

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

J.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Scarborough, ME, Employer**

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**Docket No. 19-1844
Issued: August 14, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 3, 2019 appellant filed a timely appeal from April 23 and August 7, 2019 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 12, 2018, 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.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's March 19, 2019 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a); and (2) whether it properly denied appellant's July 23, 2019 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 25, 2017 appellant, then a 46-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment, including repetitive movements of culling, ripping, and stripping on a preparation area designed for right-handed individuals, resulted in discomfort in his left thumb and corresponding tendons in his left arm. He noted that he first became aware of his conditions on August 25, 2017 and their relationship to factors of his federal employment on September 22, 2017. On the reverse side of the claim form the employing establishment reported that appellant was last exposed to the working conditions alleged to have caused his conditions on September 25, 2017.

In a state workers' compensation claim form dated October 18, 2017, Dr. Therese K. White, a Board-certified plastic surgeon, indicated that appellant required a splint for his left hand for comfort as needed. She advised that he could return to modified employment duties, but did not assign specific restrictions.

In a statement dated October 20, 2017, appellant explained his employment duties as a mail handler and described the left thumb condition he had developed. He noted that he was scheduled to have an ultrasound on his left thumb on October 27, 2017 with Dr. White, per her recommendation. Appellant also noted employment records and medical reports submitted with his statement, including the October 18, 2017 report by Dr. White. In that report, Dr. White noted her physical examination of appellant and the history of pain and inability to extend his thumb following an injury at work six weeks prior. She noted full range of motion of the hand and digits with the exception of the thumb, which he was unable to fully extend at the interphalangeal (IP) joint. Dr. White was unable to elicit any nodule and no triggering was identified upon manipulation of the thumb. She requested authorization for treatment from OWCP.

An October 27, 2017 left hand ultrasound report from Dr. Elena L. Resnick, a diagnostic radiologist, was submitted. Dr. Resnick observed a ruptured extensor pollicis longus tendon with significant retraction resulting in a 7.2 centimeter gap. She noted that the distal tendon remained visible at the IP, metacarpophalangeal, and carpometacarpal joints. The noted diagnosis was a spontaneous rupture of the extensor tendon of the left hand. In a report dated November 7, 2017, Dr. White noted that she reviewed the ultrasound findings and confirmed the diagnosis of spontaneous rupture of extensor tendons, left hand.

In an attending physician's report (Form CA-20) dated November 9, 2017, Dr. White noted that appellant's left thumb would not straighten out and lacked motion. She also noted that surgery was possible to treat the diagnosed tendon ruptures which were indicated on the ultrasound testing.

In a letter to OWCP dated November 17, 2017, appellant requested that he be permitted to submit additional paperwork in support of his claim. He indicated that he was writing as he had not received return correspondence from OWCP following the submission of records on October 27, 2017. Appellant explained that he had called and left a voicemail and had still not received a response. He noted that Dr. White's office had also attempted to contact OWCP and they too had not had any cooperation or success. Appellant again explained his employment duties and noted that he would require surgery on his left thumb. He requested assistance of OWCP to help him resolve the matter and provide the treatment that he needed immediately.

By decision dated November 28, 2017, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish that his left thumb rupture was causally related to the accepted factors of his federal employment. It concluded, therefore, that the requirements had not been met to establish an injury or a medical condition causally related to the accepted factors of federal employment.

On a fax coversheet dated December 8, 2017, Dr. White's office noted that it was sending six pages of documents (including the cover page) regarding appellant's claim with OWCP. Only the fax coversheet is of record for that date.

On December 9, 2017 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received a copy of the October 27, 2017 report of Dr. Resnick which was previously of record. It also received Dr. White's operative note dated January 30, 2018, which documented surgery for the diagnosed left hand tendon rupture. In a subsequent January 24, 2018 letter to OWCP, Dr. White noted appellant's history of injury and her course of treatment for his diagnosed left thumb condition. She explained that certainly tendon ruptures can be due to attritional wear, but appellant documented repetitive work duties for eight hours per day for five days per week on an automated induction system (flat sorter) which created an awkward position of his left hand. Therefore, Dr. White opined that the diagnosed condition was employment related.

In a May 7, 2018 addendum to a January 24, 2018 letter, Dr. White noted that she was responding with regard to the line "tendon ruptures may be due to attritional wear." She noted appellant performed tasks which would exacerbate weakness in a tendon and his repetitive work tasks can ultimately relate to tendon ruptures. Dr. White opined that given the lack of prior trauma and his repetitive work duties it was more likely than not that his work-related activities either caused or contributed to his tendon rupture.

