

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

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K.T., Appellant)	
)	
and)	
)	Docket No. 17-1429
)	Issued: November 1, 2017
U.S. POSTAL SERVICE, MOUNDSVILLE)	
POST OFFICE, Moundsville, WV, Employer)	
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Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On June 19, 2017 appellant, through counsel, filed a timely appeal from a May 3, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated August 19, 2016, to the filing of this appeal on June 19, 2017, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

¹ 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.

² 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).

FACTUAL HISTORY

On August 29, 2014 appellant, then a 54-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a large retracted torn rotator cuff and biceps tear due to her job duties. She first became aware of her condition on August 2, 2014 and first attributed her condition to her factors of federal employment on August 18, 2014.³ Appellant noted that she had undergone right shoulder surgical repair on February 3, 2014 and returned to work on June 4, 2014.

Appellant asserted that she worked 50 hours a week and attributed her right shoulder pain to lifting and carrying her mail sack, as well as repetitive casing. On June 4, 2014 she noted carrying an extra hour of a walking route with a mail sack. Appellant noted that she also worked 10 hours on June 5, 2014 and worked 100 hours during the first two weeks after her return to work following her surgery. She provided a detailed description of her job duties from July 29 to August 30, 2014. Appellant indicated that she also had a tear in her left rotator cuff. She stopped work on September 3, 2014.

Appellant underwent a right shoulder magnetic resonance imaging (MRI) scan on August 18, 2014 which demonstrated a supraspinatus tear with retraction and a partial tear of the infraspinatus as well as a probable tear of the biceps tendon. In a note dated September 3, 2014, Dr. Michael Zilles, a Board-certified orthopedic surgeon, indicated that appellant "retore" her right shoulder rotator cuff. He recommended additional surgery.

Appellant noted that her physician scheduled a second right shoulder surgery on September 19, 2014.

The employing establishment completed a statement on September 5, 2014 and confirmed that appellant was required to work 50 hours a week. It indicated that appellant spent approximately 30 to 35 minutes a day carrying her satchel and that she cased mail for 1½ hours a day. The majority of appellant's route was mounted which entailed delivering mail from the right-hand window of her vehicle to place the mail in each mailbox.

Dr. Zilles performed a right shoulder rotator cuff repair due to a recurrent tear in the top portion of her repair on September 19, 2014.

Appellant filed a claim for disability retirement with the Office of Personnel Management (OPM) on October 6, 2014.

³ Appellant has seven prior claims before OWCP. These claims include File No. xxxxxx783 an occupational disease claim for a left rotator cuff tear in 2013.

In a letter dated November 3, 2014, OWCP requested additional factual and medical evidence in support of appellant's occupational disease claim and afforded her 30 days for a response. Appellant did not submit additional evidence within the time allotted.

By decision dated December 16, 2014, OWCP denied appellant's occupational disease claim finding that she had failed to submit sufficient medical evidence to establish a causal relationship between her diagnosed medical condition and the accepted factors of her federal employment. Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on December 22, 2014.

Appellant testified at the oral hearing which was held on July 8, 2015. She indicated that she had been a mail carrier for 23 years. Appellant noted that she believed that her initial right shoulder repair was successful and that after she returned to work in June 2014 the repair tore. She reported that her husband broke his neck shortly after they were married and that she had home health care for him until December 2013 at which time he moved to a nursing home. Appellant noted that after she returned to work in June 2014 she was required to work 50 hours a week. She asserted that she was carrying her satchel for 2½ hours a day and developed increasing pain in her right shoulder.

By decision dated September 4, 2015, OWCP's hearing representative found that the medical evidence of record was insufficient to establish a causal relationship between appellant's diagnosed recurrent right rotator cuff tear and her implicated employment factors. He noted that there was no medical opinion evidence addressing the cause of appellant's recurrent right rotator cuff tear.

