

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

N.M., Appellant)
and) Docket No. 18-0354
U.S. POSTAL SERVICE, POST OFFICE,)
Brooklyn, NY, Employer) Issued: July 2, 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 December 11, 2017 appellant filed a timely appeal from an October 11, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated March 2, 2017 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 this 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 June 1, 2016 appellant, then a 57-year-old mail processor, filed a notice of recurrence (Form CA-2a) for a bilateral shoulder condition alleging that, on May 14, 2016, she sustained a

¹ 5 U.S.C. § 8101 *et seq.*

recurrence of disability of a September 15, 2006 work-related injury under OWCP File No. xxxxxx109. She stopped work on May 14, 2016.

An OWCP memorandum dated June 15, 2016 indicated that appellant's recurrence claim was to be processed as a new traumatic injury with a date of injury of May 14, 2016.

Appellant received medical treatment from Dr. Frank Watkins, a Board-certified orthopedic surgeon. In an attending physician's (Form CA-20) and duty status reports (Form CA-17) dated May 23, July 29, and August 31, 2016, Dr. Watkins noted a date of injury of September 15, 2006 and related that a magnetic resonance imaging (MRI) scan showed complete rotator cuff tear. He reported that appellant had left shoulder tendinitis as a result of a work-related accident. Dr. Watkins checked a box marked "yes" indicating that appellant's condition was caused or aggravated by the described employment activity.

OWCP received a September 24, 2014 offer of modified assignment.

By development letter dated August 12, 2016, OWCP requested that appellant respond to an attached questionnaire and provide additional medical evidence in order to establish her claim. Appellant was afforded 30 days to submit additional evidence. A similar letter was sent to the employing establishment.

In a September 6, 2016 letter, Dr. Watkins indicated that appellant was his patient relative to a left shoulder injury that she sustained at work on May 14, 2016. He provided range of motion findings on physical examination and diagnosed a left rotator cuff tear. Dr. Watkins noted that appellant was totally disabled until October 1, 2016.

On September 13, 2016 OWCP received appellant's response to its development letter. Appellant described that on May 14, 2016 she was typing on the computer, picking up packages, and placing them in hampers when she felt pain in her left shoulder. She explained that, since the September 15, 2006 employment injury, her symptoms were continuously present, but she first noticed it getting worse on May 14, 2016.

By decision dated September 15, 2016, OWCP denied appellant's claim. It accepted that the May 14, 2016 employment incident occurred as alleged and that appellant was diagnosed with a left shoulder condition, but denied her claim because the medical evidence submitted was insufficient to establish causal relationship between her left shoulder condition and the May 14, 2016 accepted incident.

On October 4, 2016 appellant requested an oral hearing. The hearing was held on January 5, 2017.

In an October 14, 2016 letter, Dr. Watkins reiterated that appellant was under his care for a May 14, 2016 work-related left shoulder injury. He reported physical examination findings of limited range of motion and positive impingement. Dr. Watkins diagnosed left rotator cuff tear and indicated that appellant was totally disabled.

OWCP also received a December 31, 2015 left shoulder MRI scan report, which noted a full thickness tear of the supraspinatus tendon.

By decision dated March 2, 2017, an OWCP hearing representative affirmed the September 15, 2016 denial decision. He found that the medical evidence submitted failed to establish that appellant sustained a work-related left shoulder injury on May 14, 2016.

On July 13, 2017 appellant requested reconsideration. She alleged that she sustained a work-related injury on September 15, 2006 and had a recurrent injury on May 14, 2016.

In February 8 and 17, 2017 reports, Dr. Watkins indicated that appellant sustained a work-related left shoulder injury on May 14, 2016 when she was typing on her computer. He reviewed appellant's history and noted that appellant's original left shoulder pain resulted from a previous September 15, 2006 employment injury. Dr. Watkins provided physical examination findings and diagnosed rotator cuff tear.

OWCP received a February 17, 2017 progress report by Dr. Raz Winiarsky, a Board-certified orthopedic surgeon, who noted a date of injury of May 14, 2016 and diagnosis of left rotator cuff sprain. He checked a box marked "yes" indicating that the incident described was the cause of appellant's injury.

In narrative reports and forms dated March 17 to June 16, 2017, Dr. Winiarsky described the accepted May 14, 2016 employment incident. He reviewed appellant's history and provided physical examination findings. Dr. Winiarsky diagnosed right shoulder impingement syndrome and left rotator cuff sprain. He checked a box marked "yes" indicating that the incident described was the cause of appellant's injury.

By decision dated October 11, 2017, OWCP denied reconsideration of the merits of appellant's claim. It found that appellant had not met the requirements of 5 U.S.C. § 8128(a) sufficient to warrant merit review. OWCP found that the additional medical reports submitted were cumulative and substantially similar to medical evidence previously considered.

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 payment of compensation at any time on his or her own motion or on application.²

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.³

² 5 U.S.C. § 8128(a)

³ 20 CFR § 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).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁵ 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.⁶

ANALYSIS

In its March 2, 2017 merit decision, OWCP's hearing representative affirmed the denial of appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish that her left shoulder injury was causally related to the accepted May 14, 2016 employment incident. Appellant subsequently requested reconsideration on July 13, 2017 and submitted additional medical evidence.

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of the claim, under 5 U.S.C. § 8128(a).

Appellant did show that OWCP erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by OWCP, and did not submit relevant and pertinent new evidence not previously considered by OWCP.

In support of her reconsideration request, appellant submitted reports by Dr. Watkins dated February 8 and 17, 2017. Dr. Watkins reiterated that on May 14, 2016 appellant was typing on the computer and experienced left shoulder pain. He conducted an examination and diagnosed left rotator cuff tear. The Board notes that Dr. Watkins merely repeated his opinion from his previous reports dated May 23 to August 31, 2016 that appellant sustained a work-related injury on May 14, 2016. The Board has held that the submission of evidence which duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.⁷

Appellant also submitted reports by Dr. Winiarsky dated February 17 to June 16, 2017. Dr. Winiarsky related that on May 14, 2016 appellant sustained an injury to her bilateral shoulders when at work. He diagnosed right shoulder impingement syndrome and left rotator cuff sprain. Dr. Winiarsky checked a box marked "yes" indicating that the incident described was the cause of appellant's injury. These reports, however, are also substantially similar to the previously submitted medical evidence of record. Medical evidence which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.⁸ Dr. Winiarsky did not provide any recent physical examination findings or otherwise provide any detailed discussion

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁶ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁷ *E.M.*, Docket No. 09-0039 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

⁸ *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

or well-rationalized medical explanation to establish a causal relationship between appellant's left shoulder tear and the accepted May 14, 2016 employment incident. Accordingly, the Board finds that appellant did not provide OWCP with any evidence which has met the requirements of 20 C.F.R. § 10.606(b)(3) sufficient to require further merit review of her claim.

The Board finds, therefore, that appellant has not met any of the regulatory requirements and OWCP properly denied her request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).⁹

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).

ORDER

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

Issued: July 2, 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

⁹ A.K., Docket No. 09-2032 (issued August 3, 2010); M.E., 58 ECAB 694 (2007); Susan A. Filkins, 57 ECAB 630 (2006).