

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 April 11, 2018 appellant, then a 57-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a right shoulder injury as a result of performing repetitive motion when casing mail while in the performance of duty. She noted that this condition resulted from degeneration of an accepted right shoulder injury on November 29, 2004.³ OWCP assigned File No. xxxxxx338. Appellant indicated that she first became aware of her condition on January 26, 2018 and first realized it was related to her federal employment on March 28, 2018. She stopped work on April 12, 2018.

In progress notes dated January 26, 2018, Dr. James P. Duffey, a Board-certified orthopedic surgeon, noted that appellant had a work-related injury in 2004 and had continued to live with daily shoulder pain since that time. He related that appellant fell at home on December 30, 2017, she did not land directly on the shoulder, but she subsequently had a significant increase in her shoulder pain. On examination of the right shoulder, Dr. Duffey observed atrophy of the supraspinatus and infraspinatus fossa, limited active range of motion, and pain with manipulation on passive range of motion. He reviewed recent magnetic resonance imaging (MRI) scans of her right shoulder and compared them to a 2004 MRI scan. Dr. Duffey observed advanced rotator cuff arthropathy with significant trophic changes at the superior humeral head and acromion, proximal humeral migration, degenerative changes to the humerus along with posterior subluxation, and atrophy of the supraspinatus and infraspinatus. The MRI scan from 2004 demonstrated a partial supraspinatus tendon tear without evidence of muscular atrophy or secondary degenerative changes of the glenohumeral joint. Dr. Duffey diagnosed right rotator cuff arthropathy, tears of the right supraspinatus and infraspinatus, and a complete tear of the right rotator cuff.

By development letter dated April 20, 2018, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and requested a narrative medical report from her physician, containing a detailed description of findings and diagnoses, and explaining how the claimed exposure resulted in a diagnosed condition. OWCP afforded appellant 30 days to respond.

In a report dated March 28, 2018, Dr. Jack L. Rook, Board-certified in physical medicine and rehabilitation, examined appellant for complaints of right shoulder pain. He noted that appellant's work for the employing establishment required casing mail and mail delivery, and that

³ On November 30, 2004 appellant filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2004 she sustained a pulled muscle in her right shoulder as a result of reaching over a tray while delivering mail in the performance of duty. OWCP assigned that claim File No. xxxxxx115 and accepted it on January 13, 2005 for right rotator cuff tear and strain. On March 22, 2018 it denied appellant's claim for recurrence under File No. xxxxxx115. OWCP File No. xxxxxx115 has been administratively combined with File No. xxxxxx338, with the latter serving as the master file.

she had sustained a work-related injury on November 29, 2004. At the time, it was recommended that appellant proceed with surgical rotator cuff repair, but appellant chose not to proceed due to her fear of surgery and her ability to continue to work despite her pain. Dr. Rook noted that appellant's right shoulder pain never resolved and worsened over time. Appellant was able to continue working until a fall at home on December 29, 2017, when she tripped and fell forward, landing on an outstretched arm. She developed an increase in her right shoulder pain secondary to this fall. Dr. Rook noted appellant's physical examination findings and diagnosed chronic subluxation of the right glenohumeral joint, caused by the longstanding rotator cuff tear, advanced degenerative joint disease of the right shoulder, with accelerated degeneration likely associated with the complete and longstanding rotator cuff tear, and permanent aggravation of right shoulder glenohumeral arthritis.

Dr. Rook opined that, based on appellant's history, medical records, and physical examination, he believed that appellant's current condition was related to her duties as a letter carrier in conjunction with an underlying work-related condition from 2004. He explained that, as appellant never had surgery for her rotator cuff tear in 2004, the duties of repetitive reaching, lifting, and opening and closing the door of her postal vehicle placed stress on her right shoulder joint. Dr. Rook noted that her worsening condition appeared to be secondary to accelerated degeneration of the joint due to instability associated with the complete rotator cuff tear. He stated that the fall sustained at home on December 29, 2017 did not account for the chronic changes within her shoulder identified on her recent MRI scan. Dr. Rook explained that, from a pathophysiological perspective, a complete rotator cuff tear resulted in decreased support of the bones of the shoulder joint, causing increased mobility of the bones, which in turn caused accelerated wearing away of the joint surfaces. He noted that appellant's recent MRI scan demonstrated malposition of her humeral head due to loss of integrity of the supporting joint structures, as well as the presence of advanced degenerative joint disease, greater than one would expect in an individual who did not have a complete rotator cuff tear for the prior 14 years. Dr. Rook opined that, within a reasonable degree of medical certainty, appellant's current condition was related to her job duties and the underlying work-related 2004 occupational injury.

On May 2, 2018 a supervisor stated that appellant performed duties of moving equipment and casing mail. He noted that on the date in question appellant had injured herself at home while holding a grandchild, which caused her claimed injury.

