

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

P.P., Appellant)	
)	
and)	Docket No. 18-0184
)	Issued: August 22, 2019
DEPARTMENT OF JUSTICE, BUREAU OF)	
PRISONS, Fairton, NJ, Employer)	
)	

Appearances:
Thomas R. Uliase, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 2, 2017 appellant, through counsel, filed a timely appeal from a June 5, 2017 merit decision and an October 24, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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.*

³ The Board notes that following the June 5, 2017, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a recurrence of disability, commencing February 22, 2013, causally related to his accepted June 9, 2012 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 11, 2012 appellant, then a 42-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on June 9, 2012 he strained the right side of his upper back when he twisted around to retrieve a shotgun in the back of his truck while in the performance of duty. He stopped work on that date. OWCP accepted appellant's claim for right rhomboid strain and sprain of back, thoracic region and paid wage-loss compensation. On July 30, 2012 appellant returned to full-time light-duty work. He continued to receive medical treatment.

In examination notes and attending physician reports (Form CA-20) dated February 21 and 22, 2013, Dr. Kimberley Y. Smith, Board-certified in physiatry and pain management noted a date of injury of June 9, 2012. She provided examination findings and diagnosed thoracic spine pain, thoracic sprain, and displacement of thoracic intervertebral disc without myelopathy. Dr. Smith indicated that appellant was totally disabled commencing February 22, 2013.

In examination notes and attending physician's reports dated March 5 and 6, 2013, Dr. Rahul Shah, a Board-certified orthopedic neck and spine surgeon, reviewed appellant's history and noted a date of injury of June 9, 2012. He provided examination findings and diagnosed cervicalgia, neck strain, thoracic spine pain, displacement of thoracic intervertebral disc without myelopathy, and thoracic sprain and strain. Dr. Shah indicated that appellant was unable to work.

On March 18, 2013 appellant filed a notice of recurrence (Form CA-2a) alleging that commencing February 22, 2013 he sustained a recurrence of disability causally related to the June 9, 2012 employment injury. He explained that, since the June 9, 2012 employment injury, he continued to experience worsening pain in his back, shoulder, neck, and arm. Appellant noted that on February 22, 2013 Dr. Smith examined him and recommended that he not work.

On the reverse side of the claim form appellant's supervisor confirmed that, following the original injury, appellant had worked sedentary duty from July 27, 2012 through February 22, 2013 when he was placed on total disability due to a worsening of his employment-related conditions. Appellant submitted various claims for wage-loss compensation (Form CA-7) for the period April 6 to July 12, 2013.

In a March 19, 2013 examination note, work capacity evaluation form, and attending physician's report, Dr. Shah again noted a date of injury of June 9, 2012, provided physical

⁴ Docket No. 16-1232 (issued December 23, 2016).

examination findings, and noted the same diagnoses as his previous report. He indicated that appellant was not able to work.

In a development letter dated April 2, 2013, OWCP advised appellant that to establish his recurrence claim he must show that he was unable to work his limited-duty assignment because of a change in the nature and extent of his work-related injury or a change in the nature and extent of his light-duty requirements. It requested that he respond to specific questions regarding the February 22, 2013 date of alleged recurrence and submit medical evidence which established why he was unable to work during his claimed period as a result of his accepted injury. A similar letter of even date was sent to the employing establishment. Appellant was afforded 30 days to respond.

On April 22, 2013 OWCP received appellant's response to its development letter. Appellant related that on February 22, 2013 Dr. Smith placed him on full disability due to his continually worsening condition and negative results from two injections in his thoracic spine.

Appellant continued to receive medical treatment from Dr. Smith and submitted medical notes dated April 22 and 25, 2013, a June 10, 2013 work capacity evaluation form and attending physician's report, and a June 21, 2013 narrative report. Dr. Smith noted a date of injury of June 9, 2012 and diagnoses of lumbar spondylosis and cervical and thoracic disc herniation. She checked a box marked "yes" indicating that appellant's condition was work related. Dr. Smith reported that she originally placed appellant on sedentary duties as of December 10, 2012, but then placed him off work commencing February 21, 2013.

By decision dated July 18, 2013, OWCP denied appellant's claim for a recurrence of disability finding that the medical evidence submitted failed to establish that his accepted right rhomboid and thoracic sprain conditions had worsened such that he was unable to work his light-duty position commencing February 22, 2013.

On July 29, 2013 OWCP received appellant's request, through counsel, for a hearing before a representative of OWCP's Branch of Hearings and Review. On November 8, 2013 a hearing was held with counsel present.

Following the hearing, appellant submitted a December 10, 2013 report by Dr. Shah who reviewed appellant's history and conducted a physical examination. Dr. Shah advised that appellant remain off work.

By decision dated January 15, 2014, the hearing representative affirmed the July 8, 2013 decision, finding that there was insufficient evidence of record to establish that appellant was unable to work on or after February 22, 2013 as a result of his accepted June 9, 2012 employment injury.

