

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

R.B., Appellant)	
)	
and)	Docket No. 18-0898
)	Issued: January 15, 2019
U.S. POSTAL SERVICE, POST OFFICE, Laurinburg, NC, Employer)	
)	

Appearances:
Christopher Henwood, for the appellant¹
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 March 22, 2018 appellant, through her representative, filed a timely appeal from a February 13, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated February 14, 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 January 4, 2017 appellant, then a 45-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her left shoulder while picking up a tub of flats in the performance of duty. She stopped work on January 5, 2017.

S.R., the officer-in-charge, in a January 5, 2017 statement, related that in a discussion with appellant on January 4, 2017, she mentioned a shoulder problem and that she was unsure of the cause.

In a January 5, 2017 authorization for examination and/or treatment (Form CA-16), S.J., an employing establishment official, authorized treatment for the alleged January 4, 2017 injury.

By development letter dated January 10, 2017, OWCP advised appellant that the evidence of record was insufficient to establish her claim. It noted that she had not submitted medical evidence containing a firm diagnosis causally related to the alleged incident. OWCP afforded appellant 30 days to submit additional evidence, including a narrative report from her treating physician.

In a January 5, 2017 work restriction and limitation form, Shannon Sozzi, a nurse practitioner, restricted appellant from using her left arm. On a January 5, 2017 hospital form, she diagnosed left shoulder sprain and tendinitis. Ms. Sozzi reported that appellant had a left shoulder injury on January 4, 2017 as the result of lifting a tub of mail weighing 5 to 10 pounds.

The record also contains duty status reports (CA-17 forms) dated January 5, 23, and 26, 2017 diagnosing left shoulder strain, an injury date of January 4, 2017, a description of how the injury occurred, and work restrictions.³

A January 5, 2017 x-ray noted a finding of normal left shoulder.

On January 12, 19, and 26, 2017 appellant was again seen by Ms. Sozzi for follow-up visits for her claimed January 4, 2017 injury. Her diagnosis was expanded to include left shoulder strain.

By decision dated February 14, 2017, OWCP denied appellant's claim. It found that she had not established that the diagnosed medical condition was causally related to the accepted January 4, 2017 employment incident.

In a letter dated January 30, 2018, appellant's representative requested reconsideration. Additional medical evidence was received.

³ These forms either contained an illegible signature or were unsigned.

Physical therapy notes covering the period August 2 to 23, 2017 signed by Amber Hughes, a physical therapist, noted diagnoses of left shoulder pain, left shoulder impingement syndrome, and left shoulder weakness. Ms. Hughes, in an August 30, 2017 discharge report, noted that appellant's physical therapy had ended.

A June 6, 2017 Form CA-17 signed by Jennifer Coughenam, a nurse practitioner, noted diagnoses of left shoulder sprain and rotator cuff tear and work restrictions. She also related that appellant's injury occurred on January 4, 2017 as the result of lifting a tub of mail weighing 10 pounds.

Dr. Paul Rush, an examining Board-certified orthopedic surgeon, in a June 14, 2017 work status report, diagnosed left shoulder strain and released appellant to return to work on June 17, 2017 with restrictions.

In a June 21, 2017 Form CA-17, Dr. Rush diagnosed left shoulder sprain, provided work restrictions, a return to work date, and noted an injury date of January 4, 2017.

On July 17, 2017 appellant was seen for a follow-up visit by Dr. Rush who noted that appellant had been seen for chronic left shoulder pain. Dr. Rush noted that appellant had been referred for physical therapy and that she had a work injury. Physical examination findings were detailed along with a diagnosis of left shoulder pain. Dr. Rush opined that appellant's work injury either caused or aggravated her left shoulder pain.

A September 30, 2017 magnetic resonance imaging (MRI) scan of appellant's left shoulder revealed inferior and anterior inferior labrum tear with suspected paralabral cyst, mild glenohumeral joint effusion or synovitis, and no evidence of rotator cuff tear.

By decision dated February 13, 2018, OWCP denied appellant's request for reconsideration of the merits of her 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.⁴

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.⁵

⁴ 5 U.S.C. § 8128(a); *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).

⁵ 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).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's 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 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).

With her timely request for reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP.⁹ Consequently, appellant is not entitled to review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Additionally, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether appellant has submitted sufficient evidence that her diagnosed medical condition was causally related to the accepted employment incident.

In support of her request for reconsideration, appellant submitted a July 17, 2017 note from Dr. Rush diagnosing left shoulder pain, which he opined was either caused or aggravated by her work injury. While this report was new, it did not provide relevant and pertinent new evidence. The Board notes that pain is a description of a symptom rather than a firm diagnosis of a compensable medical condition.¹⁰ This report is therefore irrelevant as it does not address whether a diagnosed medical condition was causally related to the accepted employment incident.¹¹

OWCP also received CA-17 forms dated June 13 and 21, 2017, a June 14, 2017 work status report from Dr. Rush which diagnosed a left shoulder strain, and a September 30, 2017 MRI scan which found a left shoulder labrum tear and mild glenohumeral joint effusion or synovitis. While this evidence is new, it does not address the relevant issue in this claim regarding causal

⁶ *Id.* at § 10.607(a).

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

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

⁹ *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

¹⁰ *K.W.*, Docket No. 12-1590 (issued December 18, 2012); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹¹ The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case. *See P.H.*, Docket No. 18-1020 (issued November 1, 2018); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

relationship, by providing an opinion regarding the cause of the diagnosed conditions. As such, these reports are insufficient to warrant merit review.¹²

Appellant also submitted reports from Ms. Hughes, a physical therapist, and Jennifer Coughenam, a nurse practitioner, diagnosing left shoulder conditions. However, physical therapists and nurse practitioners are not considered physicians as defined under FECA and therefore their opinions are of no probative value.¹³

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁴

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).

¹² *M.C.*, Docket No. 14-0021 (issued March 11, 2014); *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

¹³ 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also Roy L. Humphrey*, 57 ECAB 238 (2005). *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

¹⁴ The Board notes that a Form CA-16 (authorization for examination and/or treatment) was issued by the employing establishment on January 5, 2017. When the employing establishment properly executes a Form CA-16 which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c); *Tracy P. Spillane*, 54 ECAB 608, 610 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 13, 2018 is affirmed.

Issued: January 15, 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