

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

C.A., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Great Falls, MT, Employer)

**Docket No. 19-0160
Issued: January 16, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On September 4, 2018 appellant filed a timely appeal from a May 10, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days had elapsed from OWCP's last merit decision, dated May 19, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

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 April 25, 2014 appellant, then a 39-year-old postal support employee (PSE), filed a traumatic injury claim (Form CA-1) alleging that on March 26, 2014 he sustained a right shoulder

¹ 5 U.S.C. § 8101 *et seq.*

injury as a result of placing a package in a bag while in the performance of duty. He stopped work on that date. On the reverse side of the claim form, a supervisor noted that continuation of pay was controverted, noting that appellant had filed an occupational disease claim (Form CA-2) for both shoulders and that it was the same injury.²

In a letter dated April 25, 2014, the employing establishment controverted appellant's claim noting that he had filed another claim for both shoulders and that there were inconsistencies with how the claimed March 26, 2014 injury occurred.

In a development letter dated December 12, 2016, OWCP advised appellant that the evidence of record was insufficient to establish his claim. Specifically, it informed him that the evidence of record did not include a legible description of how the claimed March 26, 2014 injury occurred and, therefore, fact of injury had not been established. OWCP advised appellant of the type of medical and factual evidence needed and afforded him 30 days to respond.

In an undated letter, appellant responded that while working light duty on March 26, 2014, he lifted and placed boxes, packages, and letters into shipping sacks; lifted those sacks; and placed them into containers to be scanned. During that time, appellant felt pain in his elbows. He continued working and noticed that a "pumpkin" container needed to be separated. Appellant reached down into the container, grabbing a package that weighed 15 to 20 pounds, and proceeding to place it in its proper location. While doing so, he felt a sharp pain in his right shoulder, his arm went limp, and his right hand began to tingle. Appellant sought medical treatment at a hospital emergency room.

In an emergency department report dated March 26, 2014, Dr. Christian Mannsfeld, Board-certified in emergency medicine, examined appellant for a complaint of upper extremity pain. Noting that appellant had similar symptoms previously, he diagnosed a strained right shoulder and told him not to work for two days.

In a report dated April 16, 2014, Dr. Paul Johnson, Board-certified in family medicine, examined appellant for complaints of musculoskeletal pain. He noted that the onset of the pain was on February 21, 2014. Dr. Johnson diagnosed lateral epicondylitis and disorders of the bursae and tendons of the shoulder region. In an accompanying duty status report (Form CA-17) he noted that appellant should be off work due to these diagnoses.

By decision dated June 5, 2014, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish causal relationship between appellant's diagnosed right shoulder strain and the accepted employment incident of March 26, 2014.

In an attending physician's report (Form CA-20) dated June 9, 2014, Dr. Johnson checked a box marked "yes," indicating that appellant's diagnosed rotator cuff tendinitis and internal

² The Board notes that under OWCP File No. xxxxxx992, appellant claimed an occupational disease with a date of injury of February 21, 2014. As of April 25, 2014, this case was under development with no adjudicated status, and no ICD9 code had been identified. Appellant's claims have not been administratively combined. Upon return of the case record OWCP should consider administratively combining appellant's upper extremity claims.

derangement was caused or aggravated by employment activities. He explained that chronic overuse from repetitive movement was the cause of the employment injury.

In a report dated March 31, 2014, Dr. Johnson noted musculoskeletal pain related to a workers' compensation claim and that appellant had a new injury. He described the new injury as a reinjury of appellant's right shoulder while lifting packages.

On June 27, 2014 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A notification of personnel action (Form SF-50) with an effective date of November 10, 2014 noted that appellant had been terminated from the employing establishment as of that date, as he had not reported to work since March 26, 2014.

In a report dated March 27, 2014, with regard to appellant's lateral epicondylitis, Dr. Johnson noted that the medical evidence submitted established that the diagnosed condition was causally related to a work-related injury.

The hearing was held on February 11, 2015. During the hearing, counsel argued that the medical evidence of record was sufficient to establish causal relationship. The hearing representative held the record open for 30 days for submission of additional evidence.

By decision dated April 17, 2015, the hearing representative affirmed the June 5, 2014 decision finding that the medical reports of record failed to provide sufficient medical rationale, based on a complete medical background, explaining how appellant's diagnosed conditions were caused or aggravated by the March 26, 2014 "work injury."

On April 27, 2015 appellant, through counsel, requested reconsideration. Accompanying the request were copies of the March 26 and 31, 2014 reports of Dr. Mannsfeld and Dr. Johnson, respectively.

By decision dated May 28, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review finding that the March 26 and 31, 2014 reports submitted on reconsideration had previously been reviewed and addressed.

A magnetic resonance imaging (MRI) scan dated May 12, 2015 of appellant's right shoulder demonstrated a high-grade, partial articular surface tear, a type 2 acromion, subtle irregularity of the anterior inferior labrum, and trace subacromial subdeltoid fluid. In a report dated May 20, 2015, Dr. Chris Haraszti, a Board-certified orthopedic surgeon, examined appellant for complaints of right shoulder pain, noting that it had worsened on March 27, 2014 when he had a trauma. He diagnosed a partial, almost full thickness, rotator cuff tear.

