



## **FACTUAL HISTORY**

OWCP accepted that appellant, a 55-year-old transportation supervisor, sustained a right shoulder and upper arm sprain on August 18, 2014 as a result of being physically assaulted by an employee at work when he grabbed her shoulder in an attempt to stop her from using a telephone. Appellant stopped work on the date of injury and then returned to full-time, regular duty on November 28, 2014.<sup>2</sup>

Appellant filed a claim for compensation (Form CA-7) for the period April 21 to 24, 2015.

In reports dated February 4 and April 21, 2015, Dr. Craig E. Whitmore, a Board-certified physiatrist, diagnosed right rotator cuff tear and shoulder pain and checked a box marked “yes” indicating that appellant was unable to work. He advised that appellant would be able to work with restrictions as of April 27, 2015.

In a May 8, 2015 letter, OWCP advised appellant that it had received her claim and noted that she had returned to work on November 28, 2014 in a full-time, full-duty capacity and then stopped working on April 21, 2015. It requested additional medical evidence establishing appellant’s disability for work during the period claimed and afforded her 30 days to respond to its inquiries.

In response, appellant submitted a May 20, 2015 narrative statement indicating that on April 21, 2015 she woke up and could not move her right arm without the assistance of her left arm. Prior to going to sleep, she had not experienced anything out of the normal. Appellant stated that she always experienced right shoulder pain since the work injury, so it was normal for her to go to bed in pain, but the April 21, 2015 event was spontaneous and occurred without warning. She reported that she called her supervisor and informed her that she was attempting to make a doctor’s appointment. Appellant was able to get an emergency appointment on April 21, 2015 where she was given an ultrasound of the right shoulder. She noted that she received an injection directly in the tear of her right shoulder in the rotator cuff.

On February 4, 2015 Dr. Whitmore noted that appellant’s chief complaint was low back pain radiating down the right leg and right shoulder pain status post trauma. He diagnosed degenerative joint and disc disease of the cervical and lumbar spine, nerve root impingement on the right L5 and S1 nerve roots in the lateral recesses, bilateral sacroiliitis, chronic low back pain, and mild right rotator cuff tendon pathology.

In an April 21, 2015 report, Dr. Whitmore indicated that appellant was in telephone contact with his office stating that she wanted to receive more injections, including a cervical injection because she could not move around. Prior to any further injections, he requested an evaluation. Appellant indicated that the right shoulder had been bothering her for a couple of days and reiterated that she could not move it. She stated that she could not go to work that day because of the discomfort. Dr. Whitmore diagnosed acute right shoulder pain, right supraspinatus tear, possibly chronic, biceps tenosynovitis, ruled out labral tear and superior labral tear from anterior to posterior (SLAP) tear, chronic degenerative joint and disc disease of the lumbar spine resulting

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<sup>2</sup> The record establishes that appellant has an open claim for a back condition under File No. xxxxxx037.

in bilateral L5-S1 radiculitis, and bilateral sacroiliitis. He found that an ultrasound of the right shoulder demonstrated tenosynovitis of the right biceps without evidence of tendinitis or rupture. Appellant had an eight millimeter supraspinatus tear with slight retraction of the distal tendon. There was a slight swelling of the bursa and mild tendinosis of the supraspinatus. The infraspinatus was normal and there was no appreciable joint effusion. Dr. Whitmore administered a right supraspinatus tendon sheath injection and took appellant off of work until April 27, 2015.

On May 26, 2015 Dr. Whitmore reported that he had been treating appellant since November 2011 for work-related pain and diagnosed mild right rotator cuff tendon pathology. He noted that appellant experienced a work-related right shoulder injury on August 18, 2014 when she had an altercation with a fellow employee. Appellant underwent a right shoulder magnetic resonance imaging (MRI) scan on September 8, 2014, which reported inflammatory arthritic changes of the acromioclavicular joint, tendinosis, and partial thickness rotator cuff tear of the subscapularis.

By decision dated June 26, 2015, OWCP denied appellant's claim for disability for the period April 21 to 24, 2015 because the medical evidence of record was insufficient to support disability due to the employment injury.

