

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

T.H., Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF
SOLICITOR, Seattle, WA, Employer**

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**Docket No. 17-1904
Issued: February 20, 2018**

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 11, 2017 appellant filed a timely appeal from an August 11, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's most recent merit decision dated August 8, 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 appellant's 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).

On appeal appellant asserts that she submitted new and relevant evidence in support of her reconsideration request.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 5, 2013 appellant, then a 51-year-old legal assistant (office automation) filed a traumatic injury claim (Form CA-1) alleging that she strained her neck and right shoulder when she lifted a large box off the floor and placed it on her work chair on June 13, 2013.

A March 23, 2013 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated disc protrusions at C6-7 and C3-4. Dr. Thomas Buchanan, a Board-certified internist, noted on June 24, 2013 that appellant was seen for right shoulder pain. Dr. Christopher R. Howe, a Board-certified orthopedic surgeon, provided a treatment note dated July 9, 2013 in which he diagnosed a right C6-7 disc protrusion with possible radiculopathy. Dr. Alan Thomas, a Board-certified orthopedic surgeon, provided treatment notes and duty status reports (Form CA-17) dated July 25 and August 21, 2013 in which he described the claimed injury and noted that appellant had a previous left shoulder injury. He diagnosed right sprain of neck, right sprain of rotator cuff, and right sprain of hip and thigh. Dr. Thomas advised that appellant could work eight hours a day with a 10-pound weight restriction.

In letters dated September 13, 2013, OWCP informed appellant of the evidence needed to establish her claim and asked the employing establishment to comment. Dr. Buchanan submitted treatment notes dated August 12 and September 16, 2013 describing her condition. He recommended physical therapy.

By decision dated October 15, 2013, OWCP denied the claim. It found that appellant had established the incident occurred as alleged, but that the medical evidence was insufficient to establish that a medical condition had been diagnosed in connection with the incident.

On April 21, 2014 appellant, through her then representative, requested reconsideration. Additional medical evidence was submitted which included an October 21, 2013 duty status report in which Dr. Buchanan diagnosed right sacroiliac joint sprain and cervical degenerative disc disease. He provided restrictions to appellant's physical activities. An October 16, 2013 MRI scan of the right shoulder demonstrated a partial-thickness supraspinatus tear. Dr. Thomas provided progress reports dated October 21 and November 6, 2013. Dr. John W. Ellis, a Board-certified family physician, provided an impairment evaluation dated July 17, 2013, received by OWCP on April 21, 2014.² He diagnosed muscle tendon unit strain of neck, deranged discs in the neck, right shoulder internal derangement, right sacroiliac joint strain, right iliotibial ligament strain, and muscle tendon unit strain of the back and iliolumbar ligament under the instant claim. Dr. Ellis opined that all diagnoses arose out of the course of employment.

By decision dated July 18, 2014, OWCP denied modification of the prior decision after considering the merits of the claim. Appellant requested reconsideration on October 7, 2014. She submitted an August 7, 2014 report in which Dr. Ellis diagnosed right sprain of neck, herniated discs in the cervical spine, right cervical spinal nerve impingement, right shoulder

² This report was prepared for another of appellant's claims, adjudicated by OWCP under File No. xxxxxx100. The instant claim was adjudicated under File No. xxxxxx729. Dr. Ellis noted a number of diagnoses under other OWCP claims, adjudicated under File Nos. xxxxxx104 and xxxxxx635. The instant claim was adjudicated under File No. xxxxxx729. Only File No. xxxxxx729 is before the Board on the present appeal.

sprain, right shoulder suprascapularis tear, right shoulder supraspinatus tear, right shoulder labral tear, acromioclavicular joint arthropathy of the right shoulder, impingement of the right shoulder, sprain of the right hip and thigh, and traumatic arthritis of the right hip. Dr. Ellis opined that these were caused by the June 13, 2013 lifting incident.

By decision dated February 11, 2015, OWCP denied modification of its prior decisions.

Appellant again requested reconsideration on February 11, 2016. In treatment notes dated October 21, 2013 to October 23, 2014, Dr. Thomas reiterated his findings and conclusions. He performed arthroscopic rotator cuff repair of the right shoulder on January 10, 2014. A right hip MRI scan dated January 22, 2015 demonstrated inflammatory arthritis of the right hip joint. Dr. Steven Teeny, also Board-certified in orthopedic surgery and an associate of Dr. Thomas, provided treatment notes dated January 24, 2014 to April 21, 2015. He performed right hip replacement on April 6, 2015.

By decision dated August 8, 2016, OWCP modified the prior decision to indicate that diagnoses in connection with the June 13, 2013 work incident had been made, but the claim remained³ denied because the evidence of record did not contain a well-reasoned medical opinion establishing a causal relationship between the diagnosed conditions and the June 13, 2013 work incident.

On August 8, 2017 appellant again requested reconsideration. She submitted an August 8, 2017 report in which Dr. Buchanan noted reviewing appellant's medical record with respect to the causation of her medical conditions, including her neck sprain and cervical radiculopathy, her shoulder sprains and rotator cuff injuries, and her right hip and sacroiliac conditions. Dr. Buchanan opined that appellant's work activities had been "a substantial contributing cause" of her shoulder, hip, and neck pains and operations, some as a major contributing cause and others by aggravation.

By decision dated August 11, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim. It found Dr. Buchanan's report irrelevant and immaterial because he did not address the June 13, 2013 injury, which is at issue in this case.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁴ Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(3).⁵ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP

³ The decision was resent to appellant on August 17 and November 3, 2016.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

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 Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

The decision before the Board in this appeal is the decision of OWCP dated August 11, 2017 denying appellant's application for reconsideration.

With her August 8, 2017 reconsideration request, appellant merely indicated by a check on an OWCP appeal request form that she was requesting reconsideration. She, therefore, did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to further review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).⁸

With respect to the third above-noted requirement under section 10.606(b)(3), the submitted report of August 8, 2017 from Dr. Buchanan is immaterial as he does not mention the June 13, 2013 employment incident and instead attributes appellant's conditions to "work activities" without identifying any particular activity. As noted, the present claim pertains to whether appellant strained her neck and right shoulder when she lifted a large box off the floor and placed it on her work chair on June 13, 2013. Dr. Buchanan did not address whether this particular incident caused or contributed to a diagnosed medical condition.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied his reconsideration request.⁹

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(b).

⁸ *Supra* note 5; *see R.M.*, 59 ECAB 690 (2008).

⁹ *M.A.*, Docket No. 16-1846 (issued October 20, 2017).

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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