

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

K.K., Appellant	)	
	)	
and	)	Docket No. 17-1414
	)	Issued: August 22, 2018
U.S. POSTAL SERVICE, POST OFFICE,	)	
Washington, DC, Employer	)	
	)	

*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 June 13, 2017 appellant filed a timely appeal from March 15 and May 9, 2017 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 15, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

**ISSUE**

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

**FACTUAL HISTORY**

On June 29, 2015 appellant, a 50-year-old sales services and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder strain at work on that

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

date as a result of lifting a parcel. By decision dated March 21, 2016, OWCP accepted appellant's claim for left rotator cuff tear.

Appellant submitted claims for wage-loss compensation (CA-7 forms) for the period January 4 to April 22, 2016.

In a February 23, 2016 report, Dr. Angela Tomaschko, a Board-certified orthopedic surgeon, noted that appellant sustained a work-related injury on June 29, 2015 while lifting a box. Dr. Tomaschko advised that he went through a course of steroid injection and physical therapy with no relief of symptoms starting in August 2015 and continuing until appellant's rotator cuff surgery on February 4, 2016. She advised that appellant was currently in physical therapy and was limited to no lifting and limited active motion.

By decision dated April 25, 2016, OWCP denied appellant's claim for compensation for the period January 4 to April 22, 2016, finding that the medical evidence of record was insufficient to establish total disability due to the accepted employment injury.

On June 27, 2016 appellant requested reconsideration and submitted a February 4, 2016 surgical report indicating that he underwent left shoulder rotator cuff repair and biceps tenodesis performed by Dr. Tomaschko. He also submitted progress reports dated February 17, March 15, and May 31, 2016 from Dr. Tomaschko who noted that appellant was participating in physical therapy and had been released to work without limitations. Dr. Tomaschko reported that appellant was going to Ghana to visit his father on March 15, 2016, but would be back from his visit by his appointment on May 31, 2016.

In a May 31, 2016 report, Dr. Tomaschko released appellant to limited-duty work with a 15-pound lifting restriction.

OWCP referred appellant for a second opinion examination by Dr. D. Burke Haskins, a Board-certified orthopedic surgeon, who found that appellant was not totally disabled. Dr. Haskins opined that appellant was capable of returning to modified-duty work, effective July 26, 2016, with a 10-pound lifting restriction and no reaching with the left shoulder.

By decision dated August 26, 2016, OWCP modified its prior decision, finding that the medical evidence of record was sufficient to establish total disability for the period February 4 to March 15, 2016 due to appellant's surgery. It further found, however, that the evidence was insufficient to modify the entire decision because the medical evidence of record failed to establish total disability for the periods January 4 to 12, 2016 and March 16 to April 22, 2016.

On June 24 and July 1, 2016 appellant submitted claims for wage-loss compensation for the period June 17 to July 1, 2016.

By decision dated August 31, 2016, OWCP denied appellant's claim for disability for the period June 17 to July 1, 2016 because the medical evidence of record failed to establish total disability due to the accepted employment injury.

On October 24, 2016 appellant requested reconsideration and submitted an October 22, 2016 narrative statement indicating that he had not been released to work by his physician on

March 15, 2016. He stated that he had a family emergency in Ghana and he left on that date and then returned at the end of May 2016. Appellant indicated that he returned to work on July 2, 2016 with limitations while attending physical therapy until August 16, 2016. He also submitted an October 20, 2016 report from Dr. Tomaschko who noted that appellant had work limitations since his February 4, 2016 surgery and had been released to work on May 31, 2016 with a 15-pound lifting restriction. Dr. Tomaschko explained that the notation on the bottom of her reports stating “released w/o limitation” was a template portion for active duty military members and not applicable to retirees and dependents and should not be used regarding a working limitation status for appellant.

By decision dated November 15, 2016, OWCP vacated its prior decision and found that appellant was entitled to wage-loss compensation for the period June 17 to July 1, 2016.

