

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

C.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Plymouth, MI, Employer**

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**Docket No. 18-1325
Issued: February 14, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 21, 2018 appellant filed a timely appeal from a February 28, 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 June 6, 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 to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the February 28, 2018 decision, 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.*

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 December 17, 1987 appellant, then a 32-year-old part-time flexible carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right shoulder condition on November 30, 1987 while picking up tubs of mail while in the performance of duty.

Appellant intermittently submitted reports from physical therapists from February 24, 1999 through April 14, 2009. On June 14, 2007 she underwent arthroscopy and debridement of the right shoulder with Dr. David Janda, a Board-certified orthopedic surgeon. There were no complications.

OWCP approved massage therapy for appellant in the amount of 96 units per year from 2010 through 2015. Appellant submitted a note dated September 1, 2015 from Dr. Janda, which recommended massage therapy treatment for both shoulders twice a month in 2016. On January 7, 2016 OWCP approved massage therapy for her in the amount of 96 units from January 1 through December 31, 2016.

On April 21, 2017 appellant claimed compensation for leave without pay from January 26, 2015 through December 27, 2016. A supervisor noted that the total number of hours claimed was 110.74. In an attached time analysis form, appellant claimed leave without pay on intermittent dates from January 26, 2015 through December 27, 2016, noting that the reason for leave use on each date was therapy.

By letter dated May 5, 2017, OWCP informed appellant that the evidence of record was insufficient to establish her claim for wage-loss compensation for intermittent leave without pay for therapy for the period January 26, 2015 through December 27, 2016. It noted that the record did not contain evidence that she actually had physical therapy treatment during 2016 and afforded her at least 30 days to submit physical therapy notes for the claimed period.

By letter dated May 12, 2017, appellant stated that she had enclosed an authorized form from OWCP for massage therapy for the period January 1 through December 31, 2016, as well as copies of medical reimbursement forms with dates of treatment.

By decision dated June 6, 2017, OWCP denied appellant's claim for wage-loss compensation for intermittent leave without pay from January 26, 2015 through December 27, 2016. It stated that no evidence had been submitted establishing that she actually had physical therapy performed during the claimed period, as there were no physical therapy notes on file establishing that she had been treated during this period.

In a report dated April 24, 2017, Dr. Melina Kakish, a Board-certified internist and pediatrician, noted that her recommendation of massage therapy was based on Dr. Janda's recommendation in 2016, noting that Dr. Janda had since retired.

In a statement dated May 8, 2017, appellant explained that she required continued massage therapy to treat her condition and requested copies of her medical record from OWCP.

In a report dated June 8, 2017, Dr. Paul Shapiro, a Board-certified orthopedic surgeon, diagnosed left shoulder impingement syndrome with possible rotator cuff tear and status post right shoulder arthroscopy in 2007 with residual pain and stiffness. He recommended a magnetic resonance imaging (MRI) scan of her left shoulder.

The June 16, 2017 MRI scan of appellant's left shoulder demonstrated acromioclavicular joint hypertrophy with mild impingement.

On June 29, 2017 Dr. Shapiro administered an injection to appellant's left shoulder without complication. He recommended continuing her restrictions of no lifting over 20 pounds and no lifting overhead.

In a second opinion evaluation dated July 19, 2017, Dr. Bala Prasad, a Board-certified orthopedic surgeon, examined appellant to determine whether she still had residuals of her accepted conditions and what treatments were recommended. He concluded that no physical therapy, injection, or operation would resolve her symptomology. Dr. Prasad recommended that appellant continue with home exercises and continue working in an office.

In a report dated August 31, 2017, Dr. Shapiro diagnosed left shoulder impingement and recommended physical therapy.

By letter dated September 19, 2017, appellant stated that Dr. Prasad had not reviewed her record and that his examination was insufficient

In a supplemental report dated July 19, 2017, Dr. Prasad noted that he had reviewed appellant's record and that massage therapy was neither indicated nor would it provide her with improvement.

On December 6, 2017 appellant requested reconsideration of OWCP's June 6, 2017 decision. With her request, she attached a statement in which she noted that the decision of June 6, 2017 was based upon her receiving physical therapy, which was a different form of treatment from massage therapy. Appellant explained that massage therapy had previously been approved.

On June 29 and August 31, 2017 Dr. Shapiro recommended physical therapy for appellant's left shoulder.

In a report dated October 12, 2017, Dr. Kakish noted that appellant had received clinical benefit from massage therapy, which was likely due to diffuse muscle spasms in the region of her condition. She requested that appellant be able to continue these treatments.

On October 25, 2017 Dr. Kakish reiterated her recommendation for massage therapy and noted that appellant would additionally benefit from physical therapy for her left shoulder.

By letter dated February 6, 2018, appellant requested a response from OWCP to her request for reconsideration.

By decision dated February 28, 2018, OWCP denied appellant's request for reconsideration without reviewing the merits of her claim. It determined that the evidence submitted with her request for reconsideration was repetitious of evidence previously submitted or was irrelevant to the underlying issue in this case.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

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 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, she is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).⁸

Appellant also failed to submit any relevant and pertinent new evidence in support of her request for reconsideration. The underlying issue in this case is whether she provided sufficient evidence to show that she lost time from work to obtain medical care for her accepted work-related

³ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his] own motion or on application.” 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 10.607(a). 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. *Id.* at Chapter 2.1602.4b.

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

⁸ *Id.* at § 10.606(b)(3)(i) and (ii).

conditions intermittently from January 26, 2015 through December 27, 2016 when she attended massage therapy treatments. On reconsideration, appellant submitted medical reports from her physicians documenting follow-up appointments in 2017 for her accepted shoulder conditions and generally recommending that she continue to receive massage therapy. While OWCP had approved 96 units of massage therapy on January 7, 2016, and had similarly approved massage therapy for previous years, there is no evidence of record that she actually attended massage therapy on the particular dates claimed. For instance, appellant had not submitted therapy notes from the specific dates for which she claimed compensation. Reports from Dr. Janda, Dr. Kakish, and Dr. Shapiro who had recommend massage therapy are not relevant to the underlying issue in this case, as they do not address specific dates of attendance at massage therapy.⁹ Because appellant has not submitted relevant and pertinent new evidence, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹⁰ Accordingly, OWCP properly declined to reopen her case for a merit review under 5 U.S.C. § 8128(a).

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).

⁹ See *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2019
Washington, DC

Christopher J. Godfrey, 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