In a letter dated May 25, 2017, Dr. White wrote on behalf of appellant, noting his course of left thumb treatment, his health history, and his employment duties, which she opined caused the diagnosed condition. She noted three specific employment duties and described photographs documenting the work location and its ergonomic features, which required appellant's wrists to be in an awkward position as appellant is left-hand dominant and "the prep station ledge is not conducive to left-handed individuals." Dr. White opined that the repetitive motion in this awkward position is highly likely to have been the inciting cause of his attritional rupture.

By decision dated July 12, 2018, an OWCP hearing representative affirmed the November 28, 2017 decision finding that, although appellant had established a diagnosed condition, he had not met his burden of proof to establish causal relationship.

Appellant requested reconsideration on October 26, 2018. He indicated that a September 18, 2018 letter from Dr. White accompanied his reconsideration request. Appellant provided his contact information in case OWCP needed additional information. The September 18, 2018 letter was not attached to the reconsideration request in the case record as presented to the Board.

OWCP, by decision dated January 18, 2019, denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a), finding that the request neither raised substantive legal questions, nor included relevant and pertinent new evidence. It noted that the September 18, 2018 report referenced in his reconsideration request was not received.

On March 19, 2019 appellant again requested reconsideration. He indicated that Dr. White's September 18, 2018 report had accompanied his original reconsideration request, and noted that he was submitting it again. Appellant explained that Dr. White's letter provided an "unequivocal medical narrative that provides a rationalized medical opinion specifying the work activity and circumstances which resulted in the extensor tendon rupture of [his] left thumb." He requested that if additional information was necessary for consideration of his claim that he be contacted by telephone at a number he provided.

OWCP subsequently received a duplicate copy of Dr. Resnick's October 27, 2017 left hand ultrasound report.

In a letter dated April 22, 2019, appellant was notified that his reconsideration request had been received by OWCP and that the file had been directed to a senior claims examiner who would review the "petition" and new evidence or argument and issue a decision.

By decision dated April 23, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to section 8128(a) of FECA. The decision was unsigned, but found that his request had neither raised substantive legal questions, nor included relevant and pertinent new evidence. It indicated that Dr. White's September 18, 2018 report was not received as part of the reconsideration request despite appellant's statement that it was being submitted as a part of his request.

Appellant, on July 23, 2019, again requested reconsideration. He again noted that he was submitting Dr. White's September 18, 2018 letter. The medical letter was included as an attachment with this request. In the report, Dr. White opined that appellant's extensor tendon rupture of the left thumb was due to the repetitive nature of the work he performed in his mail handler position. She explained that it was well documented in literature that repetitive activities can lead to attritional ruptures. Dr. White maintained that this was exactly the scenario for appellant. She reported that he had been working at a prepping station using his left arm to reach over a ledge and pressing his left hand, thumb, and wrist in a flexed position with repetitive activity. Dr. White advised that this type of repetitive activity can certainly lead to attritional ruptures. She indicated that there was no other activity in appellant's normal daily routine that would create a similar strain. Dr. White concluded, therefore, that his injury was causally related to his work.

OWCP, by decision dated August 7, 2019, summarily denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.³ 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.⁴

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵ When a timely request 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.⁶

OWCP's procedures provide that each request for reconsideration must be handled by a senior claims examiner who was not involved in the making of the contested decision. All reconsideration decisions, whether affirmative or negative, must be issued by a senior claims examiner or higher authority.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly denied appellant's March 19, 2019 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

By decision dated April 23, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to section 8128(a) of FECA, finding that it neither raised substantive legal questions, nor included relevant and pertinent new evidence. The decision, however, is unsigned by a senior claims examiner and does not indicate it had been written by a senior claims examiner. OWCP's procedures provide that each request for reconsideration must be handled by a senior claims examiner who was not involved in the making of the contested

² 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).

³ 20 C.F.R. § 10.607.

⁴ *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 (iFECS). *Id.* at Chapter 2.1602.4b (February 2016).

⁵ *Id.* at § 10.606(b)(3).

⁶ *Id.* at § 10.608(a), (b).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(b) (October 2011).

decision.⁸ The record on appeal establishes that the contested decision of April 23, 2019 was unsigned and does not confirm that it was issued by a senior claims examiner not involved in the prior decisions. Therefore, the Board finds that OWCP failed to follow its procedures when it issued its April 23, 2019 decision denying appellant's request for reconsideration. For these reasons, the case will be remanded to OWCP for reconstruction and proper assemblage of the record and to consider all the evidence of record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's March 19, 2019 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).⁹

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 14, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

⁸ *Id.*; see *Order Remanding Case, H.G.*, Docket No. 15-1413 (issued December 29, 2015).

⁹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.