



## **FACTUAL HISTORY**

On May 19, 2005 appellant, then a 41-year-old customs and border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained a left shoulder injury when his left arm was twisted back and his shoulder was pulled while performing a takedown and handcuffing procedure in the performance of duty. He stopped work the same day and returned on May 20, 2005 in a light-duty capacity. Appellant returned to full-duty employment on July 13, 2005 and was released from care.

On March 25, 2011 appellant filed a notice of recurrence (Form CA-2a) of the need for medical treatment noting that he had experienced pain and discomfort while performing physical activities involving the use of his left arm on July 1, 2005. He noted that he had experienced pain since his original injury, but had controlled it with medication.

On May 27, 2011 OWCP accepted appellant's claim for sprain of shoulder and upper arm, unspecified site left.

In an October 25, 2011 medical report, Dr. Thomas Teske, a Board-certified neurologist, noted appellant's left upper extremity pain due to the May 19, 2005 employment incident in which an over-aggressive colleague grabbed his left arm and pulled it forcibly behind his back during a training exercise. He recounted appellant's history of pain and explained that in about February or March 2011 he experienced a significant flare up of left scapular pain. On evaluation Dr. Teske opined that appellant's medical history and current condition were strongly suggestive of left C7 radiculopathy with a C6-C7 disc protrusion. Based on an October 31, 2011 electromyogram and a nerve conduction velocity study he found mild left distal median neuropathy, but no other evidence of mononeuropathy, plexopathy, or radiculopathy.

In a June 28, 2012 diagnostic report, Dr. Hemlata Lepkowski, a Board-certified radiologist, performed a magnetic resonance imaging (MRI) scan of appellant's cervical spine and found a straightening of the cervical curvature, a central paracentral disc protrusion at C5-6, a disc osteophyte complex at C6-7, and a mixed signal intensity lesion in the floor of the right maxillary sinus with central soft tissue surrounded by cystic abnormality.

In an August 31, 2012 medical report, Dr. Jean-Jacques Abitbol, a Board-certified orthopedic surgeon, reviewed appellant's medical history following the May 19, 2005 employment injury. On evaluation he found axial neck pain and cervical radiculopathy and noted no weakness in his upper extremity.

In medical reports dated December 16, 2016 and January 27, 2017, Dr. Scott Hacker, a Board-certified orthopedic surgeon, noted moderate pain in appellant's left shoulder due to the employment injury that had continued with strenuous and overhead activity. He diagnosed cervical radiculopathy and impingement syndrome of the right shoulder. Dr. Hacker referred appellant to physical therapy.

Appellant submitted a series of physical therapy notes dated from January 10 to February 15, 2017, detailing treatment for cervical disc degeneration.

In medical notes dated April 30 and May 11, 2018, Dr. Jorge Robles, Board-certified in family medicine, opined that appellant could return to work with restrictions on May 28, 2018.

On May 14, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for leave without pay (LWOP) for the period May 1 to 25, 2018.

In a May 4, 2018 diagnostic report, Dr. Sydney Stevens, a Board-certified diagnostic radiologist, performed a cervical spine MRI scan which found impressions of increasing lower cervical dextroscoliosis and degenerative disc disease.

In a May 22, 2018 development letter, OWCP informed appellant that additional medical evidence was required to establish disability from work during the period claimed. It afforded him 30 days to submit the necessary evidence.

In response appellant submitted medical reports dated from March 21 to May 9, 2017 from Dr. Robles who diagnosed right leg pain, an injury of the left shoulder, and cervical radiculopathy. Dr. Robles opined that appellant's cervical radiculopathy was likely the result of a cervical spine injury from 2011.

In medical reports dated from April 30 to October 10, 2018, Dr. Robles noted that appellant's pain had continued in his cervical spine and provided updates for his treatment as he awaited authorization to consult with a neurosurgeon. On evaluation he diagnosed cervical radiculopathy, brachial neuritis, and a sprain of the other part of the right shoulder/sequela. Appellant was permitted to return to work with light-duty restrictions as of May 28, 2018.

In an August 10, 2018 medical report, Dr. Abitbol again noted moderate left-sided neck pain with pain radiating into the left upper extremity in relation to the May 19, 2005 employment injury. Upon review of his medical records and evaluation, he diagnosed cervical stenosis and referred him to physical therapy to treat his condition.

In physical therapy notes dated from September 19 to November 21, 2018, Dustin Bonham, a physical therapist, and Stephany Rodiles, a physical therapy assistant, provided progress notes for appellant's treatment for cervicgia, sprain of ligaments of the cervical spine, and spinal stenosis.

By decision dated January 29, 2019, OWCP denied appellant's claim for LWOP compensation, for the period May 1 to 25, 2018, finding that the medical evidence of record was insufficient to establish that he was disabled, during the period claimed, causally related to his accepted May 19, 2005 employment injury.

On March 15, 2019 appellant requested reconsideration of OWCP's January 29, 2019 decision. He submitted a letter explaining that he would provide additional medical evidence sufficient to meet his burden of proof. OWCP received no further evidence.

By decision dated April 17, 2019, OWCP denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

## 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.<sup>2</sup>

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.<sup>3</sup>

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

## ANALYSIS

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).

Appellant filed a timely request for reconsideration on March 15, 2019,<sup>7</sup> but he did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).<sup>8</sup>

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<sup>2</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

<sup>3</sup> 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also 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). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit 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.

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

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

<sup>7</sup> *Supra* note 4; *J.F.*, Docket No. 16-1233 (issued November 23, 2016).

<sup>8</sup> *Supra* note 3.

Appellant also failed to submit relevant and pertinent new evidence in support of his March 15, 2019 request for reconsideration. The underlying issue on reconsideration was whether he had met his burden of proof to establish disability from work during the period claimed causally related to his accepted work-related medical condition. This is a medical question that requires rationalized medical opinion evidence to resolve the issue.<sup>9</sup> However, appellant did not submit additional evidence with his request for reconsideration. Because he did not provide “relevant and pertinent new evidence,” he is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>10</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.

### **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 April 17, 2019 decision of the Office of Workers’ Compensation Programs is affirmed.

Issued: April 15, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees’ Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees’ Compensation Appeals Board

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<sup>9</sup> *E.T.*, Docket No. 14-1087 (issued September 5, 2014).

<sup>10</sup> 20 C.F.R. § 10.606(b)(3)(iii).