

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

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V.P., Appellant	)	
	)	
and	)	Docket No. 17-1287
	)	Issued: October 10, 2017
DEPARTMENT OF DEFENSE, DEFENSE	)	
COMMISSARY AGENCY, Fort Lee, VA,	)	
Employer	)	

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*Appearances:*

*Lorenzo W. Tijerina, 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 May 24, 2017 appellant, through counsel, filed a timely appeal from a November 25, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated March 30, 2016 to the filing of this appeal on March 24, 2017, 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 claim.

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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.*

## 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 April 4, 2015 appellant, then a 48-year-old sales store checker filed a traumatic injury claim (Form CA-1) alleging that on March 6, 2015 she experienced excruciating pain in her right shoulder and right biceps as a result of a pinched nerve and rotator cuff injury. She did not stop work. On the reverse side of the claim forms, the supervisor controverted appellant's claim on the basis of fact of injury. He alleged that appellant had not stated how the alleged injury occurred and had provided conflicting dates for the date of injury.

OWCP received various witness statements from coworkers including a March 3, 2015 statement from J.B., an April 7, 2015 statement from H.W., and an April 14, 2015 statement from P.M. They indicated that on March 3, 2015 appellant was helping to remove items from the freezer when she indicated that her right shoulder was hurting.

Appellant was initially treated in the emergency room. In a March 6, 2015 urgent care record, a nurse indicated that appellant was treated for a right rotator cuff injury and could work with restrictions of no use of her right arm, no lifting, no pushing, and no pulling until April 6, 2015.

In March 12, 2015 check-out instruction sheet, Dr. Adrian Barron, an internist, diagnosed appellant's condition as rotator cuff tendinitis.

Brittany McCright, a physical therapist, provided a March 24, 2015 consultation report. She noted a diagnosis of right acute rotator cuff shoulder sprain. Ms. McCright reported physical examination findings of no effusion, edema, ecchymosis, or deformity and a diagnosis of right shoulder impingement.

Appellant received treatment at the employee health unit. In an April 3, 2015 report, Dr. Barron related that appellant was treated for steroid injection of her right shoulder. He reviewed appellant's history and reported positive impingement symptoms after a right rotator cuff injury one month ago. Dr. Barron diagnosed right shoulder impingement. In a work status note, he related that appellant could return to work on April 4, 2015 with restrictions of no lifting over 10 pounds, no overhead movements, and no repetitive arm movements.

In a letter dated April 14, 2015, the employing establishment controverted appellant's claim. It asserted that there was a discrepancy regarding whether the alleged injury occurred on March 3 or 6, 2015. The employing establishment also noted that, when appellant initially helped remove groceries from the freezer, she had not mentioned any on-the-job injury.

By letter dated April 21, 2015, OWCP advised appellant that the evidence submitted was insufficient to establish her claim. It requested that she respond to the attached questionnaire to establish that the employment incident occurred as alleged and to provide additional medical

evidence to establish that she sustained a diagnosed condition as a result of the alleged incident. Appellant was afforded 30 days to submit the requested information.

In a May 17, 2015 statement, appellant related that on March 3, 2015 she was working at the employing establishment when H.W. asked her to help remove merchandise from the freezer and place them in carts. She noted that she worked for approximately two hours before her break and another two hours after her break. Appellant indicated that the next day she was about to place the tilt on the counter at work when she felt a sharp pain on her right shoulder. She contended that her right shoulder pain was a result of the repetitive moving of frozen items from the day before. Appellant sought treatment at the employing establishment's employee health unit. She also alleged that her supervisor gave her the "run-around" about filing a claim and did not process the claim correctly.

By decision dated June 1, 2015, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that the March 6, 2015 incident occurred as alleged. It further determined that the medical evidence submitted was insufficient to establish a diagnosed condition causally related to the employment incident.

On January 26, 2016 appellant, through counsel, requested reconsideration.

Appellant resubmitted the March 24, 2015 report from Ms. McCright which noted a diagnosis of right acute rotator cuff shoulder sprain. She reviewed appellant's history and provided physical examination findings. Ms. McCright diagnosed right shoulder impingement.

In an August 27, 2015 work status note, Dr. Barron related that appellant could return to work on August 8, 2015 with restrictions of no repetitive upper arm movements, no lifting over 10 pounds, and no overhead movements until October 1, 2015.

In a November 13, 2015 work status note, Matthew A. Froman, a certified physician assistant, related that appellant was unable to return to work.

Dr. Patrick M. Simon, a Board-certified orthopedic surgeon, indicated in work status notes dated October 14, November 30, and December 15, 2015 that appellant was unable to work until her next appointment.

In a decision dated March 30, 2016, OWCP denied modification of the June 1, 2015 decision. It found that the evidence of record failed to establish that the March 6, 2015 employment incident occurred as appellant alleged.

On September 7, 2016 appellant, through counsel, again requested reconsideration.

In a September 1, 2016 letter, counsel requested a 30-day extension for appellant to submit additional medical evidence and legal argument. No additional evidence was received by OWCP.

By decision dated November 25, 2016, OWCP denied reconsideration of the merits of appellant's claim. It found that she had not shown that OWCP had met the requirements of 5 U.S.C. § 8128(a) sufficient to warrant merit review.

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>3</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.<sup>4</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>7</sup>

## ANALYSIS

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

Appellant alleged that she sustained a right shoulder injury as a result of a March 6, 2015 employment incident. In decisions dated June 1, 2015 and March 30, 2016, OWCP denied her traumatic injury claim finding that the evidence of record was insufficient to establish that the March 6, 2015 incident occurred as alleged. On September 7, 2016 it received appellant's request, through counsel, for reconsideration. By decision dated November 25, 2016, OWCP denied further merit review of appellant's case because no evidence was submitted on reconsideration.

With his September 7, 2016 reconsideration request, counsel submitted a September 1, 2016 letter requesting a 30-day extension for appellant to submit additional medical evidence and legal argument. OWCP, however, did not receive any additional evidence on the record. The Board finds, therefore, that counsel offered no relevant legal argument which had not previously been considered by OWCP, nor did he show that OWCP erroneously applied or

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<sup>3</sup> 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>4</sup> 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

interpreted a specific point of law, nor did he submit any relevant and pertinent new evidence in support of appellant's request for reconsideration.

The Board finds that, as appellant failed to meet the criteria enumerated under 20 C.F.R. § 10.606(b)(3), OWCP properly denied further merit review of her traumatic injury claim.<sup>8</sup>

On appeal counsel alleges that appellant incorrectly inputted March 6, 2015 as the date of injury on the initial Form CA-1 but the actual date of injury was March 3, 2015. As noted above, however, the only issue before the Board is whether OWCP properly denied further merit review of appellant's case in its November 25, 2016 decision. Counsel offered a new argument on appeal. As the Board lacks jurisdiction to review the underlying merits of appellant's claim, it cannot review counsel's arguments regarding appellant's traumatic injury claim on appeal.<sup>9</sup>

### **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).

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<sup>8</sup> See *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review of the merits).

<sup>9</sup> See 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 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