



to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board will only consider the nonmerit issue.<sup>4</sup>

### **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**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On May 30, 2013 appellant, then a 38-year-old agricultural commodity grader, injured his right shoulder when he slipped while carrying a carton of grapes on his right shoulder. OWCP adjudicated this claim under File No. xxxxxx474 and accepted right shoulder sprain.

Appellant filed a claim for recurrence (Form CA-2a) on January 2, 2014. By decision dated August 11, 2015, OWCP determined that the claimed recurrence was actually a new occupational disease claim and assigned the new claim File No. xxxxxx795.

OWCP subsequently received an October 26, 2015 report from Dr. Arnold Wilson, a Board-certified orthopedic surgeon, who had performed authorized right shoulder arthroscopic surgery for diagnoses of right shoulder impingement and partial rotator cuff tear.

Under OWCP File No. xxxxxx795, by decision dated January 8, 2016, the occupational disease claim was denied because fact of injury had not been established. On January 28, 2016 appellant, through counsel, filed a request for an oral hearing. The hearing was held on September 7, 2016. By decision dated November 2, 2016, an OWCP hearing representative affirmed the denial of the claim, as modified to find that causal relationship had not been established.

OWCP subsequently received an October 26, 2016 report, submitted to File No. xxxxxx795, from Dr. Wilson who described appellant's preinjury job duties.

On December 21, 2016 appellant, through counsel, filed a request for reconsideration.

By decision dated February 8, 2017, OWCP denied modification of the prior decisions.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Counsel did not request that the Board review the January 25, 2019 merit decision. *See* 20 C.F.R. § 501.3. In the appeal request and brief to the Board, counsel specifically limited his appeal to the nonmerit decision.

<sup>5</sup> *Order Remanding Case*, Docket No. 17-0988 (issued February 2, 2018).

Appellant, through counsel, filed an appeal with the Board from the November 2, 2016 and February 8, 2017 decisions. By order dated February 2, 2018, the Board remanded the case to OWCP for it to combine File No. xxxxxx474 and File No. xxxxxx795, and issue a *de novo* decision.<sup>6</sup>

OWCP administratively combined the files on February 20, 2018.

On February 23, 2018 OWCP referred appellant to Dr. Andrew Farber, an osteopath who practices orthopedic surgery, for a second opinion evaluation. In a report dated March 12, 2018, Dr. Farber described his review of the medical record and provided physical examination findings. He diagnosed right shoulder sprain, impingement syndrome, and partial thickness rotator cuff tear, noting symptoms of ongoing pain, alleged weakness, and loss of motion. Dr. Farber noted magnetic resonance imaging (MRI) scan findings consistent with these diagnoses. He opined that appellant's right shoulder injury had resolved, that he needed no further treatment, and that he could return to full duty as an agricultural commodity grader without restrictions.

By decision dated March 23, 2018, issued under File No. xxxxxx795, OWCP found that appellant's occupational disease claim was accepted for impingement syndrome of the right shoulder, right shoulder sprain, and partial right rotator cuff tear, resolved by March 12, 2018. The decision was based upon the March 12, 2018 second opinion report of Dr. Farber.

On May 26, 2018 appellant, through counsel, requested reconsideration. Counsel maintained that additional cervical conditions should be accepted and that Dr. Farber's opinion was of insufficient rationale to establish that appellant's shoulder conditions had resolved.

Appellant filed claims for compensation (Form CA-7) for the period beginning December 12, 2013 and continuing.

By letter dated December 21, 2018, OWCP asked Dr. Farber to advise as to whether additional conditions should be accepted.

In a report dated January 4, 2019, Dr. Farber advised that appellant's right shoulder conditions were caused by the May 30, 2013 employment injury (OWCP File No. xxxxxx474). He opined that additional conditions should not be accepted.

By decision dated January 25, 2019, OWCP vacated the March 23, 2018 decision, in part, as modification was warranted. However, the decision was also affirmed in part as the evidence of record was insufficient to overturn the entire decision. It modified the prior decision to reflect that appellant's shoulder conditions should be accepted under File No. xxxxxx474. OWCP further found, however, that the evidence continued to support that appellant's right shoulder conditions had resolved effective March 12, 2018.

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<sup>6</sup> *Supra* note 4.

On February 12, 2019 appellant, through counsel, requested reconsideration, reiterating that cervical conditions should be accepted, and that Dr. Farber's report was insufficient to establish that appellant could return to work without restrictions.

By decision dated February 25, 2019, OWCP denied appellant's reconsideration request. It found that the evidence did not contain a relevant legal argument not previously considered.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.<sup>7</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

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 February 12, 2019 request for reconsideration, counsel merely reiterated that cervical conditions should be accepted, and that Dr. Farber's report was insufficient to establish that appellant could return to work without restrictions. The Board finds these assertions are duplicative of arguments counsel has made in the past. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>12</sup> Consequently, appellant was not entitled to a

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607.

<sup>9</sup> *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). Chapter 2.1602.4b provides that 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).

<sup>10</sup> 20 C.F.R. § 10.606(b)(3); *see J.B.*, Docket No. 18-1531 (issued April 11, 2019).

<sup>11</sup> 20 C.F.R. § 10.608.

<sup>12</sup> *J.B.*, *supra* note 10.

review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Furthermore, appellant submitted no new evidence in support of his request for reconsideration.<sup>13</sup> Thus, appellant is 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).<sup>14</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>15</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).

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<sup>13</sup> *Id.*

<sup>14</sup> *T.M.*, Docket No. 19-0535 (issued July 25, 2019).

<sup>15</sup> *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board