

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

J.W., Appellant)	
)	
and)	Docket No. 17-1943
)	Issued: January 28, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION-FEDERAL AIR)	
MARSHAL SERVICE, College Park, GA,)	
Employer)	
)	

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 September 18, 2017 appellant filed a timely appeal from a June 9, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 15, 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 over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the June 9, 2017 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 evidence for the first time on appeal. *Id.*

ISSUES

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 February 9, 2015 appellant, then a 42-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on February 6, 2015 he injured his left arm and shoulder when he fell backwards while training in an airplane simulator. He indicated that in the simulation activity he was shot point blank several times with "simunition" and he lost his balance and fell as he tried to avoid getting shot.

In a February 5, 2015 attending physician's report (Form CA-20), Dr. James S. Kercher, a Board-certified orthopedic surgeon, noted that on February 5, 2015 appellant fell on his left shoulder during a training exercise at work. He diagnosed shoulder pain with possible rotator cuff tear. Dr. Kercher checked the box marked "yes" with regard to whether the condition was caused or aggravated by an employment activity. He noted "fall at work." Dr. Kercher also recommended a magnetic resonance imaging (MRI) scan. He completed a modified-duty form advising that appellant could perform sedentary duties, which included answering telephones, using a computer and greeting visitors in a seated position, doing light duties, and driving a 15-passenger van. Appellant returned to modified duty on February 6, 2015.

A March 9, 2015 MRI scan interpreted by Dr. Gerald Domesicik, a Board-certified diagnostic radiologist, revealed "no evidence of acute trauma ... rotator cuff and labrum are intact.... Minor arthropathy AC [acromioclavicular] joint."

In a March 18, 2015 report, Dr. Kercher noted that he had reviewed the MRI scan and it demonstrated no evidence of an acute injury and that clinically, his shoulder pain was more consistent with AC joint arthritis. He recommended appellant return to sedentary work. In a March 19, 2015 report, Dr. Kercher completed an attending physician's report (Form CA-20) and indicated that appellant had shoulder strain and "neck pain." He advised that the primary complaint was due to neck pain and recommended a referral to a neck specialist. Dr. Kercher recommended physical therapy and sedentary duties. He saw appellant on April 21, 2015, and noted that he had reviewed the MRI scan, which demonstrated AC joint arthritis and neck strain. Dr. Kercher recommended a neck specialist.

In an April 28, 2015 report, Dr. Kercher explained that appellant initially presented for left shoulder and arm pain. He opined that the shoulder condition improved and the MRI scan demonstrated no evidence of shoulder injury, despite appellant's complaints of pain. Dr. Kercher explained that an examination of the cervical spine revealed that appellant's complaints of pain were likely related to a neck condition. He noted that because appellant's symptoms had "largely" improved, he recommended a return to full-duty work.

In a May 1, 2015 report, Dr. Chad M. Kessler, a Board-certified orthopedic surgeon, diagnosed cervical strain/shoulder pain. He placed appellant on temporary light-duty work. Dr. Kessler examined the neck and alignment midline and found that a normal degree of lordosis was present, with no deformities. He explained that he did not believe the complaints of left

shoulder pain were due to the cervical spine. Dr. Kessler recommended a referral to Dr. Michael V. Cushing, an orthopedic surgeon, for evaluation of the left shoulder.

Appellant accepted a limited-duty job offer on May 1, 2015.

In a May 14, 2015 report, Dr. Cushing diagnosed a superior labral tear from anterior to posterior (SLAP) tear, impingement syndrome of the left shoulder, and pain in joint involving shoulder region. He noted that he was concerned for a labral tear, explaining that these commonly do not show up on MRI scans, but the physical examination and history were consistent with a labral tear.

By decision dated May 20, 2015, OWCP accepted appellant's claim for sprain of the neck and sprain of the left shoulder.

