

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

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**A.G., Appellant**

**and**

**U.S. POSTAL SERVICE, DALLAS  
NORTHWEST STATION, Dallas, TX, Employer**

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**Docket No. 20-0290  
Issued: June 24, 2020**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On November 19, 2019 appellant filed a timely appeal from a May 29, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed since OWCP's last merit decision, dated May 1, 2018, to the filing of this appeal, pursuant 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 to consider the merits of this case.

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<sup>1</sup> On his application for review (AB-1 Form), appellant indicates that he is appealing from OWCP's May 1, 2018 merit decision which denied modification of its prior decision finding that he had not met his burden of proof to establish a right shoulder condition causally related to accepted factors of his federal employment. An appeal of a given final OWCP decision must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e). The 180th day following OWCP's May 1, 2018 decision was October 28, 2018. As this fell on a Sunday, appellant had until the next business day, Monday, October 29, 2018, to file a timely appeal. 20 C.F.R. § 501.3(f)(2). As this appeal was filed on November 19, 2019, the Board lacks jurisdiction to review the May 1, 2018 merit decision. *See P.H.*, Docket No. 19-1354 (issued March 13, 2020); *E.H.*, Docket No. 19-0859 (issued December 10, 2019).

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

## ISSUE

The issue is 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 June 28, 2017 appellant, then a 57-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed tendinitis in his right shoulder due to factors of his federal employment including repetitive work duties performed over many years. He noted that he first became aware of his condition and its relationship to factors of his federal employment on June 14, 2017. In an accompanying undated narrative statement, appellant attributed his right shoulder and neck pain to an excessive amount of repetitive movements that included reaching, pulling, and lifting with his right arm. He noted that he performed these duties four to six hours per day, five to six days per week.

In support of his claim, appellant submitted a June 29, 2017 medical report by Dr. J. Douglas Kirkpatrick, an attending chiropractor, who diagnosed right shoulder conditions that included: strain of unspecified muscle, fascia, and tendon, initial encounter; rotator cuff syndrome; pain; and adhesive capsulitis. Dr. Kirkpatrick opined that the diagnosed conditions resulted from appellant's repetitive work duties.

Appellant also submitted a July 3, 2017 duty status report (Form CA-17) by Dr. Deepak V. Chavda, an attending orthopedic surgeon, who diagnosed impingement, bursitis, rotator cuff unspecified, bicipital tendinitis, tendinosis, and adhesive capsulitis of the right shoulder due to a June 13, 2017 injury. Dr. Chavda released appellant to full-time regular work with restrictions.

In an August 22, 2017 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. In a separate letter of even date, OWCP notified the employing establishment of appellant's occupational disease claim. It requested comments from a knowledgeable supervisor and an explanation of appellant's work activities and accommodations. OWCP afforded both parties 30 days to submit the necessary evidence.

Thereafter, OWCP received an additional July 27, 2017 narrative report and August 17, 2017 Form CA-17 report from Dr. Chavda who reiterated his diagnoses of right shoulder impingement, bursitis, adhesive capsulitis, and tendinosis. Dr. Chavda also diagnosed pain, rotator cuff unspecified, and internal derangement of the right shoulder and noted appellant's restrictions. He advised that the diagnosed conditions were due to his June 14, 2017 injury.

On September 13, 2017 appellant responded to OWCP's development questionnaire, again attributing his claimed right shoulder injury to his repetitive work duties.

OWCP, by decision dated November 7, 2017, denied appellant's occupational disease claim finding the medical evidence of record insufficient to establish that his diagnosed right shoulder conditions were causally related to the accepted factors of his federal employment.

OWCP subsequently received additional medical reports by Dr. Chavda who continued to confirm his right shoulder diagnoses. Dr. Chavda opined that appellant's repetitive work duties caused, contributed to, or aggravated the diagnosed conditions.

On December 1, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review regarding the November 7, 2017 decision, but changed that to a request for reconsideration on February 12, 2018.

Appellant submitted a November 29, 2017 right shoulder magnetic resonance imaging scan report by Dr. Thomas Louis, a Board-certified diagnostic radiologist.

OWCP referred appellant to Dr. George Wharton, a Board-certified orthopedic spine surgeon, for second opinion examination to determine whether appellant's claimed conditions were causally related to the accepted factors of his federal employment. In a March 29, 2018 report, Dr. Wharton noted his review of the medical records and discussed examination findings. He opined: appellant's right shoulder conditions of rotator cuff, unspecified; impingement; effusion; bursitis; adhesive capsulitis, internal derangement; and tendinosis were not causally related to factors of his federal employment. Dr. Wharton reasoned, among other things, that the mild degenerative changes seen in appellant's right shoulder were considered an age-related natural disease of life and more likely preexisting.

By decision dated May 1, 2018, OWCP denied modification of its November 7, 2017 decision based on the March 29, 2018 opinion of Dr. Wharton.

On May 3, 2019 appellant requested reconsideration. He again claimed that he sustained a right shoulder injury due to his repetitive work duties. Appellant also claimed that his condition required physical therapy. He noted that Dr. Wharton found that his condition was caused by degeneration and old age, but he disputed that finding, noting the physical condition of his left upper extremity. No medical evidence accompanied the reconsideration request.

By decision dated May 29, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain

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<sup>3</sup> 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).

limitations in exercising its authority.<sup>4</sup> 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.<sup>5</sup>

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> 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.<sup>7</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).

The Board finds that, in his timely request for reconsideration, appellant submitted a statement asserting his disagreement with Dr. Wharton's opinion that his right shoulder conditions were caused by degenerative changes and old age and not by his repetitive work duties. This argument in opposition to Dr. Wharton's opinion is not relevant to the underlying issue of causal relationship between his right shoulder conditions and the accepted employment factors. Causal relationship is a medical issue that must be addressed by relevant medical evidence and appellant's lay opinion does not constitute medical evidence as he is not a physician.<sup>8</sup> The Board therefore finds that appellant has not established that OWCP erroneously applied or interpreted a specific point of law, or advanced a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to a 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).<sup>9</sup>

The Board further finds that appellant has not submitted relevant and pertinent new evidence not previously considered relative to the issue of whether he has established right shoulder conditions causally related to the accepted factors of his federal employment. His request for reconsideration was not accompanied by evidence other than his statement regarding his

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<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> *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. *Id.* at Chapter 2.1602.4b.

<sup>6</sup> *Supra* note 4 at § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

<sup>7</sup> *Supra* note 4 at § 10.608(a), (b).

<sup>8</sup> *M.C.*, Docket No. 18-0841 (issued September 13, 2019).

<sup>9</sup> *E.W.*, *supra* note 6; *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

argument on appeal. As appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review 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 May 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>10</sup> *R.L.*, Docket No. 18-0175 (issued September 5, 2018).