



## **ISSUES**

The issues are: (1) whether OWCP abused its discretion by denying appellant's request for authorization of additional left shoulder surgery; 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 May 7, 2013 appellant then a 34-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left shoulder when lifting a heavy box while in the performance of duty. He stopped work on May 8, 2013 and returned on May 9, 2013. OWCP assigned this claim OWCP File No. xxxxxx507 and accepted it for left shoulder and upper arm sprain. It subsequently expanded acceptance of appellant's claim to include left shoulder osteoarthritis, left superior glenoid labrum sprain, and left shoulder adhesive capsulitis.<sup>3</sup>

On August 20, 2013 appellant underwent OWCP-authorized left shoulder surgery and stopped work. OWCP paid him wage-loss compensation on the supplemental rolls beginning August 25, 2013. On October 7, 2013 appellant returned to full duty. He underwent additional surgeries on May 27, 2014, March 11, 2015, and February 22, 2018. OWCP paid appellant wage-loss compensation for intermittent periods of disability. On April 23, 2018 appellant returned to full-time limited duty.

Appellant continued to receive medical treatment and OWCP paid him wage-loss compensation for time lost from work due to medical appointments.

In a May 15, 2019 progress note, Dr. Benjamin Woodhead, an osteopathic physician specializing in orthopedic surgery, recounted that appellant had a complicated history of left shoulder pain following a work-related injury. He reviewed appellant's history and related that examination of appellant's left shoulder revealed crepitus with cross body adduction and tenderness to palpation of the bicipital groove. Dr. Woodhead recommended a left shoulder magnetic resonance imaging (MRI) scan and assessed that appellant had left shoulder discomfort and dysfunction, which appeared to be caused by shoulder stiffness and crepitus.

A June 5, 2019 left shoulder MRI scan report revealed mild acromioclavicular joint arthritis, focal cartilage thinning along the humeral head, and concern for partial tear of the long head of the biceps tendon.

In a June 10, 2019 progress note, Dr. Woodhead indicated that he saw appellant for follow-up of a left shoulder MRI scan and complaints of continued left shoulder pain. Upon examination of the left shoulder, he observed crepitus and no pain with palpation. Dr. Woodhead diagnosed left shoulder stiffness and chronic shoulder pain. He opined that, if any procedure should be done, appellant would benefit only from shoulder arthroplasty. Dr. Woodhead explained that a total

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<sup>3</sup> Appellant also has a prior claim for an April 13, 2011 traumatic injury under OWCP File No. xxxxxx531, which OWCP accepted right shoulder superior glenoid labrum sprain. OWCP has administratively combined OWCP File Nos. xxxxxx531 and xxxxxx507, with the latter serving as the master file.

shoulder replacement was the standard approach to the management of right shoulder arthritis and that shoulder replacement surgery usually resulted in a substantial improvement in the comfort and junction of an arthritic shoulder.

On July 2, 2019 Dr. Frederick Matsen, III, a Board-certified orthopedic surgeon, requested authorization for left shoulder replacement surgery.

In a July 12, 2019 report, Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), reviewed appellant's medical records and related that his claim was accepted for left shoulder sprain, left shoulder superior glenoid labrum lesion, and left shoulder adhesive capsulitis. In response to OWCP's questions, he answered "Yes" indicating that appellant's proposed shoulder replacement was causally related to the accepted May 7, 2013 employment injury. Dr. Kuhn noted that appellant had persistent symptoms since the employment injury and there was lack of evidence of a preexisting condition. He also responded "No" indicating that the proposed shoulder replacement surgery was not medically necessary to treat the accepted May 7, 2013 employment injury. Dr. Kuhn explained that appellant was 40 years old and had documented mild left shoulder osteoarthritis, as seen on the most recent MRI scan. He noted that there was no indication of severe joint space narrowing or significant degenerative changes to indicate that a total shoulder arthroplasty would provide significant pain relief in such a young claimant.

In a July 17, 2019 progress note, Dr. Woodhead indicated that appellant was seen for follow up of his left shoulder. He related that appellant's symptoms had not improved and that appellant wanted to proceed with left shoulder arthroplasty. Dr. Woodhead noted that a left shoulder MRI scan revealed chondromalacia over the humeral head. Examination of appellant's left shoulder revealed crepitus with cross body adduction and reduced range of motion. Dr. Woodhead reported "due to the crepitus as well as the focal humeral head defect seen on MRI [scan], we feel [appellant] would ... best benefit from a left shoulder hemiarthroplasty and possible total shoulder arthroplasty dependent on the condition of his glenoid cartilage."

In an addendum note, Dr. Matsen, III indicated that he had examined appellant and reviewed his history. He noted that he concurred with the assessment and subsequent treatment. Dr. Matsen, III related that shoulder arthroplasty was recommended to address the humeral head defect. He explained that, at surgery, he would determine if glenoid surgery was also necessary.

