

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

M.C., Appellant	)	
	)	
and	)	Docket No. 19-1349
	)	Issued: December 10, 2019
U.S. POSTAL SERVICE, MILL VALLEY POST	)	
OFFICE, Mill Valley, CA, Employer	)	
	)	

*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  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 4, 2019 appellant filed a timely appeal from a January 11, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated January 10, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**ISSUE**

The issue is 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**

On August 19, 2015 appellant, then a 53-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left shoulder when he lifted a heavy

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

door while in the performance of duty. He stopped work on August 19, 2015 and returned to full duty on August 22, 2015. On the reverse side of the claim form, the employing establishment indicated that the injury occurred in the performance of duty. OWCP accepted appellant's claim for left shoulder rotator cuff sprain.

Appellant continued to receive medical treatment. In an April 7, 2016 state workers' compensation progress report form, Dr. Alice Rucekova, Board-certified in preventive and occupational medicine, recounted that appellant believed he had reached a plateau regarding his left shoulder injury. Upon examination of appellant's left shoulder, she observed no obvious deformity, abnormality, swelling, or tenderness and restricted range of motion (ROM) with adduction, internal rotation, and extension. Dr. Rucekova diagnosed left shoulder rotator cuff syndrome, left biceps/trapezius strain, and adhesive capsulitis of the left shoulder. She recommended that appellant work modified duty and provided work restrictions. On April 8, 2016 Dr. Rucekova requested authorization to perform left shoulder manipulation/fixation with anesthesia.

OWCP referred appellant, along with a statement of accepted facts (SOAF) and medical records, to Dr. David H. Garelick, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), and requested that he offer an opinion as to whether the requested left shoulder procedure was medically necessary to treat appellant's accepted August 19, 2015 employment injury. In an April 22, 2016 report, Dr. Garelick described the August 19, 2015 employment injury and related that appellant complained of ongoing anterolateral shoulder pain. He noted that physical examination showed no tenderness at the distal clavicle and minimally diminished ROM. Dr. Garelick reported that he did not recommend authorization for left shoulder surgery since appellant's ROM was nearly normal. He explained that he did not believe that appellant had adhesive capsulitis (frozen shoulder), which would be the typical diagnosis for which a left shoulder manipulation under anesthesia would be performed.

Dr. Rucekova continued to treat appellant and provided progress reports dated April 28 to June 7, 2016. She noted diagnoses of left biceps tendon tendinitis and left shoulder adhesive capsulitis. Dr. Rucekova indicated that appellant could work modified duty and reported that they were waiting authorization for left shoulder manipulation with anesthesia.

On July 19, 2016 appellant underwent left shoulder manipulation surgery.

In a July 22, 2016 work status note, Dr. Yassamin Hazrati, a Board-certified orthopedic surgeon, indicated that appellant was placed off work from July 19 through August 29, 2016.

On August 19, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for leave without pay (LWOP) for the period July 30 to August 29, 2016.

In a development letter dated August 26, 2016, OWCP informed appellant of the type of evidence needed to support his wage-loss compensation claim for total disability. It afforded appellant 30 days within which to submit the requested information.

OWCP received a June 9, 2016 report by Dr. Rucekova, who related that she first treated appellant on August 20, 2015 after his August 19, 2015 work-related injury when he injured his left shoulder while lifting a heavy door. Dr. Rucekova indicated that appellant's initial assessment

and treatment plan were left rotator cuff syndrome with left biceps strain. She reported that a subsequent left shoulder MRI scan had shown tendinosis of the long head of the biceps with large glenohumeral joint effusion and incidental findings of intramuscular lipoma of the posterior deltoid. Dr. Rucekova explained that appellant was referred to Dr. Hazrati, a surgeon, when appellant's symptoms did not improve after conservative treatment. She noted that Dr. Hazrati concluded that appellant had left shoulder impingement syndrome with adhesive capsulitis and recommended manipulation of the left shoulder under anesthesia.

OWCP received work status notes dated August 25 to September 2, 2016 from Dr. Hazrati who indicated that appellant was placed off work from August 25 through October 6, 2016.

In September 2 and 23, 2016 progress reports, Dr. Rucekova related that on July 19, 2016 appellant underwent manipulation under anesthesia of his left shoulder and was doing reasonably well. She noted that appellant had significant improvement in ROM. Dr. Rucekova provided examination findings and diagnosed left rotator cuff syndrome, left trapezius strain, left biceps tendon tendinitis, and left shoulder adhesive capsulitis. She indicated that appellant should be off work from September 2 through October 7, 2016.

In a September 19, 2016 letter, Dr. Hazrati indicated that this letter was in support of appellant's disability claim from July 19 to August 29, 2016. He related that he had treated appellant for his left shoulder symptoms since December 10, 2015. Dr. Hazrati explained that due to the failure of conservative measures, appellant underwent shoulder joint manipulation under anesthesia on July 19, 2016. He indicated that after surgery appellant was instructed to remain in a sling and begin daily physical therapy, which would have precluded him from pursuing any work during this six-week period.

In an October 7, 2016 periodic report and work status note, Dr. Rucekova indicated that appellant was doing reasonably well after the left shoulder manipulation procedure. Examination of appellant's left shoulder revealed improved ROM. Dr. Rucekova diagnosed left rotator cuff syndrome, left biceps/trapezius strain, left biceps tendon tendinitis, and left shoulder adhesive capsulitis. She placed appellant off work from September 23 through October 8, 2016.

