

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

R.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Barre, VT, Employer**

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**Docket No. 17-1314
Issued: November 3, 2017**

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 30, 2017 appellant filed a timely appeal from a December 1, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of OWCP dated July 26, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of OWCP's December 1, 2016 decision, and on appeal, appellant submitted new evidence. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time it issued its final decision. Thus, the Board is precluded from considering the new evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

On February 25, 2016 appellant, then a 54-year-old postal clerk, filed an occupational disease claim (Form CA-2) alleging that she developed tendinitis in her right shoulder due to repetitive motion at work. She noted that she first became aware of her condition and realized its relationship to her employment on February 17, 2016. Appellant noted that she had undergone three shoulder surgeries. She stopped work on February 17, 2016.³

Appellant submitted a February 20, 2016 disability certificate from a provider whose signature is illegible, noting that appellant had an illness or nonwork-related injury and that she could return to work on February 22, 2016.

Appellant also submitted a February 22, 2016 duty status report (Form CA-17) from Rebecca Savidge, a physician assistant, noting that on February 17, 2016 appellant's right shoulder locked up while working the window and reaching for a touch screen. Ms. Savidge reported right scapular and upper trapezius tightness and tenderness on palpation due to injury. She advised appellant to resume regular work on March 1, 2016.

OWCP received daily notes dated March 7 to 18, 2016 from appellant's physical therapist which addressed her right shoulder treatment.

OWCP also received a March 2, 2016 medical report from Jayne D. Collins, a physician assistant, noting that on February 17, 2016 appellant had acute onset right shoulder pain while repetitively reaching up to use a touch computer screen at work. Ms. Collins examined appellant and assessed right shoulder impingement syndrome. She maintained that appellant sustained a workers' compensation injury to her right shoulder which had been exacerbated by repetitive motion.

By letter dated April 11, 2016, OWCP advised appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and respond to a factual development questionnaire.

OWCP received a March 2, 2016 report cosigned by Dr. Stephanie J. Landvater, an attending Board-certified orthopedic surgeon, noting a history of injury that on February 17, 2016 appellant experienced right shoulder pain while repetitively reaching up to use a touch computer screen at work. Dr. Landvater reviewed appellant's symptoms and provided findings on physical and mental examination. In the assessment portion of her report, she noted that appellant continued to work at the employing establishment with restrictions from a prior work-related injury. Dr. Landvater indicated that appellant had a positive test for right shoulder impingement. She related that her rotator cuff was functionally strong. There was discomfort with resisting the teres minor. Dr. Landvater placed appellant off work until March 22, 2016. In a March 21, 2016 office note, she noted appellant's chief complaint of frozen right shoulder. Dr. Landvater discussed findings on physical and x-ray examination. She assessed appellant as having right shoulder S.I.C.K. (Scapula Dyskinesis) syndrome due to overuse and poor posture

³ Appellant returned to work on Tuesday, March 22, 2016.

while working at the employing establishment with repetition at a computer. Dr. Landvater advised that appellant could resume work with restrictions.

OWCP received additional medical evidence, which included a March 2, 2016 right shoulder x-ray report from Dr. Alan Ericksen, a Board-certified radiologist. Dr. Ericksen provided an impression of possible impingement syndrome and recommended a magnetic resonance imaging scan.

On April 19, 2016 appellant responded to OWCP's factual development questionnaire. She described her job duties which involved repetitive motion, sorting and boxing mail, and unloading trucks, six hours a day, four days a week, and three hours a day, one day a week. Appellant claimed that she reached for a touch screen 5 to 31 times per customer. She had 30 to 100 customers a day. Appellant listed activities outside of employment as limited use of a computer at home with no internet service and gardening maybe one-half hour. She did not participate in sports. Appellant contended that she lived with pain 24 hours a day, seven days a week. She underwent three hernia surgeries related to prior OWCP claims.

Additional medical evidence received by OWCP included a letter and an office note dated April 6, 2016, a Form CA-17, and an office note dated April 29, 2016 from Dr. Landvater who assessed synovitis due to repetition and S.I.C.K. with overuse of the anterior muscles in comparison to the muscles in the back and coracoid impingement. She opined that the diagnosed conditions were work related. Dr. Landvater also addressed appellant's medical treatment and work capacity and restrictions.

