

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

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**T.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Bloomington, IL, Employer**

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**Docket No. 17-0386  
Issued: May 26, 2017**

*Appearances:*  
*Stephanie N. Leet, Esq., 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  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 2, 2016 appellant, through counsel, filed a timely appeal from a July 5, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated April 15, 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 over the merits of this case.

**ISSUE**

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

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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.*

On appeal counsel contends that a merit review of the record was warranted as new medical evidence and legal arguments were provided.

### **FACTUAL HISTORY**

On May 29, 2014 appellant, then a 52-year-old postal carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 24, 2014 he sustained a left rotator cuff tear due to slipping and falling on ice while in the performance of duty. He stopped work on May 1, 2014.

By correspondence dated June 30, 2014, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised as to the medical and factual evidence required and afforded 30 days to provide the requested information. He did not respond within the time allotted.

By decision dated August 7, 2014, OWCP denied appellant's claim. It accepted that the February 24, 2014 incident occurred as alleged. However, OWCP denied the claim as there was no medical evidence of record that diagnosed a medical condition causally related to the accepted incident.

In a form dated September 2, 2014, appellant requested a telephone hearing before an OWCP hearing representative which was held on March 10, 2015.

On October 6, 2014 OWCP received a March 1, 2014 report from Emily C. Crebo, a certified nurse practitioner. Ms. Crebo provided a medical history, examination findings, and a history of the injury. She reported that appellant had injured his shoulder when he slipped and fell on ice at work five to seven days previously. Ms. Crebo diagnosed a left rotator cuff injury and left anterior shoulder pain.

Subsequent to the March 10, 2015 hearing, OWCP received the following evidence.

In a March 18, 2014 report, Brandon R. Gale, a certified physician assistant, noted that appellant was evaluated for complaints of bilateral shoulder pain. Appellant reported that he had injured his left shoulder on February 25, 2014 when he slipped and fell on ice at work. A physical examination revealed mildly positive impingement signs. Mr. Gale diagnosed bilateral shoulder pain.

A May 1, 2014 hospital report indicated that appellant underwent left shoulder arthroscopy for left shoulder rotator cuff tear and left shoulder biceps tenosynovitis.

In reports dated May 13 and June 6, 2014, Dr. Michael S. Merkley, a treating Board-certified orthopedic surgeon, diagnosed left shoulder rotator cuff tear with biceps tenosynovitis. In a March 31, 2015 report, he opined that appellant's February 24, 2014 fall caused the condition or aggravated a preexisting rotator cuff tear and need for surgical repair. In support of his conclusion, Dr. Merkley explained that the mechanism of throwing his arms in the air while falling was sufficient to aggravate a preexisting tear. As appellant had no symptoms prior to the fall, he opined that the fall either caused the condition or aggravated a preexisting condition.

By decision dated April 15, 2015, the hearing representative affirmed the denial of appellant's claim. She found that the medical evidence of record was insufficient to establish

causal relationship between the accepted February 24, 2014 employment incident and the diagnosed medical condition. Furthermore, the hearing representative found Dr. Merkley's opinion to be speculative and insufficient to establish appellant's claim.

In a June 4, 2015 report, Dr. Neil Allen, an examining Board-certified neurologist, noted diagnoses of left shoulder and upper arm sprain and left acromioclavicular and provided an impairment rating for those conditions. He reported that on February 24, 2014 appellant lost his balance when he slipped while delivering mail and jerked his left arm up for balance. At this point appellant related feeling immediate left shoulder pain.

On April 11, 2016 counsel requested reconsideration. He argued that the hearing representative failed to provide the basis for the denial of the claim and that Dr. Merkley's reports were sufficient to establish appellant's claim. Further, counsel contended that Dr. Allen's report was sufficient to establish appellant's claim. He also resubmitted Dr. Merkley's March 31, 2015 report.

By decision dated July 5, 2016, OWCP denied reconsideration. It found Dr. Allen's report insufficient to warrant a merit review because it was an impairment rating and did not address causal relationship between the diagnosed medical condition and the accepted employment incident. OWCP also found Dr. Merkley's reports had been discussed in the prior decision and were found to be insufficient to establish causal relationship.

### **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 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 it; 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's application for review must be received by OWCP within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>6</sup>

### **ANALYSIS**

On April 11, 2016 counsel requested reconsideration of the April 15, 2015 hearing representative's decision affirming the denial of his traumatic injury claim. The underlying issue

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<sup>3</sup> *Supra* note 2. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>4</sup> 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>5</sup> *Id.* at 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-440, issued March 16, 2009; *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

on reconsideration is medical in nature, whether appellant had a medical condition causally related to the accepted February 24, 2014 employment incident.

The Board finds that appellant has neither shown that OWCP erroneously applied or interpreted a specific point of law nor advanced a relevant legal argument not previously considered by OWCP.

Counsel for appellant argued that Dr. Merkley's March 31, 2015 report was sufficient to establish appellant's claim. He further argued that the hearing representative's decision failed to provide the basis for the denial of appellant's claim.

The Board finds that OWCP properly reviewed Dr. Merkley's March 31, 2015 report in its April 15, 2015 decision finding that it was insufficient to establish appellant's claim. Contrary to counsel's contentions, the hearing representative did provide a basis for the denial of appellant's claim when she reviewed the evidence of record, including Dr. Merkley's March 31, 2015 report and found that it failed to establish causal relationship between a diagnosed medical condition and the accepted February 24, 2014 incident.

Counsel had not established an error in the application or interpretation of a specific point of law nor did she advance a relevant legal argument not previously considered by OWCP.<sup>7</sup> As such, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>8</sup>

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence.

Appellant submitted a new report dated June 4, 2015 from Dr. Allen which related appellant's history of injury and provided an impairment rating for the diagnoses of left shoulder and upper arm sprain and left acromioclavicular. This report, however, offered no opinion explaining how appellant's accepted February 24, 2014 incident caused or aggravated a left rotator cuff tear or the conditions diagnosed by Dr. Allen. The Board has held that evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>9</sup>

Appellant also resubmitted Dr. Merkley's March 31, 2015 report. However, evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>10</sup> The Board, therefore, finds that the evidence submitted by appellant is insufficient to reopen appellant's claim for a merit review.

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<sup>7</sup> *A.T.*, Docket No. 14-417 (issued June 25, 2014).

<sup>8</sup> 20 C.F.R. §10.606(b)(3).

<sup>9</sup> *E.O.*, Docket No. 15-0635 (issued June 5, 2015); *R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

<sup>10</sup> *A.L.*, Docket No. 08-1730 (issued March 16, 2009); *J.P.*, 58 ECAB 289 (2007); *Elaine M. Borghini*, 57 ECAB 549 (2006).

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law, nor did it advance a point of law not previously considered by OWCP. Appellant also did not submit pertinent new and relevant evidence. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied his request for reconsideration of the merits of the claim.

On appeal counsel argues that Dr. Allen's report was improperly dismissed by OWCP as an impairment rating. She further contends that the reports of Drs. Allen and Merkle were rationalized and sufficient to establish appellant's claim. As noted above, the Board lacks jurisdiction to review the merits of the claim.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 5, 2016 is affirmed.

Issued: May 26, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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