

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

K.F., Appellant

and

**U.S. POSTAL SERVICE, JAMES A. FARLEY
STATION, New York, NY, Employer**

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**Docket No. 19-1846
Issued: November 3, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 4, 2019 appellant filed a timely appeal from a March 14, 2019 merit decision and a June 26, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a recurrence of disability commencing January 3, 2019, causally related to her accepted March 1, 2014

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the June 26, 2019 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.*

employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 4, 2014 appellant, then a 47-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on March 1, 2014 she sustained a right shoulder injury when she tripped and fell on loose strapping on the floor while in the performance of duty. On the reverse side of the claim form, the employing establishment noted that she stopped work on March 4, 2014. On May 9, 2014 OWCP accepted the claim for sprain of the right shoulder and paid appellant intermittent wage-loss compensation on the supplemental rolls from September 27, 2014 through September 28, 2018.

On November 17, 2014 the employing establishment offered appellant a full-time modified-duty assignment as a carrier, effective April 29, 2014. Appellant accepted the modified position and returned to work.

In a note dated August 28, 2018, Dr. Noel L. Smith, a Board-certified general surgeon, diagnosed shoulder disorder, consisting of a labrum tear, bursitis, and capsule thickening. He recommended physical therapy and noted appellant's prognosis was improving.

On December 19, 2018 Dr. Smith diagnosed a shoulder disorder, consisting of a labrum tear, bursitis, and capsule thickening. He reported no improvement with physical therapy. Dr. Smith released appellant to work four hours a day with early hours only. In a January 10, 2019 duty status report (Form CA-17), Dr. Smith noted that appellant's injury occurred at work on March 1, 2014. He further noted clinical findings of right shoulder disorder and diagnosed right shoulder sprain and elbow pain. Dr. Smith advised that appellant could return to work part time, four hours per day, with restrictions.

On January 28, 2019 appellant filed a notice of recurrence (Form CA-2a) claiming disability from work commencing January 3, 2019.

In a development letter dated February 5, 2019, OWCP requested that appellant submit additional factual and medical evidence supporting that she was disabled from employment for the claimed period. It provided her with the definition of a recurrence of disability and requested that she submit a physician's opinion explaining how the claimed disability was due to the March 1, 2014 employment injury. OWCP afforded appellant 30 days to provide the requested evidence.

In evaluation reports dated June 6, 2014 and May 17, 2016, Dr. Smith diagnosed sprain/strain of the shoulder upper arm. He noted appellant's functional abilities were tested including static lifting, muscle testing, range of motion, and hand and pinch grip. The results of the examination suggested that appellant gave reliable effort. Dr. Smith noted reviewing the report and making appropriate protocol changes.

On February 14, 2019 Dr. Smith noted that on March 1, 2014 appellant fell on a platform at work, catching her foot on a twist tie and landed on her right shoulder. Appellant reported

current symptoms of pain in the neck radiating into the right shoulder. Findings on examination revealed decreased range of motion with painful movement of the right upper extremity. Dr. Smith diagnosed right shoulder sprain, right shoulder tendon and bursa injuries, mild tendinitis distal supraspinatus and distal infraspinatus tendons, mild sub acromial sub deltoid bursitis, and mild thickening of the capsule of the AC joint with associated focal flattening of the superior contour of the supraspinatus junction. He noted that appellant's work hours had been reduced from 40 hours per week to 20 hours a week due to shoulder pain. Dr. Smith indicated that she was unable to return to full-duty work as a letter carrier, but instead worked casing mail. He opined that this was a work-related injury since appellant was asymptomatic prior to the job injury. Dr. Smith noted studies and functional testing demonstrate a disorder.

By decision dated March 14, 2019, OWCP denied appellant's claim for a recurrence of disability commencing January 3, 2019, finding that the evidence of record was insufficient to establish that she was disabled due to a material change/worsening of her accepted work-related conditions.

On June 4, 2019 appellant requested reconsideration. In a separate statement, she indicated that her right shoulder pain worsened and radiated up to her neck and down to her shoulder.

Appellant submitted evaluation reports from Dr. Smith dated May 17, 2016 and April 19, 2019, who diagnosed sprain/strain of the shoulder upper arm. Dr. Smith reported testing her functional abilities including static lifting, muscle testing, range of motion, and hand and pinch grip.

By decision dated June 26, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition that had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³ This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to the work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁴

When an employee who is disabled from the job he or she held when injured on account of employment-related residuals returns to a limited-duty position, or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that he or she cannot perform such limited-duty work. As part of

³ 20 C.F.R. § 10.5(x); *see J.D.*, Docket No. 18-1533 (issued February 27, 2019).

