

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

S.C., Appellant)	
)	
and)	Docket No. 19-1305
)	Issued: December 9, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Orlando, FL, Employer)	
)	

Appearances:
Wayne Johnson, 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 May 24, 2019 appellant, through counsel, filed a timely appeal from a November 30, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 20, 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 this 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).

FACTUAL HISTORY

On August 17, 2017 appellant, then a 56-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging soreness and pain in her left arm due to factors of her federal employment including "repetitive motion and lifting." She related that, due to the restrictions placed on her right shoulder as a result of a work-related right rotator cuff surgery, she relied on her left arm while sorting mail in the manual outgoing operations. Appellant noted that she first became aware of her condition on May 10, 2017 and first realized its relation to her federal employment on August 16, 2017. On the reverse side of the claim form, the employing establishment referenced her limited-duty work restrictions as a result of an accepted July 20, 2015 traumatic injury claim for a right shoulder sprain and right shoulder impingement syndrome under OWCP File No. xxxxxx323. Appellant did not stop work.

In an accompanying narrative statement, appellant reported that in May 2017 she felt a sharp pain in her left elbow as she was extending her arm out to throw a package while she was in "manual outgoing operations." She explained that her assignments in manual outgoing operations consisted of sorting and scanning mail as well as making and assigning placards. Appellant further explained that the repetitive motions involved with throwing and tossing mail caused soreness and tenderness in her left elbow and wrist. She performed these duties five days a week for five hours per day.

Appellant submitted an unsigned January 27, 2017 medical report noting pain in her right upper extremity.

An undated and unsigned duty status report (Form CA-17) indicated that appellant was partially disabled from employment and provided work restrictions.

OWCP also received a position description indicating that appellant was responsible for loading, unloading, and moving bulk mail and performing other duties incidental to the movement and processing of mail.

In a development letter dated August 30, 2017, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of medical and factual evidence necessary to support her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested information. It sent a similar letter of even date requesting additional information from the employing establishment.

In a September 19, 2017 response to OWCP's questionnaire, appellant described her contributing employment-related activities as extending her left arm and flexing her wrist in order to sort mail on a continuous basis five days a week for five hours a day. She also explained that she experienced continuous pain in her left arm while working in manual outgoing operations on May 10, 2017.

A September 19, 2017 medical report by Dr. Carol Stewart-Francisco, Board-certified in family medicine, indicated that appellant presented with left elbow and upper arm pain that radiated down to the wrist. She referenced appellant's history of right rotator cuff surgery and noted that appellant now uses her left arm more to compensate for the loss of mobility in her right arm. Dr. Stewart-Francisco diagnosed left elbow and upper arm pain and myalgia.

By decision dated November 20, 2017, OWCP denied appellant's occupational disease claim finding that she had not submitted medical evidence containing a medical diagnosis in connection with her injuries.

OWCP continued to receive evidence. Appellant submitted medical reports dated February 8, May 4, and July 30, 2018 from Dr. George White, a Board-certified hand surgeon. Dr. White's reports discussed her right shoulder pain related to her July 20, 2015 work-related injury.

On November 20, 2018 appellant, through counsel, requested reconsideration of the November 20, 2017 decision.

By decision dated November 30, 2018, 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 reconsideration was irrelevant or immaterial.

LEGAL PRECEDENT

Section 8128(a) of FECA³ 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 own motion or on application.⁴

To require OWCP to reopen a case for merit review under 5 U.S.C. § 8128(a), OWCP 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

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements

³ *Id.*

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

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).

In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a new and relevant legal argument not previously considered. Accordingly, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

Furthermore, appellant failed to submit relevant and pertinent new evidence with her November 20, 2018 request for reconsideration.⁹ The underlying issue in this case is whether she submitted evidence containing a firm medical diagnosis causally related to the accepted factors of her federal employment. Although evidence submitted on reconsideration need not carry appellant's burden entirely to suffice for reconsideration, the new evidence must at least be relevant and pertinent to the issue upon which the claim was denied.¹⁰ While Dr. White's medical reports are new evidence, they only discuss her right shoulder pain and previously accepted July 20, 2015 traumatic injury claim under OWCP File No. xxxxxx323. The reports do not address appellant's alleged consequential left arm condition. Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

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.¹¹

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).

⁸ *Id.* at § 10.608(b); *H.H.*, *supra* note 5; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *J.B.*, Docket No. 18-1531 (issued April 11, 2019); *see L.R.*, Docket No. 18-0400 (issued August 24, 2018); *Candace A. Karkoff*, 56 ECAB 622 (2005).

¹⁰ *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *K.B.*, Docket No. 18-1392 (issued January 15, 2019); *A.A.*, Docket No. 18-0031 (issued April 5, 2018).

¹¹ *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request 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).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 9, 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