In a June 1, 2015 report, Dr. Kessler recommended surgical intervention based on appellant's continued complaints of pain. In a June 24, 2015 operative report, Dr. Cushing performed a left shoulder SLAP tear and left shoulder impingement. In a September 14, 2015 report, he released appellant from care from the shoulder standpoint. Dr. Cushing noted that appellant had complaints of pain and tightness in the neck and recommended physical therapy and a cervical spine MRI scan.

A September 16, 2015 MRI scan of the cervical spine read by Dr. Kanda Vogt, a Board-certified diagnostic radiologist, revealed posterior disc osteophyte (bone spurs) with super imposed disc protrusion at C6-7 and multilevel spondylosis.

In a September 18, 2015 report, Dr. Cushing noted that appellant "appears to have an aggravation of a preexisting degenerative disc."

By decision dated December 14, 2015, OWCP expanded acceptance of the claim to include aggravation of cervical disc degeneration.

On January 8, 2016 Dr. Cushing released appellant to full-duty work. He advised that appellant reached maximum medical improvement (MMI) with no follow up required.

In a January 14, 2016 report, Dr. Kessler completed a work capacity evaluation (OWCP-5c) advising that appellant had no limitations directly related to the reported injury, but he might be limited by noninjury-related complaints.

On January 20, 2016 appellant requested that OWCP further expand the acceptance of his claim to include additional left shoulder diagnoses.

Appellant returned to full-duty employment on January 25, 2016.

In a February 17, 2016 report, Dr. Kevin Park, a Board-certified orthopedic surgeon, diagnosed "neck pain, patient without objective weakness in [right upper extremity] RUE but subjective evidence." He opined that from an orthopedic spine perspective, appellant would be at MMI. Dr. Park noted that his examination of the cervical spine revealed no ecchymosis or muscle atrophy and the alignment was normal. Furthermore, he found that active range of motion was

normal. Dr. Park provided work restrictions of 20 pounds and recommended a functional capacity evaluation (FCE) for permanent disability.

Appellant underwent an FCE on March 3, 2016, which revealed that appellant was capable of light-duty physical work. It was also noted that he had a cyst removed from his spine in 2008, which left residuals of left lower extremity weakness, a bone spur removal in 2008, stitches to his head and chin, and dizziness.

On May 20, 2016 the employing establishment accommodated appellant's light-duty restrictions with a modified employment position of driving a 15-passenger van.

On May 20, 2016 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions, and the medical record to Dr. Alexander Doman, a Board-certified orthopedic surgeon to determine the current nature of his condition, the extent of his disability, and appropriate treatment.

In a June 16, 2016 second opinion, Dr. Doman noted appellant's history of injury and treatment and indicated that he was currently working full time in a light-duty capacity. He related that on June 24, 2015 appellant underwent arthroscopic surgery on the left shoulder due to ongoing shoulder pain. Dr. Doman also noted that a tear of the left labrum was found. He examined appellant and explained that there were no medical findings that indicated that the accepted work-related conditions were still active and causing objective symptoms. Dr. Doman noted that there was a lack of objective evidence on physical examination and in the radiographic studies to indicate ongoing medical findings to support the accepted work conditions. He also explained that the aggravation of cervical degeneration was temporary and he also explained that the temporary aggravation had long ago subsided. Dr. Doman advised that appellant's current condition was due to the natural history of his preexisting degenerative disc disease of the cervical spine. He explained that the rationale was that the type of injury that appellant sustained could only have resulted in a minor temporary aggravation, which would have subsided within three months and also noted that the cervical sprain was also temporary and would have resolved within this time. Dr. Doman noted that the MRI scan performed shortly after the injury indicated no evidence of acute injury. He related that the subjective complaints did not correspond to the lack of objective findings. Dr. Doman further explained that the MRI scan of the shoulder was normal at the time of the injury and there were no objective findings on physical examination. He indicated that there were no physical limitations resulting from any work injury.

Regarding the SLAP tear, Dr. Doman noted that it was not related to the incident of February 6, 2015. He explained that his rationale was that the MRI scan performed on May 9, 2015, clearly indicated that there was no injury to the labrum. Dr. Doman further noted that any diagnosis of labrum injury that was noted later in surgery, would therefore not be related to his injury and occurred sometime after March 9, 2015.

