

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 10, 2015 appellant, then a 53-year-old computer forwarding system (CFS) clerk, filed an occupational disease claim (Form CA-2) alleging that he sustained a neck condition due to pushing, pulling, and lifting and keyboarding while in the performance of duty. He indicated that he first became aware of his condition and realized that it was caused by factors of his federal employment on September 2, 2015. Appellant did not initially stop work.

In a narrative statement, appellant explained that he had worked for the employing establishment for 27 years. He noted that the last seven years, he worked as a CFS clerk and that prior to that he worked as a distribution clerk. Appellant indicated that he had to do a lot of heavy lifting, pushing, and pulling. He also noted that, at the present time, he was keyboarding for eight hours a day. Appellant argued that he believed that all of these activities caused his neck injury.

In an October 7, 2015 report, Dr. Basimah Khulusi, Board-certified in physical medicine and rehabilitation, related that appellant had been employed as a clerk from 1988 until the present time. She explained that, over the course of his career, he worked in several positions including: a distribution clerk and most recently, a CFS clerk. Dr. Khulusi noted the description and duties of the CFS clerk, and advised that appellant had been working with restrictions for the past year due to a previous April 8, 2014 low back injury under OWCP File No. xxxxxx959. She related that he keyed mail for 8 to 10 hours a day. Dr. Khulusi related that appellant believed that his neck condition was due to sitting at a desk and keying mail for 8 to 10 hours a day. She also indicated that he was not sure of the exact time that his neck became symptomatic; however, he believed that his initial symptoms occurred in April 2015. Dr. Khulusi explained that appellant indicated that initially he believed that he had just a little muscle soreness and the pain would go away; however, the pain in his neck continued to become more severe and he sought medical attention.

Dr. Khulusi provided examination findings and diagnosed right cervical radiculopathy, cervical disc herniations, and permanent aggravation of degenerative disc disease of the neck as a result of right cervical radiculopathy and cervical disc herniations. Regarding causation, she opined that appellant had worked at the employing establishment as a clerk for 27 years. Dr. Khulusi explained that his job activities had required lifting up to 70 pounds and pushing and pulling of very heavy all-purpose containers. Furthermore, appellant worked in his most recent position for the past seven years, which required that he key for four hours per day and perform four hours of physical work, or eight hours of physical work when other employees were off work. Dr. Khulusi explained that he had a low back injury in 2014 and since that time, he performed sedentary duties, keying for eight hours a day.

Dr. Khulusi opined that appellant's repetitive work activities day after day and year after year, caused repetitive straining and spraining of the structures of the cervical spine, which resulted in a cumulative trauma disorder that led to weakening of structures of the cervical spine with weakening of the annuli containing the discs between vertebrae and weakening of the ligamentous

structures that hold the vertebrae together to provide stability of the cervical spine structure. Furthermore, she explained that the body reacted to with degenerative changes to fuse the vertebrae together to minimize movement between the vertebrae and thus to prevent more protrusion or extrusion of the discs into the cervical spinal canal. Dr. Khulusi opined that appellant had protrusions at multiple levels causing a mild compression of the spinal cord at multiple levels from C3 to C7.

Dr. Khulusi explained that, when appellant was performing his keying tasks, he had to hold his arms up in the air the whole time he was working, which led to static contractions of the cervical musculature, and the muscles of the back that were innervated by cervical nerve roots. She opined that, day after day, this led to a severe spraining of the structures and acceleration of the cervical degeneration.

On December 21, 2015 OWCP referred appellant for a second opinion examination with Dr. Michael Einbund, a Board-certified orthopedic surgeon. Dr. Einbund noted appellant's history of injury and treatment, examined appellant and provided findings. He diagnosed degenerative disc disease of the cervical spine and opined that it was not work related. Dr. Einbund explained that the performance of appellant's work duties may have resulted in pain and may have revealed his underlying condition. He noted that appellant had widespread degeneration of the cervical spine with multiple levels of disc bulges and stenosis, which were degenerative in nature; however, he opined that they would not have been the result of his job duties as a CFS clerk.

By decision dated February 9, 2016, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish a causal relationship between his medical condition and factors of his federal employment. It explained that the weight of the evidence rested with the second opinion physician, Dr. Einbund.

On March 2, 2016 Dr. Khulusi requested reconsideration on appellant's behalf. She explained that she had reviewed Dr. Einbund's report and argued that his report did not contain any medical reasoning "whatsoever" to reach his conclusions. Dr. Khulusi reviewed appellant's magnetic resonance imaging scan findings and argued that appellant had acceleration of his degenerative condition. She requested that OWCP accept the diagnoses of: acceleration of degenerative disc disease of the neck; multiple cervical disc protrusions as a result; multiple right cervical radiculopathies as a result and permanent aggravation of degenerative disc disease of the neck as a result.

