

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

V.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Stanton, CA, Employer**

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**Docket No. 18-0669
Issued: August 10, 2018**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 8, 2018 appellant filed a timely appeal from a November 16, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated October 31, 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 over the merits of the claim.

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 20, 2015 appellant, then a 57-year-old supervisor of customer service, filed an occupational disease claim (Form CA-2) claiming that she sustained an occupational injury in the

¹ 5 U.S.C. § 8101 *et seq.*

form of a rotator cuff tear. She indicated that she first became aware of her claimed condition on June 15, 2014 and first realized on August 27, 2014 that it was caused or aggravated by her federal employment. In an accompanying April 20, 2015 statement, appellant indicated that she had pain in both shoulders, and she attributed her condition to using an old desk at work that had drawers that were hard to open and close. She stopped work on April 21, 2015, but later returned to modified duty.²

In an April 14, 2015 attending physician's report (Form CA-20), Dr. Talal Malhis, a Board-certified orthopedic surgeon, listed the history of injury as bilateral shoulder pain and diagnosed rotator cuff tear. He found that appellant was partially disabled from August 27, 2014 to the present.

In an April 28, 2015 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim.

Appellant submitted an August 27, 2014 report from Dr. Malhis who noted that appellant reported that her bilateral shoulder pain started about four months ago. Dr. Malhis diagnosed bilateral shoulder pain, adhesive capsulitis of the left shoulder, and rotator cuff tendinitis of the left shoulder. The findings of an October 2, 2014 magnetic resonance imaging (MRI) scan of appellant's left shoulder contained an impression of tear of the infraspinatus footplate, supraspinatus tendinosis, teres minor edema with quadrilateral space syndrome, and thickened inferior glenohumeral ligaments with fluid in the extra-articular biceps tendon sheath (as can be seen with adhesive capsulitis versus post-traumatic result). On April 7, 2015 Dr. Malhis diagnosed rotator cuff tear of the left shoulder, bilateral shoulder pain, and bilateral adhesive capsulitis of the shoulders.

By decision dated June 9, 2015, OWCP denied appellant's claim because she failed to submit sufficient medical evidence to establish that her claimed shoulder condition was causally related to the accepted employment factors.³

On September 9, 2015 appellant requested reconsideration of OWCP's June 9, 2015 decision and submitted a July 13, 2015 MRI scan of the right shoulder which showed signs of chronic calcific supraspinatus tendinitis, mild bursitis, and mild arthropathy of the acromioclavicular joint. The findings of a July 14, 2015 MRI scan of the left shoulder showed signs of chronic calcific supraspinatus tendinitis, mild bursitis, and mild arthropathy of the acromioclavicular joint.

In a July 27, 2015 report, Dr. Hosea Brown, III, an attending Board-certified orthopedic surgeon, discussed appellant's shoulder problems and reported the findings of the physical examination he conducted on that date. He diagnosed bilateral rotator cuff syndrome, bilateral shoulder tenosynovitis, bilateral acromioclavicular joint arthropathy, right calcific supraspinatus tendinitis, and bilateral subdeltoid/subacromial bursitis. Dr. Brown opined that these conditions

² Appellant retired from the employing establishment, effective April 29, 2016.

³ OWCP accepted the employment factors as alleged, *i.e.*, using an old desk at work that had drawers that were hard to open and close.

were caused by appellant's repetitive typing duties and by opening and closing desk drawers with both arms for one hour each day over the course of her 26-year federal employment. He determined that appellant had partial disability due to her diagnosed conditions.

In September 2015, OWCP referred appellant for a second opinion examination with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon. It requested that Dr. Einbund provide an opinion regarding whether appellant had an employment-related condition.

In an October 13, 2015 report, Dr. Einbund discussed appellant's factual and medical history and detailed the findings of the physical examination he conducted on that date. He noted that appellant exhibited full range of motion of her shoulders with no motor weakness. Appellant reported experiencing pain in her right rotator cuff while engaging in range of motion testing. Dr. Einbund diagnosed disorder of bursae and tendons of both shoulders. He noted that an October 2, 2014 MRI scan of appellant's left shoulder showed a rotator cuff tear, but that this finding was not confirmed by a July 14, 2015 MRI scan of the left shoulder. Dr. Einbund found that appellant's bilateral shoulder condition was not caused or aggravated by the implicated employment factors, but rather was due to the progression of a degenerative process.

By decision dated October 28, 2015, OWCP denied modification noting that the weight of the medical evidence with respect to her shoulder condition rested with the well-rationalized opinion of Dr. Einbund. It determined that the opinion of Dr. Brown was conclusory in nature and of questionable plausibility.