Appellant responded to OWCP's inquiries on May 2, 2018. She alleged that on December 29, 2017 she tripped and fell forward, landing on outstretched arms, resulting in a marked increase of right shoulder pain and inability to work. Appellant noted that she had sustained a work-related injury on November 29, 2004, which was accepted for a complete right shoulder rotator cuff tear under OWCP File No. xxxxxx115. Surgery was recommended, but she did not undergo surgery due to fear of the procedure and her ability to continue working despite the pain.

By decision dated July 12, 2018, OWCP denied the claim.

On August 6, 2018 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By letter dated August 6, 2018, appellant argued that she had submitted sufficient medical evidence to establish her claim. She noted that her April 5, 2018 MRI scan documented a full thickness rotator cuff tear of the right shoulder. Appellant stated that her fall at home on December 29, 2017 was a “wake up” call to a more serious condition, but that the condition was not caused by the fall. In a separate letter of the same date, she noted that the employing establishment could not accommodate her work restrictions.

By decision dated December 17, 2018, OWCP’s Branch of Hearings and Review affirmed the decision of July 12, 2018, finding that the medical evidence of record was insufficient to establish causal relationship between appellant’s diagnosed conditions and the accepted factors of her federal employment.

Appellant subsequently submitted a report from Dr. Rook dated January 16, 2019. Dr. Rook again noted that appellant had never had optimal treatment for her 2004 right shoulder injury. Appellant had chosen not to have surgery and continued to work at a job which aggravated her condition on a daily basis, due to the required repetitive reaching and lifting, as well as frequent opening and closing her vehicle door using her right upper extremity. Dr. Rook explained that repetitive reaching at the shoulder level caused repeated impingement of the shoulder joint with progressive inflammation and further breakdown of the rotator cuff fibers. He also explained that appellant’s other employment activities placed great stress on her right shoulder joint and torn rotator cuff. This repeated stress to the joint caused wear and tear of the rotator cuff fibers, with further degeneration and pain. In an attached duty status report of the same date, Dr. Rook recommended that appellant could return to work with restrictions, including, but not limited to use of the left upper extremity only and no long life vehicle (LLV) driving.

In a report dated February 15, 2019, Dr. Duffey noted that he had reviewed the documentation from Dr. Rook and completely agreed with his findings and statement. He opined that appellant’s work-related injury in 2004 resulted in a rotator cuff tear, which was never repaired surgically, and progressed over the years into rotator cuff arthropathy. Dr. Duffey noted that appellant had a fall at home in 2017, but that the changes seen on her MRI scan at that time were mostly chronic, consistent with the 2004 injury. He stated that her work as a letter carrier, including duties of casing mail, lifting and carrying packages, lifting and carrying cases of mail, and delivering mail, continued to aggravate this problem, and had progressed over the years into a rotator cuff arthropathy. On physical examination of the right shoulder Dr. Duffey observed active forward flexion and abduction to 90 degrees, passive to 30 to 40 degrees, pain on rotation, and reduced strength. He reviewed an MRI scan, noting a massive rotator cuff tear with significant and chronic atrophy of the supraspinatus, infraspinatus, and superior portion of the subscapularis, glenohumeral degenerative changes, and proximal humeral migration. Dr. Duffey related that appellant was a candidate for reverse shoulder arthroplasty of the right shoulder.

On June 25, 2019 appellant requested reconsideration of the decision dated December 17, 2018.

By decision dated July 8, 2019, OWCP denied appellant’s request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶ A timely request 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.⁷ 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.⁸

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

The Board finds that appellant submitted relevant and pertinent new evidence with her request for reconsideration. OWCP denied appellant's claim, finding that she had not established that factors of her federal employment had caused or aggravated her diagnosed right shoulder condition(s).

On reconsideration appellant submitted a report dated February 15, 2019 from Dr. Duffey. Dr. Duffey opined that appellant's work-related injury in 2004 resulted in a rotator cuff tear, which was never repaired surgically, and progressed over the years into rotator cuff arthropathy. He noted that appellant had a fall at home in 2017, but that the changes seen on her MRI scan at that time were mostly chronic, consistent with the 2004 injury. Dr. Duffey explained that her work as a letter carrier, including duties of casing mail, lifting and carrying packages, lifting and carrying cases of mail, and delivering mail, continued to aggravate this problem, and had likely led to the progression of pain and disability over time. He also related that he had reviewed Dr. Rook's documentation and completely agreed with his findings and conclusions.

⁴ 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).

⁵ 20 C.F.R. § 10.607.

⁶ *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.

⁷ *Id.* at § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

Dr. Duffey's February 15, 2019 report provided support regarding causal relationship of appellant's right shoulder condition to duties of her federal employment. As such, the Board finds that the February 15, 2019 report from Dr. Duffey constituted relevant and pertinent new evidence. Therefore, appellant's June 25, 2019 reconsideration request met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3).

Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608. The case shall therefore be remanded to OWCP to review the case records under OWCP File Nos. xxxxxx338 and xxxxxx115 for consideration of the merits of appellant's claim, to be followed by an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 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: December 31, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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