Counsel requested reconsideration on May 23, 2016. In support of this request, he submitted a report dated May 10, 2016 from Dr. Alan Tissenbaum, a Board-certified orthopedic surgeon. In this report, Dr. Tissenbaum reviewed appellant's November 2, 2015 right shoulder MRI scan. He opined, "It is reasonable to believe that her injuries are consistent with her job duties as a mail carrier. Lifting approximately 70 pounds and carrying a mailbag weighing 30 to 40 pounds, along with the repetitive motion of casing mail for about two hours per day over several years that you could expect injuries of this nature." Dr. Tissenbaum indicated that he performed a right reverse total shoulder arthroplasty on December 1, 2015.

In a decision dated August 19, 2016, OWCP denied modification of its prior decisions, finding that Dr. Tissenbaum's report was not based on a complete and accurate work or medical history. It further found that the report was not well rationalized and did not meet appellant's burden of proof to establish her occupational disease claim.

On November 2, 2015 appellant had a right shoulder MRI scan which demonstrated tear of the supraspinatus and infraspinatus tendons with glenohumeral subluxation, biceps tendon tear of the long head with retraction into the upper arm, as well as osteoarthritis of the joint.

Counsel requested reconsideration of the August 19, 2016 decision on February 3, 2017.⁴ He submitted an additional report from Dr. Tissenbaum dated September 15, 2016. Dr. Tissenbaum noted that he assumed appellant's care in the fall of 2015 due to an August 2, 2014 injury. Appellant reported extreme pain in her right shoulder and underwent a right shoulder MRI scan on November 2, 2015. Dr. Tissenbaum opined that right shoulder findings were consistent with appellant's original complaint. He concluded, "It is reasonable to believe that her right shoulder tearing is consistent with her job duties as a mail carrier. Lifting approximately 70 pounds and carrying a mailbag weighing 30 to 40 pounds, along with the repetitive motion of casing mail for about two hours per day over several years that you could expect injuries of this nature to the right shoulder." Dr. Tissenbaum noted on December 1, 2015 that he performed a right reverse total shoulder arthroplasty for the chronic rotator cuff arthropathy.

By decision dated May 3, 2017, OWCP declined to reopen appellant's claim for consideration of the merits. It found That Dr. Tissenbaum's September 15, 2016 report was duplicative of his May 10, 2016 report. OWCP found that the remainder of the medical evidence did not address the issue of causal relationship.

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.⁵ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may 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.⁶ Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does 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.⁷ 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.⁸

⁴ In an order dated February 2, 2017 in Docket No. 16-1799, the Board granted counsel's request to dismiss her appeal in File Nos. xxxxxx783 and xxxxxx410. See *Order Dismissing Appeal*, Docket No. 16-1799 (issued February 2, 2017).

⁵ 5 U.S.C. §§ 8101-8193, 8128(a).

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608.

⁸ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

ANALYSIS

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).

Appellant's February 3, 2017 request for reconsideration was timely filed. However, she neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance any relevant legal arguments not previously considered by OWCP. The Board finds that appellant is therefore not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).⁹

Appellant also failed to submit any relevant and pertinent new evidence with her February 3, 2017 request for reconsideration. The issue on reconsideration was whether there was causal relationship between appellant's right shoulder rotator cuff tears and her accepted employment factors. Causal relationship is a medical question that generally requires rationalized medical opinion evidence to resolve the issue.¹⁰ The November 2, 2015 MRI scan therefore cannot suffice for purposes of establishing causal relationship as it does not address this issue.¹¹ Appellant submitted Dr. Tissenbaum September 15, 2016 report, which is cumulative of his May 10, 2016 report. Providing additional evidence that either repeats or duplicates information already of record does not constitute a basis for reopening a claim.¹² Because appellant did not provide any probative relevant and pertinent new evidence, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹³ Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

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).

⁹ *B.W.*, Docket No. 16-1778 (issued August 24, 2017); 20 C.F.R. § 10.606(b)(3)(i) and (ii).

¹⁰ *Id.*

¹¹ The submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case. *A.M.*, Docket No. 16-1875 (issued August 23, 2017); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹² *B.W.*, *supra* note 9; *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹³ *S.F.*, Docket No. 16-1019 (issued May 4, 2017).

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 2017
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