Appellant, through counsel, requested reconsideration on February 27, 2014 and, in support thereof, he submitted a February 12, 2014 narrative report by Dr. Shah who described the history of the June 9, 2012 employment injury and the medical treatment that appellant received for his accepted conditions. Dr. Shah opined that appellant's current symptoms were directly related to his employment injury of June 9, 2012 and explained that his "discomfort continued to worsen until his point of no longer being able to work on February 22, 2013 as a direct result of his work-related injury of June 9, 2012."

By decision dated November 14, 2014, OWCP denied appellant's request for reconsideration of the January 15, 2014 decision. Appellant again requested reconsideration on May 7, 2015.

In a February 27, 2015 narrative report, Dr. Shah noted the history of injury and the conservative medical treatment that appellant received for his accepted conditions. He reported: "it appears that appellant's discomfort was causally related to his twisting injury, which caused an onset of neck discomfort as well as subsequent arm discomfort."

By decision dated March 10, 2016, OWCP denied modification of a prior merit decision dated January 15, 2014. It determined that the newly submitted medical reports failed to establish a causal relationship between appellant's current complaints and his accepted June 9, 2012 employment injury.

On May 25, 2016 appellant filed an appeal with the Board.

By decision dated December 23, 2016, the Board affirmed the March 10, 2016 OWCP decision. It determined that the evidence of record failed to establish that appellant sustained a recurrence of disability on February 22, 2013 causally related to the June 9, 2012 employment injury.

On March 8, 2017 appellant, through counsel, requested reconsideration.⁵ He related that he was enclosing a February 16, 2017 report by Dr. Shah, which provided "abundant reasons" for why appellant was unable to work "beginning February 23, 2013"⁶ As a result of the original June 9, 2012 twisting injury at work.⁷

In the February 16, 2017 narrative report submitted by counsel, Dr. Shah opined that the reason for appellant's absence commencing February 23, 2013 was related to the work-related injury of June 9, 2012. He explained that the rationale was explained by the nature of the relationship within the diagnosis and mechanism of injury identified by the claimant. Dr. Shah reported: "it appears as though the patient's discomfort was causally related to his twisting injury which caused an onset of neck discomfort as well as subsequent arm discomfort." He related that, based on the complete medical background, there was "clear medical rationale for the diagnosed conditions, cervical radiculopathy and cervical disc herniation (and the specific employment

⁵ Although appellant claimed to be filing a request for reconsideration from the Board's December 23, 2016 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the December 23, 2016 Board decision was the last merit decision, OWCP's March 10, 2016 decision was the appropriate subject of possible modification by OWCP.

⁶ Dr. Shah's use of the date February 23, 2013 appears to be a typographical error.

⁷ Counsel also alleged that the Board presumably denied authorization for cervical surgery and requested a determination on the need for cervical fusion. The Board, however, did not address authorization for cervical surgery. Furthermore, the record does not contain a final, adverse decision by OWCP regarding the issue of authorization for cervical fusion surgery. Accordingly, this issue is not before the Board at this time. *See* 5 U.S.C. § 8149; 20 C.F.R. §§ 501.2(c) and 501.3(a).

factors of twisting and applying axial plane force and torque) which justifies medical reason for the conclusions and the reports herein too.”

By decision dated June 5, 2017, OWCP denied modification of the March 10, 2016 decision. It found that Dr. Shah’s February 16, 2017 narrative report lacked sufficient medical rationale to support his opinion that appellant sustained a recurrence of disability commencing February 22, 2013 causally related to the accepted June 9, 2012 employment injury.

On July 27, 2017 appellant, through counsel, requested reconsideration of the June 5, 2017 decision. He indicated that he was enclosing an addendum report by Dr. Shah, which sufficiently explained how the mechanism of injury, particularly the “twisting and twerking” of the neck, caused appellant’s current cervical condition. Counsel alleged that there was abundant medical evidence of record to show that appellant suffered an overall worsening of his work-related condition commencing February 23, 2013.

In a June 28, 2017 narrative report, Dr. Shah described the June 9, 2012 employment injury and noted that appellant had initially been diagnosed with right rhomboid and thoracic conditions. He opined that there was “clear causality of [appellant’s] symptomatology of rhomboid and thoracic pathology as it relates to C7 as this is the area where C7 referred pain is emanating.” Dr. Shah further explained that based on the mechanism of injury, specifically “bending, twisting, and twerking of the neck,” and without this symptomatology after the work-related injury, it was clear that appellant’s current symptoms were causally related to the work-related injury. He concluded that appellant was having worsening symptomatology to the point that he was unable to effectively move his arm or his neck without experiencing significant incapacitating pain, which required appellant to stop work commencing February 23, 2013. Dr. Shah reported that appellant’s worsening symptomatology was “all related” to the work-related injury.

