



back when carrying and lifting a heavy bag while in the performance of duty. On February 15, 2013 OWCP accepted her claim for right shoulder strain and right trapezius and rhomboid strain. It authorized wage-loss compensation beginning January 8, 2013.

By decision dated February 15, 2013, OWCP denied appellant's request for continuation of pay as her claim was not timely reported within 30 days.<sup>2</sup>

On February 19, 2013 appellant's physician, Dr. Dean W. Ziegler, a Board-certified orthopedic surgeon, reviewed appellant's magnetic resonance imaging (MRI) scan and diagnosed partial thickness tearing of the supraspinatus tendon of the rotator cuff on the right. He found that she could return to light-duty work lifting, pushing, and pulling up to five pounds with no reaching above the shoulders.

On April 10, 2013 the employing establishment terminated appellant's employment.

On May 22, 2013 Dr. Ziegler performed right shoulder arthroscopic rotator cuff repair due to partial thickness tear of a supraspinatus tendon. On June 11, 2013 he released appellant to return to work with the restriction of no use of her right arm or hand.

In a letter dated August 20, 2013, appellant informed OWCP that she had returned to part-time private sector employment on July 26, 2013. On February 19, 2014 OWCP requested information from her to determine her pay rate for wage-loss compensation purposes. It requested the amount of appellant's earnings in the previous year as she had not worked at the employing establishment for a full year or a full-time basis at the time of her November 3, 2012 employment injury.

On April 22, 2014 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for a second opinion evaluation with Dr. Mysore S. Shivaram, a Board-certified orthopedic surgeon. In his May 15, 2014 report, Dr. Shivaram diagnosed status post right shoulder rotator cuff repair with complaints of continued stiffness and pain in the right shoulder. He opined that appellant was capable of eight hours of light-duty work. Dr. Shivaram listed her restrictions as 10 pounds of lifting, pushing, and pulling with the right arm and no reaching above the shoulder. He concluded that, after an additional three months, appellant could return to regular duty with no restrictions.

By decision dated August 25, 2014, OWCP reduced appellant's wage-loss compensation benefits based on her actual earnings as a dispatcher in the private sector with wages of \$401.50 per week. It found that this position fairly and reasonable represented her wage-earning capacity.

On November 2, 2016 OWCP referred appellant for an additional second opinion evaluation with Dr. Shivaram. In a report dated December 5, 2016, Dr. Shivaram noted her history of injury and reviewed the SOAF. He noted that appellant was attending nursing school and working part time in a dental office. Appellant continued to report limited range of motion in her

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<sup>2</sup> On February 23, 2013 appellant requested a review of the written record from an OWCP hearing representative. She withdrew this request on June 17, 2013. In a letter dated July 3, 2013, an OWCP hearing representative granted the request for withdrawal of the review of the written record.

right shoulder as well as numbness and tingling in her arms and hands. On physical examination Dr. Shivaram found overreaction to light touch. He reported that appellant appeared to voluntarily restrict free range of motion in her shoulder and found incomplete effort and self-limiting behavior. Dr. Shivaram determined that she could return to regular-duty work without restriction on December 5, 2016. He found that appellant had a satisfactory recovery from her right shoulder surgery. Dr. Shivaram opined that she had no residuals of her injury and that she demonstrated significant overreaction to pain.

On April 21, 2017 OWCP provided appellant with notice of proposed termination of her wage-loss compensation and medical benefits based on Dr. Shivaram's December 5, 2016 report. It afforded her 30 days to submit evidence or argument if she disagreed with the proposed termination.

In a May 19, 2017 letter, appellant noted that she was unable to return to work at the employing establishment due to a previous settlement and asked that her wage-loss compensation benefits continue. She provided a November 12, 2013 note from Dr. Ziegler and a November 7, 2013 physical therapy note.

By decision dated October 16, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective October 15, 2017, based on Dr. Shivaram's December 5, 2016 report.

On January 16, 2018 appellant requested reconsideration. In support of this request, she provided a November 14, 2017 note from Dr. Anjum Razzaq, a Board-certified neurologist. Dr. Ziegler examined appellant due to right shoulder pain and noted her history of injury. Appellant underwent a right shoulder MRI scan on November 17, 2017, which demonstrated tendinosis of the supraspinatus tendon. She also provided a December 19, 2017 note from Dr. Ziegler. Dr. Ziegler noted appellant's history of injury and medical history. He found significant supraspinatus dysfunction in her right shoulder following rotator cuff repair. Dr. Ziegler recommended additional physical therapy.