On August 4, 2016 appellant requested reconsideration of OWCP's October 28, 2015 decision and submitted additional evidence. In a July 18, 2016 report, Dr. Charles Herring, an attending Board-certified orthopedic surgeon, discussed appellant's shoulder problems and reported the findings of the physical examination he conducted on that date. He diagnosed bilateral shoulder impingement syndrome, bilateral shoulder subacromial bursitis, right shoulder calcific tendinitis, bilateral shoulder acromioclavicular joint arthropathy, and bilateral shoulder adhesive capsulitis. Dr. Herring noted that appellant reported pushing and pulling faulty metal desk drawers while working for the employing establishment. He indicated that this type of activity could cause bursitis and impingement.

In an August 1, 2016 report, Dr. Brown asserted that the biomechanical process of appellant's opening and closing desk drawers over an extended period was competent to cause the diagnosed bilateral shoulder conditions. He claimed that the repetitive trauma caused by this activity was confirmed by the diagnostic testing of record. Dr. Brown expressed his disagreement with OWCP's finding that the weight of the medical evidence with respect to appellant's shoulder condition rested with the opinion of Dr. Einbund.

By decision dated October 31, 2016, OWCP denied modification, noting that the weight of the medical evidence with respect to appellant's shoulder condition continued to rest with the well-rationalized opinion of Dr. Einbund. It determined that the opinions of appellant's attending physicians were not well rationalized and that there was no conflict in the medical opinion evidence regarding the cause of appellant's shoulder condition.

On January 19, 2017 appellant requested reconsideration of OWCP's October 31, 2016 decision and submitted a January 5, 2017 report from Dr. Basimah Khulusi, an attending Board-certified physical medicine and rehabilitation physician, who indicated that she disagreed with Dr. Einbund's opinion that appellant's shoulder condition was solely due to age-related progression of a degenerative condition. She alleged that Dr. Einbund had an inherent conflict of interest because he was hired by OWCP to examine appellant. Dr. Khulusi asserted that the reports of appellant's attending physicians showed that appellant's opening and closing of faulty desk drawers at work caused her multiple shoulder problems.

By decision dated January 23, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It determined that the evidence that appellant submitted in connection with her timely reconsideration request was similar to evidence that already had been considered.

On October 27, 2017 appellant requested reconsideration of OWCP's October 31, 2016 decision. In support of her reconsideration request, she submitted copies of new reports from attending physicians.

In a March 1, 2017 report, Dr. Brown noted that appellant presented for follow up of her bilateral shoulder discomfort. He discussed appellant's compensation claim and asserted that there was a conflict in the medical opinion evidence between the second opinion physician, Dr. Einbund, and two attending physicians, Dr. Herring and himself. Dr. Brown recommended that appellant be referred for a referee evaluation in order to resolve the conflict in the medical opinion evidence. He detailed the findings of the physical examination he conducted on March 1, 2017, noting that appellant had significant discomfort upon range of motion testing of the shoulders with positive bilateral shoulder impingement signs and weakly positive bilateral arc maneuvers. Dr. Brown diagnosed bilateral rotator cuff syndrome, bilateral shoulder tenosynovitis, bilateral acromioclavicular joint arthropathy, right calcific supraspinatus tendinitis, and bilateral subdeltoid/subacromial bursitis.

In a June 5, 2017 report, Dr. Brown provided findings upon physical examination on that date which were similar to those provided in his March 1, 2017 report. He again asserted that there was a conflict in the medical opinion evidence between the second opinion physician, Dr. Einbund, and two attending physicians, Dr. Herring and himself. Dr. Brown again recommended that appellant be referred for a referee evaluation. In a June 5, 2017 duty status report, he diagnosed bilateral rotator cuff syndrome and indicated that work restrictions were not applicable to appellant.

In an October 19, 2017 letter to OWCP, Dr. Khulusi indicated that she had received OWCP's January 23, 2017 decision denying merit review which advised that her January 5, 2017 report was not sufficient to warrant a referee examination or to shift the weight of medical opinion previously accorded to Dr. Einbund. She asserted that there was a conflict between multiple physicians who treated appellant, including two orthopedic specialists, and the second opinion physician hired by OWCP, and she noted that OWCP still refused to send appellant for a referee evaluation. Dr. Khulusi asserted that OWCP procedures provide that, when there is a conflict of medical opinion between an attending physician and a second opinion physician, as in the present case, the claimant and the case record should be referred to a Board-certified specialist in the

pertinent field of medicine that is appropriate for the issue in conflict.⁴ She indicated that she was hereby requesting that OWCP refer appellant for a referee evaluation in accordance with “FECA laws.”

