

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

A.F., Appellant	)	
	)	
and	)	
	)	<b>Docket No. 19-1832</b>
DEPARTMENT OF VETERANS AFFAIRS,	)	<b>Issued: July 21, 2020</b>
SAN FRANCISCO VETERANS	)	
ADMINISTRATION HEALTH CARE SYSTEM,	)	
San Francisco, CA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
CHRISTOPHER J. GODFREY, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 30, 2019 appellant filed a timely appeal from an August 7, 2019<sup>1</sup> nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated February 28, 2019 to the filing of this appeal, pursuant

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<sup>1</sup> Appellant also appealed from a purported June 7, 2019 decision in OWCP Master File No. xxxxxx827. *See infra* note 5. However, there is no OWCP decision of record dated June 7, 2019 in either Master File No. xxxxxx827 or the current file, OWCP File No. xxxxxx244. Additionally, there is no final adverse decision issued within 180 days of the filing of the current appeal in Master File No. xxxxxx827 over which the Board may properly exercise jurisdiction.

to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

### **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**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 13, 2016 appellant, then a 35-year-old human resources assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 15, 2016 she pulled a muscle in her right arm when she reached for some papers while sitting at her desk while in the performance of duty. OWCP accepted the claim for right arm/shoulder strain on May 27, 2016. It paid appellant wage-loss compensation benefits on the supplemental rolls from May 9 to August 20, 2016 and again from October 16 to 28, 2016.<sup>5</sup>

Appellant filed claims for wage-loss compensation (Form CA-7) for total disability for the period August 21 to October 14, 2016.

By decision dated October 26, 2016, OWCP denied appellant's claim for wage-loss compensation for the period commencing August 21, 2016 and continuing.

On November 9, 2016 appellant requested an oral hearing before an OWCP hearing representative, which was held on March 31, 2017.

On December 9, 2016 appellant filed a Form CA-7 wage-loss compensation claim for the period November 28 through December 9, 2016.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the August 7, 2019 nonmerit decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>4</sup> Docket No. 17-1514 (issued April 10, 2018).

<sup>5</sup> OWCP noted that appellant filed an occupational disease claim (Form CA-2) alleging a right shoulder injury on or about March 15, 2016, OWCP File No. xxxxxx827. This claim was accepted for right shoulder superior glenoid labrum lesion and right upper limb ulnar nerve lesion. OWCP noted that the instant claim had been administratively combined with OWCP File No. xxxxxx827, with the latter OWCP File designated as the master file number.

By decision dated June 15, 2017, OWCP's hearing representative affirmed the October 26, 2016 denial of the claim.

On July 3, 2017 appellant filed an appeal with the Board. By decision dated April 10, 2018, the Board affirmed the June 15, 2017 hearing representative's decision.<sup>6</sup> The Board noted that appellant had claimed wage-loss compensation from August 21, 2016 and continuing, but found the medical evidence of record was insufficient to establish total disability.

OWCP continued to receive progress reports from Dr. Mark H. Chan, an attending Board-certified physiatrist and pain medicine physician, regarding appellant's medical treatment, diagnoses, and employment status during 2017. It also received reports from Kelly Maris-Weissburg, a nurse practitioner; Dr. Mathias Masem, a Board-certified orthopedic and hand surgeon; and Dr. Fred Blackwell, a Board-certified orthopedic surgeon, regarding appellant's medical status in 2017. Dr. Blackwell in a series of work status reports from October 13 through December 18, 2017 indicated that appellant was capable of working four to five hours per day with restrictions for the period October 16, 2017 to January 18, 2018.

By decision dated December 5, 2017, OWCP expanded acceptance of appellant's claim to include the conditions of right shoulder superior glenoid labrum lesion, right shoulder synovitis, and tenosynovitis.

On April 11, 2018 appellant requested reconsideration regarding the denial of her wage-loss compensation commencing August 21, 2016 and submitted additional medical evidence from Dr. Blackwell regarding her medical status in 2018. In work status reports dated from January 5 through June 18, 2018, Dr. Blackwell opined that appellant was capable of working four to five hours per day for the periods January 5 to February 5, 2018 and February 20 to July 30, 2018. In an April 6, 2018 report, he found appellant was totally disabled from working at that time. In reports dated April 20, May 1, and June 5, 2018, Dr. Blackwell found appellant could continue working from home. OWCP also received 2018 reports from Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon.

By decision dated July 10, 2018, OWCP denied modification of its prior decision.

Following the July 10, 2018 decision, OWCP received work status reports and narrative reports from Dr. Blackwell addressing appellant's need for surgery and her ability to perform modified work for four to five hours per day from home.