On August 2, 2016 OWCP advised appellant of its proposed termination of medical benefits and wage-loss compensation based upon Dr. Doman's June 16, 2016 report. It found that the accepted conditions had resolved. OWCP afforded appellant 30 days to submit evidence and/or argument should he disagree with the proposed termination of benefits.

On August 9, 2016 appellant disagreed with the notice of proposed termination.

In a March 16, 2016 status report, Dr. Park noted that appellant was seen for neck pain. He explained that full details from the FCE revealed a demonstrated good effort. Dr. Park indicated that walking and standing could be performed on a continuous basis without limitations and there were no limitations with stair climbing. He also indicated that lifting be limited to 15 pounds, intermittent to 35 pounds, and provided permanent restrictions of light physical and physical demand level. Dr. Park diagnosed sprain of joints and ligaments of unspecified parts of neck, sequela.

OWCP received a June 1, 2015 impairment rating from Dr. Cushing and a June 24, 2015 operative report from Dr. Cushing, who noted that appellant had what appeared to be a posterior superior labral tear just behind the biceps anchor.

By decision dated September 13, 2016, OWCP finalized the proposed termination of appellant's wage-loss compensation and medical benefits, effective September 13, 2016.

In September 1, 2016 report, Dr. Qingng Ni, a Board-certified neurologist, who noted that appellant had headache, painful neck, benign paroxysmal positional vertigo nystagmus, skin rash, and rebound headache.

On October 14, 2016 appellant requested reconsideration. However, on January 12, 2017, he clarified that he wished a review of the written record by an OWCP hearing representative. Appellant submitted additional evidence.

By decision dated March 15, 2017, OWCP's hearing representative affirmed the September 13, 2016 decision. She found that the weight of the medical evidence of record clearly established that all of the accepted medical conditions in the claim had resolved. The hearing representative noted that appellant's own treating physicians, Dr. Cushing and Dr. Kessler, had found him to have attained MMI without the need for treatment of his shoulder and cervical spine conditions. She explained that the lack of ongoing disability following MMI was confirmed by the second opinion physician, Dr. Doman, who provided a well-rationalized report noting no ongoing disability or need for additional medical treatment. The hearing representative further found that the opinions of Dr. Park and Dr. Ni both failed to provide medical opinions which supported ongoing disability, and that Dr. Ni's reports discussed other diagnoses which had not been accepted by OWCP.

Appellant requested reconsideration on March 31, 2017 providing a statement of his arguments as to why he had continuing disability. Along with his reconsideration request he resubmitted a June 24, 2015 operative report.

By decision dated June 9, 2017, OWCP denied modification of the March 15, 2017 decision.

LEGAL PRECEDENT -- ISSUE I

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.³

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 OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

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

ANALYSIS -- ISSUE I

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).

With his March 31, 2017 reconsideration request, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, he was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).⁸

Along with a narrative statement which outlined the history of his treatment and why he felt his case should be reopened, the only evidence submitted in support of his request for reconsideration was a June 24, 2015 operative report which was previously of record. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but in this case the only evidence submitted was not new, nor was it relevant to the issue of continuing

³ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 18-1007 (issued November 28, 2018).

⁴ 20 C.F.R. § 10.606(b)(3); *see also P.H.*, Docket No. 18-0896 (issued November 21, 2018).

⁵ *Id.* at § 10.607(a). *See also D.L.*, *supra* note 3.

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

⁷ *Id.* at § 10.608(b); *see also P.H.*, *supra* note 4.

⁸ *See J.B.*, Docket No. 17-0628 (issued June 28, 2017).

disability.⁹ Thus, he was also not entitled to a review of the merits of his claim based on the third above-noted requirement under section 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) and thus OWCP properly denied merit review.

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 June 9, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 28, 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

⁹ See *G.T.*, Docket No. 18-0158 (issued May 11, 2018).