By decision dated March 30, 2018, OWCP denied modification of the October 16, 2017 decision, finding that appellant had not established continuing disability or medical residuals due to her November 3, 2012 employment injury.

On May 21, 2018 appellant requested reconsideration of the March 30, 2018 decision and submitted additional notes from Dr. Ziegler. On February 13, 2018 Dr. Ziegler reviewed her November 17, 2017 MRI scan and on physical examination found definite weakness with supraspinatus testing. He found that the MRI scan was not useful and performed a limited diagnostic ultrasound, which demonstrated that the anterior supraspinatus tendon was not intact at its attachment to the greater tuberosity. Dr. Ziegler reported that there was abutment in attempting to clear the greater tuberosity and the acromion. He diagnosed right shoulder with tear of the anterior supraspinatus tendon of the rotator cuff. Dr. Ziegler noted, "It appears that this is an indication of nonhealing of the tendon."

In a note dated April 17, 2018, Dr. Ziegler diagnosed right shoulder supraspinatus tendon tear and opined that this was work related. He reported that appellant never improved from her

original surgery, did not heal, and that, therefore, her current condition was related to her original work injury. Dr. Ziegler recommended additional right shoulder surgery.

By decision dated August 15, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It determined that Dr. Ziegler's February 13 and April 17, 2018 reports were substantially similar to those previously of record.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 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.<sup>3</sup>

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.<sup>4</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>5</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>6</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence, which may be necessary to discharge his or her burden of proof.<sup>7</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>8</sup> When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set for at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>9</sup>

### **ANALYSIS**

The Board finds that OWCP improperly 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, and she did not advance a new and relevant legal

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<sup>3</sup> 20 C.F.R. § 10.606(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).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(a); *see also H.H.*, *supra* note 3; *M.S.*, 59 ECAB 231 (2007).

<sup>6</sup> *Id.* at § 10.608(b); *see also H.H.*, *id.*; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>7</sup> *S.M.*, Docket No. 18-1158 (issued January 16, 2019); *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

<sup>8</sup> *See supra* note 3; *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>9</sup> *S.M.*, *supra* note 7; *Annette Louise*, 54 ECAB 783 (2003).

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).<sup>10</sup>

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted new medical evidence from Dr. Ziegler, which addressed the relevant issue of continuing medical residuals due to her November 3, 2012 employment injury. Prior to the October 16, 2017 termination decision and the March 30, 2018 denial of modification, Dr. Ziegler had not provided a specific diagnosis of her current right shoulder condition and had not opined that this condition continued to be employment related.

On February 13, 2018 Dr. Ziegler performed a limited diagnostic ultrasound, which he found demonstrated that the anterior supraspinatus tendon was not intact at its attachment to the greater tuberosity. He diagnosed a repeated right shoulder with tear of the anterior supraspinatus tendon of the rotator cuff. On April 17, 2018 Dr. Ziegler opined that this was work related. He reported that appellant never improved from her original surgery, did not heal, and that, therefore, her current condition was related to her original work injury. Dr. Ziegler recommended additional right shoulder surgery.

The Board finds that the findings and opinions expressed in Dr. Ziegler's February 13 and April 17, 2018 notes constitute relevant and pertinent new evidence not previously considered by OWCP. These notes directly address the basis upon which OWCP terminated appellant's wage-loss compensation and medical benefits, as the notes address appellant's current condition and offer opinion on the causal relationship between this condition and her accepted employment injury.<sup>11</sup> Appellant's request for reconsideration met one of the standards for obtaining merit review of her case.<sup>12</sup> Accordingly, she is entitled to a merit review.

The Board will therefore set aside OWCP's August 15, 2018 decision and remand the case for an appropriate merit decision on appellant's claim. After such further development of the evidence as might be necessary, OWCP shall issue a merit decision.

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>10</sup> *H.H.*, *supra* note 3.

<sup>11</sup> The Board has held that, in support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof. He or she need only submit relevant and pertinent evidence not previously considered by OWCP. *See M.C.*, Docket No. 17-1983 (issued August 17, 2018); *S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>12</sup> *M.C.*, *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 15, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: June 13, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board