By decision dated October 24, 2017, OWCP denied appellant’s request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that Dr. Shah’s July 26, 2017 report was cumulative and substantially similar to medical evidence already contained in the record and which had previously been considered.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.⁸ This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee’s physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee’s physical limitations.⁹

⁸ 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

⁹ *Id.*

OWCP procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. OWCP does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.¹⁰

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.¹¹ Where no such rationale is present, the medical evidence is of diminished probative value.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability, commencing February 22, 2013, causally related to his accepted June 9, 2012 employment injury.

Preliminarily, the Board notes that it is unnecessary for it to consider the evidence appellant submitted prior to the issuance of OWCP's March 10, 2016 decision because the Board has already considered that evidence in its December 23, 2016 decision.¹³ Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁴

Following the Board's decision of December 23, 2016, which affirmed the denial of appellant's recurrence of disability claim, appellant submitted to OWCP a February 16, 2017 narrative report, in which Dr. Shah opined that appellant's absence from work commencing February 23, 2013 was related to the June 9, 2012 employment injury. Dr. Shah reported that appellant's discomfort "was causally related to his twisting injury which caused an onset of neck discomfort as well as subsequent arm discomfort." He further explained that based on the complete medical background, there was "clear medical rationale for the diagnosed conditions, cervical radiculopathy and cervical disc herniation (and the specific employment factors of twisting and applying axial plane force and torque)." Although Dr. Shah opined in the February 16, 2017 report that appellant was unable to work commencing February 23, 2013, he failed to provide medical rationale explaining how his accepted conditions of right rhomboid and thoracic strains had changed or worsened to the extent that he was no longer able to work his modified-duty assignment

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013). *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

¹¹ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

¹² *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

¹³ *Supra* note 4.

¹⁴ *T.H.*, Docket No.18-1585 (issued March 22, 2019).

offered by the employing establishment. Rather, he merely noted that appellant had an onset of neck and arm discomfort. The Board has found that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a proper medical opinion on the issue of disability.¹⁵ Although Dr. Shah's report is generally supportive of causal relationship, he did not provide objective evidence and medical rationale explaining the basis of his opinion regarding causal relationship. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given period of disability was related to an employment injury.¹⁶ Accordingly, the Board finds that Dr. Shah has not provided a sufficiently rationalized medical opinion explaining how or why appellant was disabled from work commencing February 22, 2013 due to objective medical findings substantiating disability.¹⁷

On appeal counsel asserts that Dr. Shah's medical report corrected the deficiencies identified by the Board in its December 23, 2016 decision. He further asserts that Dr. Shah provided firm diagnoses of cervical radiculopathy and cervical disc herniation, and that he adequately explained how appellant's specific employment factors contributed to his current neck symptoms resulting in an inability to work. As explained above, however, Dr. Shah's medical reports are insufficient to establish that appellant's June 9, 2012 employment injury had worsened to the extent that he was unable to perform the duties of his limited-duty job assignment. Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹⁸ As appellant has not provided such rationalized medical evidence in this case, he has not met his burden of proof to establish his claim.

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 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 compensation at any time on his own motion or on application.¹⁹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

¹⁵ *P.D.*, Docket No. 14-0744 (issued August 6, 2014); *G.T.*, 59 ECAB 447 (2008).

¹⁶ *See Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁷ *See S.B.*, Docket No. 13-1162 (issued December 12, 2013).

¹⁸ *L.D.*, Docket No. 19-0039 (issued May 7, 2019); *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

¹⁹ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁰

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²¹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.²² 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.²³

ANALYSIS -- ISSUE 2

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

Appellant has not established that OWCP erroneously applied or interpreted a specific point of law or advanced a new and relevant legal argument not previously considered. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of his July 27, 2017 reconsideration request, appellant submitted a new medical report by Dr. Shah. In a June 28, 2017 narrative report, Dr. Shah described the June 9, 2012 employment injury and opined that appellant's current neck and arm symptoms were causally related to the work-related injury. The Board finds that, although Dr. Shah's June 28, 2017 report was not previously considered by OWCP, it is substantially similar and cumulative of evidence previously considered and reviewed by OWCP, and does not constitute a basis for reopening the case.²⁴ Accordingly, the Board finds that this report did not constitute relevant and pertinent new evidence not previously considered by OWCP. As such, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).²⁵

²⁰ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

²¹ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

²² *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

²³ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁴ Evidence that repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *M.B.*, Docket No. 16-1681 (issued December 14, 2017); *Denis M. Dupor*, 51 ECAB 482 (2000).

²⁵ *See* 20 C.F.R. § 10.606(b)(3)(iii).

The Board accordingly finds that appellant has not met 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.²⁶

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability, commencing February 22, 2013, causally related to his accepted June 9, 2012 employment injury. The Board also finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 24 and June 5, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 22, 2019
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

²⁶ *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *see A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).