

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

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**B.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Glencoe, MO, Employer**

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**Docket No. 18-0692  
Issued: June 5, 2020**

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>  
*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  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On February 13, 2018 appellant, through counsel, filed a timely appeal from an August 18, 2017 merit decision and a January 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

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

<sup>3</sup> The Board notes that, following the January 3, 2018 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.*

## ISSUES

The issues are: (1) whether appellant met his burden of proof to establish total disability for the period November 14, 2015 to January 22, 2016 causally related to his accepted March 2, 2015 employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On March 2, 2015 appellant, then a 60-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right knee, right elbow, and right hip when he fell on ice while loading packages while in the performance of duty. He did not stop work.

By decision dated April 20, 2015, OWCP indicated that it had administratively approved the payment of a limited amount of medical expenses because appellant appeared to have sustained a minor injury that resulted in minimal or no lost time from work and the employing establishment did not controvert continuation of pay or challenge the case. It noted that it had reopened the claim for formal consideration of the merits and had accepted the conditions of right knee contusion, right elbow contusion, right hip contusion, neck strain, and right shoulder strain as work related. OWCP authorized appellant's right shoulder surgery, which was performed by Dr. Luke S. Choi, a Board-certified orthopedic surgeon, on June 23, 2015.<sup>4</sup> Appellant stopped work in connection with his surgery, returned to work on September 29, 2015 without restrictions, and then stopped work again on November 14, 2015. He received wage-loss compensation for intermittent periods of disability.

Appellant filed claims for wage-loss compensation (Form CA-7) for the period November 14, 2015 to January 22, 2016.

Appellant submitted a November 16, 2015 report from Dr. Choi who advised that appellant complained of diffuse pain in his right shoulder, both knees, and lower back. Dr. Choi noted that, upon examination, appellant's right shoulder exhibited good range of motion and good strength without signs of an infectious process. He diagnosed status post right shoulder arthroscopy with distal clavicle resection/biceps tenodesis and opined that appellant had reached maximum medical improvement (MMI) at that time. Dr. Choi cleared appellant to return to work that day without restrictions. In a November 16, 2015 work status report, he released appellant to return to full-duty work that day with no restrictions and no further treatment.

In reports dated November 18, 19, and 25 and December 3, 2015, Art McAlister, a physical therapist, described the therapy sessions performed on those dates. Appellant also submitted reports from attending physicians, which preceded his claimed period of disability, including March 3 and April 29, 2015 reports by Dr. Charles Keefe, a Board-certified family practitioner.

In a December 8, 2015 development letter, OWCP advised appellant of the deficiencies of his wage-loss claim and afforded him 30 days to submit additional evidence. It requested that his physician submit a comprehensive narrative report which explained, with objective findings, how

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<sup>4</sup> The procedures performed included subacromial decompression with acromioplasty, labral debridement, open subpectoral biceps tenodesis, distal clavicle resection, and rotator cuff debridement.

his work-related conditions had worsened such that he was no longer able to perform the duties of the position he held when he stopped work on November 14, 2015.

In response, appellant submitted a December 2, 2015 report from Dr. John Ellena, a Board-certified internist, who opined that appellant had permanent injury to his right shoulder, right wrist, and right knee which occurred on the job. Dr. Ellena determined that appellant had reached MMI.

In an unsigned December 30, 2015 report, an unidentified care provider indicated that appellant had suffered an injury at work, which required surgical repair. The care provider opined that appellant was capable of returning to work on March 1, 2016 with restrictions.

Appellant also submitted numerous reports dated between June 2011 and October 2015 from attending physicians, including Dr. William Feinstein and Dr. Mitchell Rotman, Board-certified orthopedic surgeons, and Dr. Bakul Dave, a Board-certified anesthesiologist. The reports provided examination findings for multiple conditions involving appellant's back and extremities.

By decision dated February 12, 2016, OWCP denied appellant's wage-loss claim for the period November 14, 2015 to January 22, 2016 because the medical evidence of record was insufficient to establish disability due to the accepted March 2, 2015 employment injury.

Appellant subsequently submitted December 28, 2015 x-rays of the right hip which were read as normal and cervical spine x-rays of even date, which revealed multi-segment cervical degenerative disc disease, facet osteoarthritis, uncovertebral osteoarthritis with degenerativeolistheses, moderate lower cervical spine central canal stenosis, and moderate-to-severe bilateral foraminal stenosis.

On January 4, 2017 appellant, through counsel, requested reconsideration of the February 12, 2016 decision and submitted additional medical evidence.