⁴ *Id.*

this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the limited-duty job requirements.⁵

An employee who claims a recurrence of disability from an accepted employment injury has the burden of proof to establish that the disability is related to the accepted injury. This burden of proof includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.⁶ Where no such rationale is present, the medical evidence is of diminished probative value.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing January 3, 2019, causally related to the accepted March 1, 2014 employment injury.

Appellant has not alleged a change in her light-duty job requirements. Instead, she attributed her inability to work to a change in the nature and extent of her employment-related conditions. Appellant therefore has the burden of proof to provide medical evidence to establish that she was disabled from work due to a worsening of her accepted work-related condition.⁸

On December 19, 2018 Dr. Smith diagnosed a labrum tear, bursitis, and capsule thickening. He reported no improvement with physical therapy. Dr. Smith released appellant to work four hours a day with early hours only. However, he did not provide an opinion regarding the cause of her increased work restrictions that reduced her hours to four a day. 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.⁹

In a January 10, 2019 duty status report (Form CA-17), Dr. Smith treated appellant for a work injury that occurred on March 1, 2014. He noted clinical findings and diagnosed right shoulder sprain. Dr. Smith advised that appellant could return to work part time, four hours per day, with other restrictions. This report is of no probative value on the underlying issue as Dr. Smith did not provide an opinion that appellant sustained a recurrence of disability causally related to the accepted March 1, 2014 employment injury.

On February 14, 2019 Dr. Smith noted that on March 1, 2014 appellant fell on a platform at work, catching her foot on a twist tie and landing on her right shoulder. He diagnosed right

⁵ *J.B.*, Docket Nos. 18-1752, 19-0792 (issued May 6, 2019).

⁶ *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁷ *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

⁸ *See J.P.*, Docket No. 18-1396 (issued January 23, 2020).

⁹ *L.O.*, Docket No. 19-0953 (issued October 7, 2019); *see also L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

shoulder sprain, right shoulder tendon and bursa injuries, mild tendinitis distal supraspinatus and distal infraspinatus tendons, mild sub acromial sub deltoid bursitis, mild thickening of the capsule of the AC joint with associated focal flattening of the superior contour of the supraspinatus junction. Dr. Smith noted that appellant's work hours had been reduced from 40 hours per week to 20 hours a week due to shoulder pain. However, as noted above, he did not specifically address whether she sustained a recurrence of disability commencing January 3, 2019, causally related to the accepted employment injury.¹⁰ The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation was claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹¹ Thus, Dr. Smith's February 14, 2019 report also is of no probative value on causal relationship and is insufficient to meet appellant's burden of proof.

Other evaluation reports from Dr. Smith dated June 6, 2014 and May 17, 2016 were of no probative value in establishing the claimed recurrence of disability of January 3, 2019 as they predated the claimed recurrence.¹²

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.¹³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁴ 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.¹⁵ 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.¹⁶ When a timely request for reconsideration does not meet at least one of the above-noted

¹⁰ See *D.K.*, *id.*

¹¹ *B.L.*, Docket No. 19-0852 (issued October 18, 2019); *William A. Archer*, 55 ECAB 674 (2004).

¹² See *C.W.*, Docket No. 19-1555 (issued February 24, 2020); *Gregory Hardeman*, Docket No. 00-0009 (issued May 21, 2001).

¹³ This section provides in pertinent part: the 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).

¹⁴ 20 C.F.R. § 10.607.

¹⁵ *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.

¹⁶ *Id.* at § 10.606(b)(3).

requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁷

ANALYSIS -- ISSUE 2

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

On June 4, 2019 appellant requested reconsideration. However, this request does not show a legal error by OWCP, nor does it provide a new and relevant legal argument. Consequently, appellant 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).¹⁸

Appellant did not submit any pertinent new and relevant medical evidence in support of her claim. She submitted evaluation reports from Dr. Smith dated May 17, 2016 and April 19, 2019 who diagnosed sprain/strain of the shoulder upper arm. However, this evidence is substantially similar to evidence previously submitted and considered by OWCP in its earlier decision dated March 14, 2019, and found deficient. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁹ As appellant has not provided relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).²⁰

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 her burden of proof to establish a recurrence of disability commencing January 3, 2019, causally related to her accepted March 1, 2014 employment injury. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁷ *Id.* at § 10.608(a), (b).

¹⁸ *J.R.*, Docket No. 20-0496 (issued August 13, 2020); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁹ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

²⁰ 20 C.F.R. § 10.606(b)(3)(iii); *J.R.*, *supra* note 18; *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 26 and March 14, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 3, 2020
Washington, DC

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

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

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