On December 3, 2018 appellant requested reconsideration. In support of her request for reconsideration she submitted progress reports and work status reports finding she was capable of working four to five hours per day with restrictions from Dr. Blackwell dated June 19, 2018 through February 8, 2019 and supplemental reports from Dr. Mohinder Nijjar, a Board-certified orthopedic surgeon, dated August 30 and October 5, 2018. Appellant also resubmitted reports from her treating physicians as well as electromyography and nerve conduction velocity (EMG/NCV) scan/study, and magnetic resonance imaging (MRI) scans previously of record.

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<sup>6</sup> *Id.*

By decision dated February 28, 2019, OWCP denied modification finding that none of the new medical evidence addressed disability during the ongoing claimed period. It also noted that appellant had been paid wage-loss compensation for intermittent periods for missed work during the period October 8, 2017 through January 4, 2019.

Appellant resubmitted an August 17, 2016 MRI scan report and an October 6, 2016 EMG/NCV scan study. OWCP also received work status and progress reports from Dr. Blackwell regarding appellant's physical status in 2017, 2018, and 2019.

On June 3, 2019 appellant requested reconsideration and referenced her occupational disease claim in OWCP File No. xxxxxx827. Following her request, OWCP received May 28 and June 4, 2019 disability certificates for the period May 28 to July 10 2019 from Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon, indicating that appellant was disabled from work.

OWCP also received a June 3, 2019 letter from Dr. Blackwell addressing reduction of appellant's work hours for the period April 4 to 26, 2019. A progress report from Dr. Blackwell dated June 28, 2019 included diagnoses of right rotator cuff tendinitis with impingement and probable superior labral anterior to superior (SLAP) lesion. He added that appellant's shoulder was stable although she had noted increased difficulties. In a July 19, 2019 progress report, Dr. Blackwell diagnosed chronic cervical sprain and strain and right rotator cuff tendinitis with impingement and probable SLAP lesion, noted that an additional MRI scan may be needed to verify the SLAP lesion, and added that appellant was capable of performing modified duty. Additionally, appellant submitted work status reports from Dr. Blackwell concerning her work capacity and diagnoses of ulnar neuropathy, right shoulder derangement syndrome, right cubital tunnel release, and right shoulder sprain. In the May 24, 2019 work status report, Dr. Blackwell found appellant was disabled from work for the period May 24 through July 31, 2019. In work status reports dated July 12 and 19, 2019, he found that appellant was disabled from work for the period July 12 through August 31, 2019.

By decision dated August 7, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim 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>7</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

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<sup>7</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).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>8</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>9</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>10</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>11</sup>

### ANALYSIS

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

In her request for reconsideration, appellant 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. Thus, she is not entitled to a review of the merits based on either the first or second requirements under section 10.606(b)(3).<sup>12</sup>

However, with respect to the third above-noted requirement under 20 C.F.R. § 10.606(b)(3), appellant submitted numerous reports from Drs. Fong and Blackwell addressing her medical treatment, disability status, and work restrictions limiting her to working four to five hours per day in 2017, 2018, and 2019. In its August 7, 2019 decision, OWCP denied appellant's request for a merit review as it found the evidence submitted irrelevant or immaterial. It only noted that the evidence submitted with her reconsideration request included a May 25, 2019 handwritten statement and numerous medical documentations.

Since the Board's jurisdiction of a case is limited to reviewing that evidence which is before OWCP at the time of its final decision,<sup>13</sup> it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. FECA provides that OWCP shall determine and make findings of fact in making an award for or against payment of

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<sup>8</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>9</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 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.

<sup>10</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>11</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>12</sup> *Supra* note 8 at § 10.606(b)(3)(i) and (ii).

<sup>13</sup> *R.P.*, Docket No. 19-0301 (issued August 21, 2019); *K.L.*, Docket No. 16-1341 (issued December 20, 2016); *E.Z.*, Docket No. 14-0274 (issued March 16, 2015); *Linda Johnson*, 45 ECAB 439 (1994).

compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim.<sup>14</sup>

The Board finds that it is unclear what medical documentation OWCP reviewed in denying appellant's request for reconsideration as there was no discussion or identification of any specific report submitted on reconsideration. In this case, OWCP initially accepted the claim for right shoulder strain, but by decision dated December 5, 2017, it expanded acceptance of appellant's claim to include the conditions of right shoulder superior glenoid labrum lesion, right shoulder synovitis, and tenosynovitis, it was therefore necessary for OWCP to determine whether any of the medical reports submitted on reconsideration attributed appellant's disability to any of appellant's accepted conditions, and whether these reports had been previously reviewed following the expansion of appellant's accepted right shoulder conditions. Therefore, the case is remanded to OWCP for a discussion and identification of the medical evidence appellant submitted in connection with her reconsideration request, to be followed by the issuance of an appropriate decision regarding her reconsideration request.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 7, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 21, 2020  
Washington, DC

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

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

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

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<sup>14</sup> 5 U.S.C. § 8124(a); 20 C.F.R. § 10.126; *see J.J.*, Docket No. 19-0448 (issued December 30, 2019); *see Hubert Jones, Jr.*, 57 ECAB 467 (2006).