In a January 18, 2016 report, Dr. James M. Goldring, a Board-certified neurologist, indicated that appellant underwent right shoulder surgery in the summer of 2015 necessitated by a fall-related injury, followed by a subsequent injury while doing exercises and physical therapy in mid-November 2015. In the diagnosis portion of the report, he indicated that appellant had continuing mild headaches, blurry vision, and shakiness which he identified as "likely all part of a post-concussive syndrome," as well as symptoms of neck pain radiating into the left arm which he believed "could represent a cervical radiculopathy." Dr. Goldring recommended that appellant undergo physical therapy.

On March 1, 2016 Dr. Ellena indicated that appellant had reached MMI and could not perform his current job duties. In a December 22, 2016 report, he discussed appellant's neck surgery on an unspecified date and right eye infection problems which followed the surgery.

Appellant also submitted physical therapy reports of Mr. McAlister dated January 20 and 22, 2016. He submitted additional reports from attending physicians dated between 2013 and 2015.

By decision dated August 18, 2017, OWCP denied modification of its February 2, 2016 decision.

On October 13, 2017 appellant, through counsel, requested reconsideration of the August 18, 2017 decision and submitted an undated report from Dr. Prabakar K. Rao, a Board-certified ophthalmologist, who noted that appellant was in a work accident on March 2, 2015 and required surgery on his shoulder and neck. Dr. Rao indicated that appellant underwent neck surgery in August 2016 and two weeks post operation developed a neck abscess. He noted that, while appellant was in the hospital, he complained that he could no longer see and that he was diagnosed with endophthalmitis and retinal detachment in the right eye. Dr. Rao indicated that in September 2016 he performed right eye surgery to treat these conditions and opined that appellant's right eye injuries occurred due to his previous "neck surgery from his neck abscess."<sup>5</sup>

By decision dated January 3, 2018, OWCP found that the evidence appellant submitted in support of reconsideration was irrelevant to his claim for disability compensation for the period November 14, 2015 to January 22, 2016 and therefore denied a merit review of the claim.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup>

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>7</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>8</sup> An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.<sup>9</sup> When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.<sup>10</sup>

The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must

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<sup>5</sup> Appellant also submitted a report of the September 6, 2016 right eye surgery, which included para plana vitrectomy, vitreous biopsy, endolaser, intravitreal antibiotic injection, fluid/air exchange, and insertion of octafluoropropane gas in the right eye.

<sup>6</sup> S.W., Docket No. 18-1529 (issued April 19, 2019); J.F., Docket No. 09-1061 (issued November 17, 2009).

<sup>7</sup> 20 C.F.R. § 10.5(f); S.T., Docket No. 18-0412 (issued October 22, 2018).

<sup>8</sup> See L.W., Docket No. 17-1685 (issued October 9, 2018).

<sup>9</sup> See D.G., Docket No. 18-0597 (issued October 3, 2018).

<sup>10</sup> See D.R., Docket No. 18-0323 (issued October 2, 2018).

be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish total disability from work for the period November 14, 2015 to January 22, 2016 causally related to his accepted March 2, 2015 employment injury.

Appellant submitted a November 16, 2015 report from Dr. Choi who diagnosed status post right shoulder arthroscopy with distal clavicle resection/biceps tenodesis, opined that appellant had reached MMI, and released him to full-duty work effective November 16, 2015. In a December 2, 2015 report, Dr. Ellena indicated that appellant had a permanent injury that occurred on the job, which included the right shoulder, wrist, and knee, and he opined that appellant had reached MMI. On January 18, 2016 Dr. Goldring noted that appellant had continuing mild headaches, blurry vision, and shakiness which he identified as “likely all part of a post concussive syndrome,” as well as symptoms, which could represent a cervical radiculopathy. The Board notes, however, that these reports have no probative value with respect to the underlying issue of this case because they do not contain an opinion that appellant had disability from November 14, 2015 to January 22, 2016 due to the accepted March 2, 2015 employment injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee’s condition or disability is of no probative value on the issue of causal relationship.<sup>12</sup> Consequently, these reports are insufficient to satisfy appellant’s burden of proof. Appellant submitted reports dated between June 2011 and October 2015 from Dr. Keefe, Dr. Feinstein, Dr. Rotman, and Dr. Dave. Moreover, he also submitted a February 23, 2016 report of Dr. Choi, and March 1 and December 22, 2016 reports of Dr. Ellena. The Board notes that these reports do not address appellant’s medical condition during the claimed period of disability, November 14, 2015 to January 22, 2016, and do not contain an opinion on disability during that period. Therefore, they also have no probative value on the underlying issue of this case.<sup>13</sup>