On July 7, 2015 appellant requested an oral hearing by a representative of the Branch of Hearings and Review and submitted a July 13, 2015 narrative statement reiterating the factual history of her claim. She also submitted Family and Medical Leave Act (FMLA) forms dated April 27, 2015 signed by Dr. Whitmore who opined that she was incapacitated due to chronic work-related pain for the period April 21 to 27, 2015.

In a February 12, 2016 report, Dr. Whitmore noted that appellant experienced a work-related injury to her right shoulder on August 18, 2014 when she had an altercation with a fellow employee. He indicated that she continued to work through her pain with medication and restrictions, but the medications were not helping. Appellant returned to Dr. Whitmore's office on April 21, 2015 with continued severe right shoulder pain related to the original August 18, 2014 injury. Dr. Whitmore administered an injection to treat the right shoulder on April 21, 2015 and she followed his advice to rest for three days. He explained that appellant took three days off of work due to her work-related right shoulder condition and his recommendations.

A telephonic hearing was held before an OWCP hearing representative on February 8, 2016. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a February 25, 2016 report from Dr. Whitmore who reiterated his February 12, 2016 report, but edited it to state that appellant had been "physically assaulted by a fellow employee" and had been advised to take four days off of work.

By decision dated March 15, 2016, OWCP's hearing representative affirmed the prior decision, finding that the medical evidence submitted was insufficient to establish appellant's disability due to the April 21, 2015 injection was causally related to the accepted condition of right shoulder sprain.

On March 22, 2016 appellant requested reconsideration and submitted a duty status report (Form CA-17) dated June 20, 2016.

In a June 7, 2016 report, Dr. Whitmore noted that appellant had several medical problems which disallowed her from working more than five days per week. On July 26, 2016 he opined that appellant was totally disabled for work for the period July 12 to August 22, 2016 due to a disc herniation.

By decision dated August 18, 2016, OWCP denied modification of its prior decision.

On September 9, 2016 appellant requested reconsideration and submitted narrative statements reiterating the factual history of her claim and arguing that OWCP failed to consider previously submitted medical evidence from her doctor, Dr. Todd Frush, a Board-certified orthopedic surgeon. She also submitted a police report dated August 18, 2014 documenting her assault. Appellant resubmitted medical evidence dated October 1, November 13, and December 11, 2014 from Dr. Frush diagnosing right partial tear of rotator cuff, right biceps tenosynovitis, and right rotator cuff syndrome and providing the following work restrictions: no overhead reaching; no lifting/carrying over 20 pounds; and no pushing/pulling over 20 pounds. She further resubmitted an August 18, 2014 emergency room discharge report and a work excuse note dated December 3, 2015. Appellant also resubmitted reports dated May 26, 2015 and February 25, 2016 from Dr. Whitmore.

By decision dated December 19, 2016, OWCP denied appellant's request for reconsideration without a merit review because she failed to advance a relevant legal argument or submit any relevant and pertinent new evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA<sup>3</sup> sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."<sup>4</sup> This meaning, for brevity, is expressed as disability for work.<sup>5</sup> For each period of disability claimed, an employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.<sup>6</sup> Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 20 C.F.R. § 10.5(f); *see also William H. Kong*, 53 ECAB 394 (2002).

<sup>5</sup> *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>6</sup> *See William A. Archer*, 55 ECAB 674 (2004).

issues, which must be proved by the preponderance of the reliable, probative, and substantial medical evidence.<sup>7</sup>

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA, and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish that she was totally disabled for the period April 21 to 24, 2015 causally related to her employment injuries. While OWCP accepted that appellant sustained a right shoulder and upper arm sprain, she bears the burden to establish through the submission of medical evidence that she was disabled during the claimed time period and that her disability was causally related to the accepted injury.<sup>9</sup> The Board finds that she did not submit rationalized medical evidence explaining how the employment injuries materially worsened or aggravated her right shoulder and upper arm conditions and caused her to be disabled for work for the period April 21 to 24, 2015.