On September 22, 2015 appellant again requested reconsideration.

In an operative note dated October 9, 2015, Dr. Haraszti described performing rotator cuff repair, biceps tenodesis, and arthroscopic limited debridement on appellant's right shoulder.

By decision dated January 26, 2016, OWCP reviewed the merits of appellant's case, but denied modification of its April 17, 2015 decision finding that the evidence submitted on reconsideration did not contain a physician's opinion on causal relationship, and that as such, it was not of sufficient probative value to modify the prior decision.

On February 22, 2016 appellant requested reconsideration of OWCP's January 26, 2016 decision. With his request he enclosed a February 3, 2016 report from Dr. Haraszti. Dr. Haraszti noted that while he had a low level of pain in his right shoulder prior to 2014, appellant believed that the March 26, 2014 incident was the factor resulting in his need for surgery. He opined that it was reasonable to assume that because his pain was of a different quality and more severe after March 26, 2014, the incident on that date either caused or aggravated a rotator cuff tear, but that because he had not seen appellant until a year after the injury, there was no way of firmly establishing a causal relationship.

By decision dated March 4, 2016, OWCP denied appellant's request for reconsideration without conducting a merit review finding that Dr. Haraszti's February 3, 2016 note was irrelevant. The hearing representative further noted that under OWCP File No. xxxxxx992, appellant's claim had been accepted for a partial tear of the right rotator cuff, and that he was currently in receipt of medical and wage-loss benefits under that case number.

On November 2, 2016 appellant again requested reconsideration. With his request, he submitted an October 4, 2016 letter from Dr. Haraszti. Dr. Haraszti noted that he had an injury to his right shoulder on March 24, 2016, when he lifted a package and felt severe pain in his right shoulder. He opined that an injury on March 24, 2014 more likely than not resulted in an incomplete right rotator cuff tear and biceps tendinitis of the right shoulder, which should be considered work related. Dr. Haraszti noted that as he had not seen appellant until several months after the claimed injuries, he could not be completely definitive as to causal relationship. However, he found that it was more likely than not that appellant's diagnoses were a direct result of the duties of his federal employment. In an addendum report dated December 19, 2016, Dr. Haraszti corrected the date of appellant's claimed work-related injury, noting that it occurred on March 24, 2014, not March 24, 2016.

By decision dated January 30, 2017, OWCP reviewed the merits of appellant's case, but denied modification of its January 26, 2016 decision, finding that Dr. Haraszti's October 4, 2016 opinion on causal relationship was speculative in nature and therefore, it was not of sufficient probative value to modify the prior decision.

On March 7, 2017 appellant requested reconsideration of OWCP's January 30, 2017 decision. With his request he enclosed an addendum from Dr. Haraszti dated March 6, 2017, which noted that appellant had an injury to his right shoulder on March 26, 2014, not March 24, 2016, when he lifted a package out of a pumpkin container and felt a pop in his shoulder.

By decision dated May 19, 2017, OWCP reviewed the merits of appellant's case, but denied modification of its January 30, 2017 decision, finding that Dr. Haraszti had not offered a sufficiently rationalized opinion on causal relationship establishing that appellant's diagnosed right shoulder conditions were related to the accepted employment incident of March 26, 2014.

On April 16, 2018 appellant requested reconsideration of OWCP's May 19, 2017 decision. With his request he attached a letter in which he argued that there was a month's worth of medical documentation related to this traumatic injury claim under OWCP File No. xxxxxx992.

By decision dated May 10, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.³ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁴ This section provides that the application for reconsideration must be submitted in writing and 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.⁵ Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶ A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁰ He or she needs only to submit

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.608(a).

⁵ *Id.* at § 10.606(b)(3).

⁶ *Id.* at § 10.608(b).

⁷ *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.

⁸ *Id.* at § 10.608(a); *see also A.P.*, Docket No. 19-0224 (issued July 11, 2019).

⁹ *Id.* at § 10.608(b); *A.G.*, Docket No. 19-0113 (issued July 12, 2019).

¹⁰ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

relevant, pertinent evidence not previously considered by OWCP.¹¹ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹²

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 appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant also did not advance a relevant legal argument not previously considered by OWCP. While he submitted a statement with his April 16, 2018 reconsideration request, in which he argued that there was a month's worth of medical documentation related to this claim under OWCP File No. xxxxxx992, this statement is not relevant to the underlying issue of causal relationship for which appellant has the burden of proof. Thus, appellant is not entitled to a review of the merits based on the first or second requirements under 20 C.F.R. § 10.606(b)(3).

As noted, the underlying issue of the present case is medical in nature, *i.e.*, whether appellant submitted medical evidence sufficient to establish causal relationship between diagnosed right shoulder conditions and the accepted March 26, 2014 incident. On reconsideration appellant did not submit new evidence in support of his claim. Therefore, appellant is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board therefore 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).

¹¹ S.S., Docket No. 18-0647 (issued October 15, 2018).

¹² P.L., *supra* note 10; *Annette Louise*, 54 ECAB 783 (2003).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board