By decision dated November 16, 2017, OWCP denied appellant’s request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It determined that the evidence and argument that appellant submitted in connection with her timely reconsideration request was repetitive or immaterial to the underlying issue of the case.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.⁵

A claimant seeking reconsideration of a final decision must present arguments or provide evidence 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.⁶ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁷ 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.⁸

A request for reconsideration must also be received by OWCP within one year of the date of OWCP’s decision for which review is sought.⁹ For OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the “received date” as recorded in the Integrated Federal Employees’ Compensation System (iFECS).¹⁰ If the last day of the one-

⁴ Dr. Khulusi cited several portions of the Federal (FECA) Procedure Manual regarding the referral of claimants to impartial medical specialists.

⁵ 5 U.S.C. § 8128(a).

⁶ 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).

⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *Id.* at § 10.607(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). *See also C.B.*, Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987, there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP’s decision for which review is sought.

year time period is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.¹¹

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹² and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹³ While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁴

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).

OWCP issued a decision on October 31, 2016 and received appellant's request for reconsideration on October 27, 2017. Appellant's request was timely filed because it was received within one year of OWCP's October 31, 2016 decision.¹⁵

The Board finds that appellant's request for reconsideration has not met any of the requirements of 20 C.F.R. § 10.606(b)(3), and it does not require OWCP to reopen the case for further review of the merits of the claim. Appellant's request for reconsideration 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 by OWCP. The underlying issue of the present case, *i.e.*, whether the medical evidence establishes that appellant sustained an employment-related occupational injury, is a medical issue which must be addressed by relevant medical evidence.¹⁶

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case.

Appellant submitted March 1 and June 5, 2017 reports in which Dr. Brown detailed examination findings from those dates and asserted that there was a conflict in the medical opinion evidence regarding appellant's shoulder condition between the second opinion physician, Dr. Einbund, and two attending physicians, Dr. Herring and himself. Dr. Brown recommended that appellant be referred for a referee evaluation in order to resolve the conflict in the medical opinion evidence. Appellant also submitted an October 19, 2017 letter in which Dr. Khulusi also asserted that there was a conflict between multiple physicians who treated appellant, including two

¹¹ *Id.* at Chapter 2.1602.4. *See also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹² *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹³ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁴ *John F. Critz*, 44 ECAB 788, 794 (1993).

¹⁵ *See supra* note 9.

¹⁶ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

orthopedic specialists, and the second opinion physician hired by OWCP. Dr. Khulusi claimed that OWCP procedures provide that when there is a conflict of medical opinion between an attending physician and a second opinion physician, as in the present case, the claimant and the case record should be referred to a Board-certified specialist in the pertinent field of medicine that is appropriate for the issue in conflict.

In essence, these reports present an opinion by attending physicians that there is a conflict in the medical opinion evidence regarding appellant's shoulder condition between OWCP's referral physician, Dr. Einbund, and the attending physicians which requires referral to an impartial medical specialist.¹⁷ However, the Board notes that OWCP already considered and rejected this proposition when it determined that the weight of the medical evidence with respect to appellant's shoulder condition rested with Dr. Einbund's opinion. The Board further found that there was no conflict in the medical opinion evidence regarding the cause of appellant's shoulder condition because the opinions of appellant's attending physicians were not well rationalized. The reports of Dr. Brown and Dr. Khulusi do not require reopening appellant's case for merit review as the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹⁸

Moreover, the opinions of Dr. Brown and Dr. Khulusi asserting that there is a conflict in the medical opinion evidence essentially address a legal determination and the Board has held that a medical expert's determination of legal standards is outside the scope of his or her expertise.¹⁹ In this regard, the opinions of Dr. Brown and Dr. Khulusi regarding whether there is a conflict in the medical opinion evidence are not directly relevant to the underlying issue of the present case, *i.e.*, whether the medical evidence of record shows that appellant sustained an occupational condition due to the accepted federal employment factors. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²⁰

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

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).

¹⁷ See *supra* notes 15 through 17.

¹⁸ See *supra* note 12. In his March 1 and June 5, 2017 narrative reports, Dr. Brown provided examination findings, but these findings are similar to those provided in earlier reports and this aspect of these reports would not require reopening of appellant's claim for merit review.

¹⁹ See *Barbara Bush*, 38 ECAB 710, 714 (1987).

²⁰ See *supra* note 13. In a June 5, 2017 duty status report, Dr. Brown diagnosed bilateral rotator cuff syndrome and indicated that work restrictions were not applicable to appellant. However, this report is not relevant to the underlying issue of this case because it does not contain any opinion on the cause of the diagnosed condition.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 10, 2018
Washington, DC

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

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

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