In his reports, Dr. Whitmore diagnosed right rotator cuff tear, degenerative joint and disc disease of the cervical and lumbar spine, nerve root impingement on the right L5 and S1 nerve roots in the lateral recesses, bilateral sacroiliitis, chronic low back pain, and mild right rotator cuff tendon pathology. He reported that he had seen appellant since November 2011 for work-related pain and indicated that more recently he had been treating her for an August 18, 2014 work-related right shoulder injury. In his February 12, 2016 report, Dr. Whitmore noted that appellant returned to his office on April 21, 2015 with continued severe right shoulder pain related to the original August 18, 2014 employment injury, he administered an injection, and then advised her to rest for three days. Subsequently, in a February 25, 2016 report, he reiterated his February 12, 2016 report, but edited it to note that appellant had been “physically assaulted by a fellow employee” and had been advised to take four days off of work. Although Dr. Whitmore opined that appellant was totally disabled for work, his opinion is conclusory in nature, and fails to explain in detail how the accepted medical conditions were responsible for appellant’s disability and why she could not perform her federal employment during the period claimed.<sup>10</sup> Consequently, the Board finds that Dr. Whitmore’s reports are insufficient to establish appellant’s claim that she was totally disabled for the period April 21 to 24, 2015 causally related to her employment injuries.

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<sup>7</sup> See *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>8</sup> *Id.*

<sup>9</sup> See *supra* notes 7 and 8. See also *V.P.*, Docket No. 09-0337 (issued August 4, 2009).

<sup>10</sup> See *J.J.*, Docket No. 15-1329 (issued December 18, 2015).

The Board notes that the previously submitted medical evidence of record fails to address the period claimed and, therefore, lacks probative value to establish appellant's claim.

The Board finds appellant's doctor has not provided sufficiently rationalized medical opinion evidence establishing that she was disabled during the period April 21 to 24, 2015 causally related to the employment injuries. Thus, appellant has not met her burden of proof to establish that she is entitled to compensation for total disability.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>11</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>12</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>13</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>14</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>15</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's September 9, 2016 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that she did not advance a relevant legal argument not previously considered by OWCP. Appellant argued that OWCP had failed to consider all the evidence she properly submitted. The Board, however, finds that OWCP properly considered all of the evidence of record before denying appellant's claims for disability in its August 18, 2016 decision.

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<sup>11</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>12</sup> 20 C.F.R. § 10.607.

<sup>13</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>14</sup> 20 C.F.R. § 10.606(b)(3).

<sup>15</sup> *Id.* at § 10.608(a), (b).

Consequently, appellant is 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).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. Along with her reconsideration request, appellant submitted a police report dated August 18, 2014 documenting her assault. The Board finds that submission of this document did not require reopening appellant's case for merit review. As OWCP denied appellant's claim based on the lack of supportive medical evidence establishing disability for the period April 21 to 24, 2015 and this document does not constitute medical evidence, it is irrelevant and fails to constitute relevant and pertinent new evidence. Thus, this evidence is insufficient to require OWCP to reopen appellant's claim for consideration of the merits.<sup>16</sup>

In support of her request for reconsideration, appellant resubmitted medical evidence dated October 1, November 13, and December 11, 2014 from Dr. Frush diagnosing right partial tear of rotator cuff, right biceps tenosynovitis, and right rotator cuff syndrome and providing work restrictions. She further resubmitted an August 18, 2014 emergency room discharge report and a work excuse note dated December 3, 2015. 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 prior decisions. Moreover, the Board finds that this medical evidence fails to address the period claimed and is, therefore, irrelevant to the issue that was before OWCP. Thus, appellant has not established a basis for reopening her case.<sup>17</sup>

Appellant also resubmitted reports dated May 26, 2015 and February 25, 2016 from Dr. Whitmore. The Board finds that the submission of these reports 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 18, 2016 decision. As the reports repeat evidence already in the case record, they are duplicative and fail to constitute relevant and pertinent new evidence.<sup>18</sup>

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

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish that she was totally disabled for the period April 21 to 24, 2015 causally related to her employment injury. The Board further 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>16</sup> See *L.H.*, 59 ECAB 253 (2007).

<sup>17</sup> See *D.K.*, 59 ECAB 141 (2007).

<sup>18</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 19 and August 18, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 2, 2018  
Washington, DC

Christopher J. Godfrey, 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