Appellant also requested reconsideration on July 7, 2016.

By decision dated October 3, 2016, OWCP denied reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision. It found that Dr. Khulusi had not provided relevant legal argument or medical evidence not previously considered.

On November 4, 2016 appellant requested reconsideration and submitted additional medical evidence.

In an October 27, 2016 report, Dr. Khulusi argued that OWCP misinterpreted the law with regard to whether appellant sustained work-related aggravation of his degenerative condition by

comparing his condition to the natural or traditional course of the condition, instead of to another individual with an ordinary course of the disease. She explained that she had reviewed OWCP's Federal (FECA) Procedure Manual and had provided rationale to show how the underlying condition could be accelerated by employment. Dr. Khulusi requested that OWCP review all of her medical arguments and that OWCP accept appellant's claim for acceleration of degenerative disc disease of the neck, multiple cervical disc protrusions, multiple right cervical radiculopathies, and permanent aggravation of degenerative disc disease of the neck.

Dr. Khulusi also provided treatment notes dated August 3 and October 10, 2016.

By decision dated January 27, 2017, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant merit review.

On March 14, 2017 appellant again requested reconsideration.

In a letter dated March 2, 2017, Dr. Khulusi argued that OWCP based its opinion upon Dr. Einbund's January 27, 2016 report. She indicated that a physician specializing in occupational medicine was capable of providing an opinion on causal relationship, even if the attending physician was not an orthopedist. Dr. Khulusi argued that a conflict existed and a referral should be made to a referee physician, specializing in occupational medicine, to resolve the conflict.

OWCP also received Dr. Khulusi's treatment notes dated March 9, 2016 to February 15, 2017.

By decision dated June 5, 2017, OWCP denied appellant's request for reconsideration.

On June 19, 2017 appellant again requested reconsideration and submitted a June 15, 2017 letter from Dr. Khulusi, wherein she argued that OWCP had abused its discretion in denying his claim as she had provided the requisite rationale to support that his employment duties caused his condition. Dr. Khulusi reiterated that he had worked at the employing establishment as a clerk since 1988 and continuously. She explained that appellant had no prior cervical condition, but developed his condition while working for the employing establishment. While OWCP kept referring to a lack of rationale differentiating between his preexisting condition and his current condition, he did not have a preexisting condition when he began work at the employing establishment, but rather had developed a degenerative condition. Dr. Khulusi further explained that appellant's cervical conditions were not age related, but rather were caused by acceleration of the degeneration of his discs in the neck because of the nature of his employment, as he had more degeneration than other males his age. She argued that, since there was a disagreement between her opinion and Dr. Einbund's, OWCP should appoint a third physician who should make an examination. Dr. Khulusi repeated her request that OWCP accept appellant's condition for: acceleration of degenerative disc disease of the neck; multiple cervical disc protrusions as a result; multiple right cervical radiculopathies as a result and permanent aggravation of degenerative disc disease of the neck as a result.

By decision dated September 15, 2017, OWCP denied appellant's request for reconsideration.

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 or her own motion or on application.³

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.⁴

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

ANALYSIS

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

Appellant timely requested reconsideration on June 19, 2017. However, he did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. The Board therefore finds that appellant is not entitled to a review of the merits based on the first and second requirements under 20 C.F.R. § 10.606(b)(3).⁷

With his request for reconsideration, appellant submitted a June 15, 2017 letter from Dr. Khulusi. The Board finds that this letter constitutes relevant and pertinent new evidence under the third prong of 20 C.F.R. § 10.606(b). In her June 15, 2017 letter, Dr. Khulusi explained that appellant's cervical conditions were not age related, but rather were caused by acceleration of his

³ 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).

⁴ 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).

⁵ *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 its 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. *Id.* at Chapter 2.1602.4b.

⁶ *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019).

⁷ *Id.* § 10.606(b)(3)(i) and (ii).

cervical disc degeneration due to his employment. For the first time, she explained that, prior to his 27 years of employment, he had no preexisting cervical conditions. Dr. Khulusi explained that he developed degenerative cervical conditions during his employment, which were accelerated by his employment. The Board finds that explanation is new and pertinent relevant evidence, which directly addresses the issue of causal relationship. Appellant's request for reconsideration therefore met the third standard for obtaining merit review of his case under 20 C.F.R. § 10.606(b)(3).⁸ Accordingly, he is entitled to a merit review.

The Board will therefore set aside OWCP's September 15, 2017 decision and remand the case for an appropriate merit decision on appellant's claim.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2017 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further action consistent with this decision of the Board.

Issued: February 10, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

⁸ 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).