On October 8, 2016 appellant returned to work in a light-duty capacity.

Appellant filed additional Form CA-7 claims for wage-loss compensation for continuing total disability until October 7, 2016.

By decision dated October 18, 2016, OWCP denied appellant's claim for wage-loss compensation for the period commencing July 30, 2016, finding that the medical evidence of record was insufficient to establish that appellant was no longer able to work beginning July 30, 2016 due to his accepted August 19, 2015 employment injury. It noted that the evidence of record indicated that appellant's inability to work was a result of surgery for left shoulder adhesive capsulitis, which was not an accepted work-related condition.

Appellant continued to receive medical treatment and submit periodic reports dated October 28, 2016 to January 13, 2017 by Dr. Rucekova. Dr. Rucekova noted that his claim had been denied for left shoulder adhesive capsulitis and authorization for left shoulder manipulation. She indicated that appellant had a history of left shoulder arthritis with degenerative labrum tear

and explained that there was a known connection between shoulder impingement and development of adhesive capsulitis. Dr. Rucekova recommended that he continue working modified duty.

On October 17, 2017 appellant requested reconsideration of the October 18, 2016 decision.

Appellant submitted progress notes by Dr. Hazrati dated December 10, 2015 and July 19, 2016 and physical therapy treatment notes dated August 2 to October 6, 2016.

In an October 7, 2017 progress report, Dr. Hazrati noted diagnoses of left shoulder rotator cuff syndrome, left biceps/trapezius strain, left biceps tendinitis, and left shoulder adhesive capsulitis. He described the August 19, 2015 employment injury and noted that appellant underwent left shoulder manipulation under anesthesia on July 10, 2016. Dr. Hazrati provided examination findings and ROM testing. He opined that appellant developed traumatic adhesive capsulitis secondary to his shoulder injury. Dr. Hazrati noted that appellant's symptoms improved after manipulation under anesthesia.

On November 29, 2017 OWCP referred appellant, along with a SOAF and the medical record to Dr. John H. Welborn, a Board-certified orthopedic surgeon, for a second opinion examination. In a December 20, 2017 report, Dr. Welborn discussed appellant's history of injury and noted that his claim was accepted for left shoulder strain. He indicated that appellant rated his left shoulder pain as a two with heavy lifting. Upon examination of appellant's left shoulder, Dr. Welborn observed no tenderness, no swelling, and negative impingement sign. He diagnosed left shoulder adhesive capsulitis, left shoulder and upper arm strain, left biceps tendinitis, and left shoulder impingement syndrome. Dr. Welborn reported that appellant did not have left shoulder impingement, biceps tendinitis, rotator cuff syndrome, or adhesive capsulitis due to his employment injury. He opined that the left shoulder manipulation procedure for adhesive capsulitis was "more likely" due to his diabetes than to his factors of employment. Dr. Welborn concluded that appellant no longer suffered residuals of the August 19, 2015 employment injury, that his disability "was not work related [but] rather due to his diabetes which caused the adhesive capsulitis," that he may return to fully duty, and that he did not need further treatment.

By decision dated January 10, 2018, OWCP denied modification of the October 18, 2016 decision.

On October 9, 2018 appellant requested reconsideration. In an attached statement, he related that he had been diabetic for more than 11 years, but did not experience frozen shoulder symptoms until the August 19, 2015 employment injury. Appellant indicated that even after undergoing physical therapy treatments for over a year, he still experienced left shoulder pain and did not gain full motion of his shoulder. He asserted that he would not have undergone surgery if he knew that he would not be getting paid while on leave for recovery.

By decision dated January 11, 2019,<sup>2</sup> OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

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<sup>2</sup> OWCP noted that the January 11, 2019 decision superseded October 19, 2018 and January 8, 2019 decisions, which denied appellant's request for reconsideration of the merits of his claim.

## 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 compensation at any time on his own motion or on application.<sup>3</sup>

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.<sup>4</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</sup> 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.<sup>7</sup>

## ANALYSIS

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).

On October 9, 2018 appellant requested reconsideration of OWCP's January 10, 2018 decision denying his wage-loss compensation claim. He submitted a statement asserting that his frozen shoulder was not caused by his preexisting diabetic condition. Appellant related that he had been diabetic for more than 11 years, but did not experience frozen shoulder symptoms until the August 15, 2015 employment injury. He explained that he still experienced left shoulder pain and limited ROM despite physical therapy treatments. Appellant noted that he regained motion and healed quickly after his surgery. As the underlying issue is medical in nature and can only be resolved by the submission of medical evidence, this statement does not show a legal error by OWCP, nor does it provide a new and relevant legal argument. The Board, therefore, finds that in his October 9, 2018 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously

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<sup>3</sup> 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.

<sup>4</sup> 20 C.F.R. § 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).

<sup>5</sup> 20 C.F.R. § 10.607(a). 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). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4b (February 2016).

<sup>6</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

considered. Thus, appellant 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).

OWCP did not receive any additional medical evidence along with appellant's October 9, 2018 reconsideration request. Because appellant's request for reconsideration did not include relevant and pertinent new evidence not previously considered, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).<sup>8</sup>

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.<sup>9</sup>

### **CONCLUSION**

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).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> See *R.A.*, Docket No. 19-0821 (issued September 12, 2019); *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

<sup>9</sup> *T.H.*, Docket No. 18-1542 (issued April 8, 2019); *M.E.*, 58 ECAB 694 (2007).