

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

K.T., Appellant)	
)	
and)	Docket No. 18-0193
)	Issued: May 21, 2018
U.S. POSTAL SERVICE, MOUNDSVILLE)	
POST OFFICE, Moundsville, WV, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 November 6, 2017 appellant, through counsel, filed a timely appeal from an August 29, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated April 25, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction over the merits of the case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

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 counsel contends that appellant's medical evidence was "nitpicked" and OWCP should have conducted a merit review.

FACTUAL HISTORY

On September 3, 2013 appellant, then a 59-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a torn rotator cuff in her left arm due to federal employment duties she performed for 22 years, which required constant repetitive arm movement while reaching, driving, lifting, casing, and pulling. In her accompanying statement, she alleged that both arms had been hurting and that she tried to work through the pain. Appellant underwent a magnetic resonance imaging (MRI) scan on July 25, 2013 which demonstrated a left rotator cuff tear. She noted that for the last 10 years she had been assigned a mounted route which required constant arm use including lifting, reaching, casing, closing the door, and pulling on the emergency brake.

Dr. Vic Wood, an osteopath specializing in family medicine, completed a report on June 26, 2013 and diagnosed tendinitis of the left shoulder, muscle spasm, and generalized pain. He also examined appellant on July 1 and 11, 2013 due to left shoulder pain. Dr. Wood noted that appellant reported joint pain, stiffness, and swelling, but that x-rays were negative. He provided a left shoulder injection and recommended a left shoulder MRI scan. On September 3, 2013 Dr. Wood examined appellant for right shoulder pain, but provided no further diagnosis in his notes and form report of the same date.

Dr. Mary Margaret Haus, a Board-certified orthopedic surgeon, examined appellant on August 2, 2013 due to left shoulder pain. She reviewed appellant's MRI scan and found that it confirmed the presence of partial thickness tears. Dr. Haus diagnosed impingement and partial thickness tear.

In a development letter dated October 17, 2013, OWCP requested that appellant provide additional factual and medical evidence in support of her occupational disease claim. It afforded appellant 30 days to respond.

Dr. Haus completed a note on November 1, 2013 and diagnosed acromioclavicular (AC) degenerative joint disease and impingement. She opined that this condition was exacerbated by work at or above shoulder level as part of appellant's federal job duties. Dr. Haus concluded, "The job therefore contributes to her shoulder issue."

By decision dated December 13, 2013, OWCP denied appellant's occupational disease claim, finding that although she had established her job duties and a diagnosed condition, she had not provided medical evidence establishing causal relationship between her AC degenerative joint disease and her federal employment duties.

Following the December 13, 2013 decision, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She asserted that there was no activity other than work which could have contributed to her torn rotator cuff as she did not participate in athletic activities. Appellant clarified that she attributed her torn rotator cuff to overuse and repetitive motion such as casing mail for 90 minutes every morning. Dr. Wood also provided a brief statement that her left shoulder damage was "likely caused by the repetitive nature of [appellant's] job."

On October 14, 2013 appellant underwent a right shoulder MRI scan which demonstrated subchondral cystic change in the humeral head, rotator cuff impingement, and full-thickness retracted tear of the supraspinatus tendon. She also exhibited partial tears of the distal infraspinatus and subscapularis tendons. On February 5, 2014 Dr. Michael M. Zilles, a Board-certified orthopedic surgeon, performed a right shoulder rotator open subacromial decompression, distal clavicle excision, and rotator cuff repair.

By decision dated June 25, 2014, OWCP's hearing representative found that the medical evidence of record did not establish causal relationship between appellant's diagnosed conditions and her accepted federal employment duties.

On May 1, 2015 appellant, through counsel, requested reconsideration of the June 25, 2014 decision. In support of this request, he provided documents regarding the likelihood of shoulder injuries in postal employees.

By decision dated July 28, 2015, OWCP reviewed the merits of appellant's claim, but denied modification of its June 25, 2014 decision.