On December 15, 2016 appellant requested reconsideration of OWCP’s August 26, 2016 decision and submitted a narrative statement arguing that he was entitled to wage-loss compensation for disability for the period March 16 to April 22, 2016. He also resubmitted his February 4, 2016 surgical report.

By decision dated March 15, 2017, OWCP denied appellant’s request for reconsideration of the merits of his claim, finding that he failed to advance a relevant legal argument or submit any relevant and pertinent new evidence. It determined that the evidence submitted was irrelevant or immaterial because it did not contain medical evidence supporting disability for the period March 16 to April 22, 2016.

On April 21, 2017 appellant again requested reconsideration and argued that he was entitled to disability compensation for the period March 16 to May 31, 2016 because he had a family emergency in Ghana and attended physical therapy in Ghana during the period claimed. He further submitted an April 21, 2017 report from Dr. Albert Prempeh, a healthcare provider at Boakye Dankaw Memorial Hospital, who indicated that appellant underwent physiotherapy on his left shoulder rotator cuff for the period March 17 to May 26, 2016.

By decision dated May 9, 2017, OWCP denied appellant’s request for reconsideration of the merits of his claim, finding that he did not advance a relevant legal argument or submit any relevant and pertinent new evidence. It determined that the evidence submitted on reconsideration was immaterial because it did not contain medical evidence supporting disability for the periods January 4 to 12, 2016 and March 16 to April 22, 2016. OWCP further found that appellant’s argument was irrelevant to the issue before OWCP because it failed to address the periods of disability previously denied.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>2</sup> OWCP has discretionary authority in this regard and has imposed certain

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<sup>2</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).

limitations in exercising its authority.<sup>3</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>4</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>5</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>6</sup>

### ANALYSIS

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

Appellant's December 12, 2016 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. His April 21, 2017 request for reconsideration argued that he was entitled to disability compensation for the period March 16 to May 31, 2016. The Board finds, however, that this argument is irrelevant because OWCP's August 26, 2016 decision denied disability compensation for the periods January 4 to 12, 2016 and March 16 to April 22, 2016. As he failed to address the periods of disability previously denied by OWCP, appellant's argument is irrelevant and immaterial.<sup>7</sup> Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. He resubmitted a February 4, 2016 surgical report in support of his December 12, 2016 reconsideration request. The Board finds that the submission of this evidence did not require reopening appellant's case for merit review because appellant had submitted the same evidence, which was previously reviewed by OWCP in its August 26, 2016 decision. As the report repeats evidence already in the case record, it is duplicative and does not constitute relevant and pertinent new evidence.<sup>8</sup> Appellant also submitted with his April 21, 2017 request an April 21,

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<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</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>5</sup> 20 C.F.R. § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.608(a), (b).

<sup>7</sup> The submission of argument and/or evidence which does not address the particular issue involved does not constitute a basis for reopening a case. *See A.D.*, Docket No. 18-0497 (issued July 25, 2018); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>8</sup> *See D.K.*, 59 ECAB 141 (2007).

2017 report from Dr. Prempeh who indicated that he underwent physiotherapy on his left shoulder rotator cuff for the period March 17 to May 26, 2016 at Boakye Dankaw Memorial Hospital in Ghana. The Board finds that submission of this evidence did not require reopening appellant's case for merit review because it did not provide medical rationale supporting disability for the periods January 4 to 12, 2016 and March 16 to April 22, 2016 due to the accepted work injury.<sup>9</sup> Therefore, this report does not constitute relevant and pertinent new evidence and is insufficient to require OWCP to reopen appellant's claim for consideration of the merits in accordance with the third above-noted requirement under section 10.606(b)(3).

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(3) and properly denied his request for reconsideration.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 9 and March 15, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 22, 2018  
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

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<sup>9</sup> See 5 U.S.C. § 8101(2). See also *Paul Foster*, 56 ECAB 208, 212 n.12 (2004).