On May 12, 2016 the employing establishment responded to OWCP's questionnaire. It noted that appellant reported that her right shoulder locked up as she reached out to perform a retail transaction on a touch screen at the time of the incident. The employing establishment claimed that it did not have any knowledge as to whether her injury was work related.

In a May 26, 2016 decision, OWCP denied appellant's occupational disease claim. It found that the medical evidence of record was insufficient to establish that her diagnosed medical condition was causally related to the established factors of her federal employment.

OWCP received additional medical evidence from Dr. Landvater. In office notes and Form CA-17 reports dated May 16 to June 22, 2016, Dr. Landvater reiterated appellant's history of injury. She discussed findings and reviewed x-ray results. Dr. Landvater assessed right shoulder acromioclavicular joint synovitis. She restated her diagnosis of right shoulder scapular dyskinesis with overuse of the anterior muscles in comparison to the muscles in the back and coracoid impingement due to repetitive motion at work. Dr. Landvater addressed appellant's work capacity and restrictions.

On July 13, 2016 appellant requested reconsideration. She submitted a May 18, 2016 office note in which Dr. Landvater reported findings and assessed scapular dyskinesis with a scapular bursa on the superior medial border. Dr. Landvater placed appellant off work until her reevaluation in a couple of weeks.

In a July 26, 2016 decision, OWCP denied modification of its May 26, 2016 decision. It found that Dr. Landvater did not provide a rationalized medical opinion to establish causal relationship between appellant's diagnosed condition and work factors.

OWCP received a June 1, 2016 Form CA-17 report in which Dr. Landvater again reiterated appellant's history of injury and her prior diagnosis of right shoulder scapular dyskinesia due to injury. It also received a July 15, 2016 daily note from appellant's physical therapist addressing the treatment of her right shoulder condition.

On August 31, 2016 appellant requested reconsideration of OWCP's July 26, 2016 decision. She resubmitted the March 2, 2016 report by Dr. Landvater, the March 2, 2016 report from Ms. Collins, March 21, 2016 office note from Dr. Landvater, and the March 2, 2016 right shoulder x-ray report from Dr. Ericksen.

OWCP received a June 22, 2016 office note in which Dr. Landvater discussed examination findings and assessed excellent shoulder response on the right to the scapular thoracic articulation superiorly. Dr. Landvater maintained that appellant had a workers' compensation injury and could perform full-time, full-duty work.

By decision dated December 1, 2016, OWCP denied appellant's request for reconsideration of the merits of her claim. It found that the evidence submitted was repetitious and irrelevant.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a 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.⁴ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁵ 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.⁶ 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.⁷

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration without conducting further merit review.

OWCP issued a May 26, 2016 merit decision denying appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the established employment factors. In a July 26, 2016 merit decision, it denied modification of this decision. On August 31, 2016 appellant requested reconsideration. OWCP denied her request for reconsideration in a December 1, 2016 nonmerit decision.

The Board does not have jurisdiction over the July 26, 2016 merit decision and can consider only whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), which would prompt OWCP to reopen the case for merit review. The underlying issue on reconsideration is medical in nature, namely whether the medical evidence establishes causal relationship between her right shoulder condition and the established work factors.

The Board finds that, in her August 31, 2016 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, she is 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).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. Appellant submitted a new June 1, 2016 Form CA-17 report and June 22, 2016 office note from Dr. Landvater which related appellant's history of injury, diagnosed right shoulder scapular dyskinesia and excellent shoulder response on the right to the scapular thoracic articulation superiorly, and found that these conditions were work related. This evidence, however, essentially reiterated Dr. Landvater's diagnoses and opinion set forth in her prior reports of record. Appellant also resubmitted the March 2, 2016 report by Dr. Landvater, the March 2, 2016 report from Ms. Collins, the March 21, 2016 office note from Dr. Landvater, and a March 2, 2016 right shoulder x-ray report from Dr. Ericksen. 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.⁸

The new daily note dated July 15, 2016 from appellant's physical therapist is insufficient to warrant merit review as a physical therapist is not considered a physician as defined under FECA.⁹ The Board finds, therefore, that this evidence is not relevant to the underlying medical issue on appeal and is insufficient to warrant further merit review of appellant's claim.

⁸ *D.K.*, 59 ECAB 141 (2007).

⁹ *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁰

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 December 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 3, 2017
Washington, DC

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

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

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

¹⁰ See *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).