On April 27, 2016 appellant, through counsel, requested reconsideration of the July 28, 2015 decision. On April 14, 2016 Dr. Alan Tissenbaum, Board-certified in sports medicine and orthopedic sports medicine, completed a note and opined that appellant's shoulder injuries were consistent with job duties as a mail carrier. He attributed her condition to lifting 70 pounds and carrying a mailbag of 30 to 35 pounds.

By decision dated July 21, 2016, OWCP reviewed the merits of appellant's claim, but denied modification of its July 28, 2015 decision.

On March 29, 2016 appellant underwent a left shoulder MRI scan which demonstrated moderate atrophy of the supraspinatus and mild-to-moderate atrophy of the infraspinatus which had progressed. She also exhibited a recurrent tear of the supraspinatus and infraspinatus as well as mild degenerative disease of the AC joint.³

On February 3, 2017 appellant, through counsel, requested reconsideration of the July 21, 2016 OWCP decision. Counsel submitted a report from Dr. Tissenbaum dated September 26, 2016 which attributed appellant's left shoulder condition to her federal job duties of lifting 70

³ On September 9, 2016 counsel appealed the July 21, 2016 decision to the Board. In a letter dated November 4, 2016, he requested that the appeal be dismissed. By Order Dismissing Appeal dated February 2, 2017, the Board granted this request. *Order Dismissing Appeal*, Docket No. 16-1799 (issued February 2, 2017).

pounds and carrying a mailbag weighing 30 pounds as well as the repetitive motion of casing mail for about two hours a day. Dr. Tissenbaum noted that he had performed a left shoulder revision arthroplasty on May 3, 2016 for chronic rotator cuff arthropathy.

By decision dated April 25, 2017, OWCP reviewed the merits of appellant's claim, but denied modification of its July 21, 2016 decision.

On June 8, 2017 appellant, through counsel, requested reconsideration of the April 25, 2017 decision. In support of this request, counsel provided Dr. Tissenbaum's May 3, 2016 operative report for appellant's left shoulder total arthroplasty. He also provided a copy of her position description as a city carrier which noted that she may be required to carry mail weighing up to 35 pounds in shoulder satchels and to load or unload containers of mail weighing up to 70 pounds. In a letter dated May 21, 2014, the employing establishment noted that appellant had been on a mounted route for over a decade and that this entailed mostly driving, lifting up to 25 pounds in letter trays and tubs.

By decision dated August 29, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence submitted in support of her request for reconsideration did not address the reason for the denial of her claim, which was the lack of medical evidence establishing a causal relationship between her diagnosed condition and her accepted federal employment duties.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for review without reopening the case for a review on the merits.⁷

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ He or she needs only

⁴ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

to submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set for at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁰

The Board has held that the submission of evidence which repeats or duplicates evidence already of record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the 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.¹¹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim.

On June 8, 2017 appellant, through counsel, requested reconsideration of OWCP's April 25, 2017 decision which denied her occupational disease claim. The underlying issue on reconsideration is medical in nature, namely, whether appellant established that the implicated factors of her federal employment caused or contributed to her claimed shoulder conditions.

In her July 8, 2017 request for reconsideration, appellant 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. Thus, she is not entitled to a review of the merits of her claim based on the first as second above-noted requirements under section 10.606(b)(3).¹²

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of reconsideration. The letter from the employing establishment regarding her work duties and the copy of her position description are not relevant to the underlying medical issue. These documents do not provide medical evidence that appellant's bilateral shoulder conditions were caused or aggravated by her accepted employment duties. Similarly, the May 3, 2016 operative report does not address the issue of causal relationship between appellant's diagnosed condition and her employment duties. This medical report merely details the events of appellant's May 3, 2016 surgery. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.¹³ The Board finds that, contrary to counsel's

⁹ *Id.*; see also *Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *Supra* note 8; *Annette Louise*, 54 ECAB 783 (2003).

¹¹ *M.E.*, 58 ECAB 694 (2007).

¹² *S.J.*, Docket No. 17-1798 (issued February 23 2018).

¹³ *Id.*

contentions on appeal, there was no basis for reopening appellant's claim for consideration of the merits.

The Board accordingly finds that appellant failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 21, 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