury to different medical providers. In addition, OWCP noted that appellant initially filed an occupational disease claim in File No. xxxxxx624 indicating a date of injury of June 14, 2015, the day before the alleged injury in the instant claim. It reported that appellant indicated in the previous claim that he “went to sleep when (he) got home woke up and had pain in (his) shoulder,” and had subsequently requested withdrawal of that claim.

On July 1, 2016 appellant again requested reconsideration. In a handwritten letter dated July 1, 2016, he asserted that management required him to perform work that exceeded his physical restrictions, which resulted in his reinjuring the left shoulder.

Appellant submitted an amended equal employment opportunity (EEO) complaint dated January 27, 2016, in which he alleged various grievances pertaining to his working outside of his medical restrictions and his use of leave.

By decision dated July 27, 2016, OWCP denied appellant’s request for reconsideration as it neither raised substantive legal questions nor included pertinent and relevant new evidence sufficient to require OWCP to review the merits of its prior decision.

### **LEGAL PRECEDENT -- ISSUE 1**

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.<sup>4</sup>

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether “fact of injury” has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.<sup>5</sup> The second component is whether the employment incident caused a personal injury.<sup>6</sup>

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence to seriously question whether the specific event or incident occurred at the time, place, and in the

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<sup>4</sup> 20 C.F.R. § 10.115(e), (f); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

<sup>5</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue. *Robert G. Morris*, 48 ECAB 238 (1996). A physician’s opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician’s opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant’s specific employment factor(s). *Id.*

manner alleged.<sup>7</sup> An injury need not be confirmed by an eyewitness. However, the employee's statements must be consistent with surrounding facts and circumstances and his subsequent course of action.<sup>8</sup> Circumstances such as late notification of injury, lack of confirmation of injury, continuing to work without apparent difficulty following the alleged injury, and failure to obtain medical treatment may cast doubt on an employee's statements regarding the alleged employment injury.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not established that he injured his left shoulder on June 15, 2015 while offloading BMCs of mail. Dr. Spector indicated in his September 18, 2015 report, that appellant had injured his left shoulder in a June 15, 2015 work-related incident. This assertion was contradicted, however, by differing accounts that appellant provided to several other medical personnel. In his July 2, 2015 report, Mr. Haymond advised that appellant began experiencing left shoulder pain due to an incident which occurred on May 15, 2015. He reported that appellant strained his left shoulder while trying to stabilize a cart with a bad wheel that he had been pushing. Dr. Temple indicated in his August 19, 2015 report that appellant was injured in May 2015 while moving a large box of mail. Appellant informed him that the box was stuck under another box and that, as he pulled, he felt a traction injury on his left side which radiated into his left trapezial region and around his left scapular region. Further, OWCP noted that appellant initially filed an occupational disease claim (File No. xxxxxx624) with a June 14, 2015 date of injury, which he later withdrew. Appellant indicated on the Form CA-2 that he "went to sleep when I got home woke up and had pain in my shoulder." Therefore, there are discrepancies in the accounts of injury appellant provided in the course of his treatments. This contradictory evidence created an uncertainty as to the time, place, and manner in which appellant allegedly injured his left shoulder. It is unclear whether the physicians of record had an accurate history of the June 15, 2015 incident as they related differing accounts of how the left shoulder injury occurred.

Lastly, appellant failed to provide factual information in response to OWCP's October 2, 2015 development questionnaire. He also did not provide any corroborating witness statements. The lack of supporting documentation, coupled with inconsistent accounts of the alleged incident/injury, casts doubt on appellant's assertion that he injured his left shoulder on June 15, 2015 offloading BMCs of mail.

Therefore, given the inconsistencies in the evidence regarding how appellant sustained his injury, the Board finds that there is insufficient evidence to establish fact of injury or to prove that he sustained an injury in the performance of duty as alleged.<sup>10</sup>

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<sup>7</sup> *Supra* note 5.

<sup>8</sup> See *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

<sup>9</sup> See *Constance G. Patterson*, 42 ECAB 206 (1989).

<sup>10</sup> See *Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>11</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>12</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>13</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (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>14</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, nor has he advanced a relevant legal argument not previously considered by OWCP, or presented new evidence that is relevant and pertinent to the issue on appeal.

The Board has held that the submission of evidence which does not address the particular issue in the case does not constitute a basis for reopening the claim.<sup>16</sup> The January 27, 2016 amended EEO complaint contains allegations appellant made subsequent to the alleged June 15, 2015 work incident, which pertain to matters of leave and assertions of being required to do work exceeding his restrictions. The issue in this case is whether the June 15, 2015 incident occurred as alleged. Appellant's reconsideration request thus failed to show that OWCP erroneously applied or interpreted a point of law, nor did it advance a relevant legal argument not previously considered by OWCP, or present new evidence relevant and pertinent to the issue on

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<sup>11</sup> This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application.” 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.607.

<sup>13</sup> *Id.* § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>14</sup> 20 C.F.R. § 10.606(b)(3).

<sup>15</sup> *Id.* at § 10.608(a), (b).

<sup>16</sup> *See David J. McDonald*, 50 ECAB 185 (1998).

appeal. Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

**CONCLUSION**

The Board finds that appellant failed to establish that he sustained an injury in the performance of duty on June 15, 2015. The Board further finds that OWCP properly denied appellant's July 1, 2016 request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 27 and May 26, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 15, 2016  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board