



## 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 December 6, 1997 appellant, then a 38-year-old military personnel clerk, filed a notice of occupational disease (Form CA-2), alleging that she developed tendinitis of the wrist and tennis elbow as a result of gripping and pulling motions in the performance of duty. OWCP accepted the claim for right medial epicondylitis, temporary aggravation of right carpal tunnel syndrome and permanent aggravation of right medial epicondylitis and right trapezius myofascial pain. Appellant was placed on the periodic rolls of compensation effective September 9, 2001.

OWCP referred appellant to Dr. Norman Mindrebo, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature and extent of her accepted conditions. In an August 2, 2012 report, Dr. Mindrebo determined that appellant had reached maximum medical improvement and opined that her employment-related conditions had ceased without residuals.

By decision dated November 30, 2012, OWCP terminated appellant's compensation benefits as her accepted conditions had ceased without residuals. It found that the weight of the evidence was represented by Dr. Mindrebo. Appellant requested a telephone hearing before a representative of OWCP's Branch of Hearings and Review.

In a July 22, 2013 decision, an OWCP hearing representative affirmed the termination decision.

Appellant submitted reports dated October 14, 2013 through March 12, 2014 from Dr. John T. Munshower, a Board-certified neurologist, who diagnosed chronic pain syndrome, movement disorder, right shoulder pain, and neck pain. On December 16, 2013 Dr. Munshower opined that appellant's right posterior shoulder and arm pain radiating to the hand was causally related to forceful and repetitive motions of removing heavy duty staples from packing materials. He opined that appellant's work-related injuries of permanent aggravation of right medial epicondylitis, permanent aggravation of right trapezial myofascial pain, and aggravation of carpal tunnel syndrome resulted in a persistent pain, which was still active at that time.

On November 18, 2014 OWCP found a conflict in the medical evidence and referred appellant to Dr. Paul Ho, a Board-certified orthopedic hand surgeon, for an impartial medical examination to resolve the conflict. In his December 19, 2014 report, Dr. Ho diagnosed cervical degenerative joint disease with C5 radiculopathy with referred pain to the right trapezius and right arm, including the shoulder and elbow, bilateral elbow pain, possibly from cervical condition, right carpal tunnel syndrome, probable left carpal tunnel syndrome, and right cubital tunnel syndrome by electromyography (EMG). He found that appellant had a complex problem which was partially due to a neurological movement disorder that she had since childhood. Dr. Ho opined that, based on the physical examination, appellant's elbow medial epicondylitis

condition had resolved. He opined that appellant's ongoing symptoms were related to her cervical disc problem with radiculopathy and since a cervical condition had not been accepted, then the pain in the trapezius area was more than likely not work related.

By decision dated June 3, 2015, OWCP denied modification of its prior decision.

On April 22, 2016 counsel requested reconsideration and submitted additional medical evidence.

In an April 15, 2016 report, Dr. Paul F. Bustion, a neurologist, provided a list of appellant's work-related and nonwork-related conditions. His work-related diagnoses included carpal and cubital tunnel syndromes, trapezius/myofascial pain, and right elbow epicondylitis. Dr. Bustion asserted that appellant's nonwork-related diagnoses were dystonia musculorum deformans (DMD) and cervical spondylosis. He opined that her work-related disability was permanently present and responsible for her problems. Dr. Bustion found that appellant's carpal and cubital tunnel syndromes were documented by neurophysiology tests and her trapezius/myofascial pain and right elbow epicondylitis were documented by clinical evaluation. He stated that her neurologists would have no difficulty recognizing that DMD does not cause the repetitive use injuries that she experienced. Dr. Bustion asserted that Dr. Ho had no difficulty identifying appellant's work-related injuries but opined that, as a nontreating orthopedic surgeon, Dr. Ho could not separate the work-related problems from appellant's DMD condition. He stated that he did not think that any physicians other than neurologists, and probably even most neurologists, would be able to reliably make this distinction.

On reconsideration counsel argued that a nontreating orthopedic surgeon, such as Dr. Ho, would not be able to separate work-related problems from a neurological issue. He further argued that appellant's nonwork-related diagnosis was a neurological issue and consequently only a neurologist could determine whether her other injuries were related to her work-related injuries and, therefore, OWCP should send the conflict in the medical evidence to be resolved by a neurologist, not an orthopedic surgeon.

By decision dated July 21, 2016, OWCP denied appellant's request for reconsideration. It considered Dr. Bustion's April 15, 2016 report cumulative, noting that he had not provided new clinical or examination findings, but merely reiterated appellant's various diagnoses. OWCP further found that because appellant did not have any accepted neurological conditions, Dr. Ho's qualifications as an orthopedic hand surgeon was appropriate for resolving the conflict in medical opinion.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>4</sup> One such limitation is that the request for reconsideration

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<sup>3</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 own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

must be received by OWCP within one year of the date of the decision for which review is sought.<sup>5</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>6</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>7</sup>

### ANALYSIS

In support of her April 22, 2016 reconsideration request, appellant submitted an April 15, 2016 report from Dr. Bustion who reiterated the accepted conditions. Dr. Bustion also noted nonwork-related conditions of DMD and cervical spondylosis. He opined that appellant's neurologists would have no difficulty recognizing that DMD does not cause the repetitive use injuries that she experienced. Dr. Bustion also asserted that Dr. Ho had no difficulty identifying appellant's work-related injuries, but opined that as a nontreating orthopedic surgeon, Dr. Ho could not separate the work-related problems from appellant's DMD condition. The Board finds that Dr. Bustion's April 22, 2016 report is irrelevant to the issue that was before OWCP as it was focused on appellant's nonwork-related conditions, not her accepted conditions. Additionally, Dr. Bustion did not provide any new clinical or examination findings, but merely reiterated previous findings and/or diagnoses of record. As OWCP terminated appellant's FECA benefits based on the lack of supportive medical evidence and this report repeats evidence already in the case record, it is cumulative and does not constitute relevant and pertinent new evidence. Therefore, it is not sufficient to require OWCP to reopen the claim for consideration of the merits.<sup>8</sup>

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. Because appellant only submitted cumulative evidence with her request for reconsideration, the Board finds that she did not meet any of the necessary requirements and she is not entitled to further merit review.<sup>9</sup>

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<sup>5</sup> *Id.* at § 10.607(a). 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>6</sup> 20 C.F.R. § 10.606(b)(3).

<sup>7</sup> *Id.* at § 10.608(a), (b).

<sup>8</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

<sup>9</sup> *See L.H.*, 59 ECAB 253 (2007).

**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 July 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 4, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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