Appellant also submitted physical therapy reports of Mr. McAlister dated November 18, 2015 through January 22, 2016 in support of his claim. These documents do not constitute competent medical evidence because a physical therapist is not a “physician” as defined under FECA.<sup>14</sup> Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to compensation benefits.<sup>15</sup> Appellant submitted an unsigned December 30, 2015 report in which an unidentified individual indicated that appellant underwent surgery due to a work-related condition. However, this report has no probative value with respect to the underlying issue of this case as the Board has held that unsigned reports cannot be considered

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<sup>11</sup> V.A., Docket No. 19-1123 (issued October 29, 2019).

<sup>12</sup> See L.B., Docket No. 18-0533 (issued August 27, 2018); D.K., Docket No. 17-1549 (issued July 6, 2018).

<sup>13</sup> See *id.*

<sup>14</sup> 5 U.S.C. § 8101(2); S.T., Docket No. 17-0913 (issued June 23, 2017) (a physical therapist is not a physician under FECA).

<sup>15</sup> *Id.*

probative medical evidence because they lack proper identification.<sup>16</sup> The Board finds appellant's treating physicians have not provided rationalized medical opinion evidence establishing that he was disabled during the period November 14, 2015 to January 22, 2016 causally related to the accepted March 2, 2015 employment injury. Thus, appellant has not met his burden of proof to establish that he is entitled to compensation for total disability.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

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>17</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>18</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>19</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>20</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>21</sup>

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<sup>16</sup> R.C., Docket No. 18-1639 (issued February 26, 2019). Appellant submitted diagnostic testing results from December 2015. However, diagnostic studies lack probative value as they do not address whether employment factors caused the diagnosed condition/disability. C.S., Docket No. 19-1279 (issued December 30, 2019).

<sup>17</sup> 5 U.S.C. § 8128(a); see L.D., Docket No. 18-1468 (issued February 11, 2019); 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>18</sup> 20 C.F.R. § 10.606(b)(3); see M.S., Docket No. 18-1041 (issued October 25, 2018); L.G., Docket No. 09-1517 (issued March 3, 2010); C.N., Docket No. 08-1569 (issued December 9, 2008).

<sup>19</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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>20</sup> *Id.* at § 10.608(a); see D.C., Docket No. 19-0873 (issued January 27, 2020); M.S., 59 ECAB 231 (2007).

<sup>21</sup> 20 C.F.R. § 10.608(b); see T.V., Docket No. 19-1504 (issued January 23, 2020); E.R., Docket No. 09-1655 (issued March 18, 2010).

## **ANALYSIS -- ISSUE 2**

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's October 13, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. He also failed to advance a relevant legal argument not previously considered by OWCP. For these reasons, the Board finds that appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Additionally, the Board finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. On reconsideration, appellant submitted an undated report from Dr. Rao who indicated that appellant underwent neck surgery in August 2016 and two weeks postsurgery developed a neck abscess. While appellant was in the hospital, he complained that he could no longer see and he was diagnosed with endophthalmitis and retinal detachment in the right eye. Dr. Rao indicated that he had performed right eye surgery in September 2016 and opined that appellant's right eye injuries occurred due to his previous neck surgery and resultant neck abscess. Appellant also submitted a report of the September 6, 2016 right eye surgery. The Board finds that submission of these reports does not require reopening appellant's case for merit review because they are not relevant to the underlying issue of the case, *i.e.*, whether appellant established disability from November 14, 2015 to January 22, 2016 causally related to the accepted March 2, 2015 employment injury. Dr. Rao's undated report and the September 6, 2016 surgery report relate to appellant's medical condition after the claimed period of disability and Dr. Rao did not provide an opinion on the cause of disability during that period. The Board further notes that OWCP has not accepted a neck abscess or right eye condition in this case. Therefore, these reports do not constitute relevant and pertinent new evidence and are insufficient to require OWCP to reopen appellant's claim for consideration of the merits in accordance with the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>22</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 appellant has not met his burden of proof to establish total disability for the period November 14, 2015 to January 22, 2016 causally related to his accepted March 2, 2015 employment injury. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>22</sup> See *supra* notes 18 and 21.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2018 and August 18, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 5, 2020  
Washington, DC

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

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

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