By decision dated July 22, 2019, OWCP denied authorization for the proposed total left shoulder replacement surgery. It found that the weight of the medical evidence rested with the July 12, 2019 DMA report.

Appellant subsequently underwent a July 17, 2019 left shoulder x-ray examination, which revealed no bone, joint, or soft tissue abnormality.

On September 10, 2019 appellant requested reconsideration and submitted additional medical evidence.

In a September 6, 2019 progress note, Alexander L. Bertelsen, a certified physician assistant, recounted appellant's complaints of left shoulder pain since a May 2013 work-related

injury. He discussed the medical treatment that appellant had received and noted that appellant's request for surgery was denied.

By decision dated September 13, 2019, OWCP denied modification of the July 22, 2019 decision.

By separate decision of even date, OWCP expanded acceptance of appellant's claim to include left shoulder arthrosis.

On October 23, 2019 appellant requested reconsideration of the September 13, 2019 decision. He indicated that he was submitting new medical evidence and a revised medical note regarding the requirements for the surgery.

In an October 7, 2019 progress note, Mr. Bertelsen related appellant's complaints of left shoulder pain and noted diagnoses of chronic left shoulder pain and left shoulder arthritis. He reviewed appellant's history and provided examination findings. Mr. Bertelsen indicated that he was providing an updated plan based on new x-ray examination. He related that x-ray examination of appellant's shoulder showed mild joint space narrowing and some light irregularities on the surface of the humeral head, including focal cartilage thinning. Mr. Bertelsen opined that this defect likely was the cause of appellant's ongoing shoulder pain and explained that shoulders with these findings are often very painful and have benefitted from shoulder arthroplasty. He reported that appellant had failed to improve with conservative management and that it was unlikely that nonoperative management would improve appellant's shoulder comfort or function.

Appellant submitted reports of diagnostic testing dated October 7, 2019. A left shoulder x-ray examination report showed no bone, joint, or soft tissue abnormalities. A left shoulder MRI scan report revealed a shoulder with what appeared to be an area of articular surface humeral head without a chondral surface.

By decision dated January 6, 2020, OWCP denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

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

Section 8103(a) of FECA<sup>4</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed by or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.<sup>5</sup> In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in

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<sup>4</sup> 5 U.S.C. § 8103(a).

<sup>5</sup> *Id.*; see *Thomas W. Stevens*, 50 ECAB 288 (1999).

determining whether a particular type of treatment is likely to cure or give relief.<sup>6</sup> The only limitation on OWCP's authority is that of reasonableness.<sup>7</sup>

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of proof to establish that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.<sup>8</sup> Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.<sup>9</sup> In order for a surgical procedure to be authorized, appellant must establish that the procedure was for a condition causally related to the employment injury and that the procedure was medically warranted.<sup>10</sup> Both of these criteria must be met in order for OWCP to authorize payment.<sup>11</sup>

Abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>12</sup>

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

The Board finds that OWCP did not abuse its discretion in denying appellant's request for authorization of left shoulder total replacement surgery.

In the July 12, 2019 report, Dr. Kuhn provided a comprehensive evaluation, based on a thorough review of the medical evidence. While he noted that the requested surgery was causally related to the accepted May 7, 2013 employment injury, he opined that the requested left shoulder replacement surgery was not necessary for appellant's accepted left shoulder injury. Dr. Kuhn explained that there was no indication in the most recent MRI scan of severe joint space narrowing or significant degenerative changes to indicate that a total shoulder arthroplasty would provide significant pain relief in such a young claimant. The Board finds that Dr. Kuhn's report is sufficiently probative, rationalized, and based upon a proper factual background.<sup>13</sup> Therefore,

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<sup>6</sup> *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *W.T.*, Docket No. 08-0812 (issued April 3, 2009).

<sup>7</sup> *D.C.*, Docket No. 18-0080 (issued May 22, 2018); *Mira R. Adams*, 48 ECAB 504 (1997).

<sup>8</sup> *R.M.*, Docket No. 19-1319 (issued December 10, 2019); *J.T.*, Docket No. 18-0503 (issued October 16, 2018); *Debra S. King*, 44 ECAB 203, 209 (1992).

<sup>9</sup> *K.W.*, Docket No. 18-1523 (issued May 22, 2019); *C.L.*, Docket No. 17-0230 (issued April 24, 2018); *M.B.*, 58 ECAB 588 (2007); *Bertha L. Arnold*, 38 ECAB 282 (1986).

<sup>10</sup> *T.A.*, Docket No 19-1030 (issued November 22, 2019); *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

<sup>11</sup> *J.L.*, Docket No. 18-0990 (issued March 5, 2019); *R.C.*, 58 ECAB 238 (2006); *Cathy B. Millin*, 51 ECAB 331, 333 (2000).

<sup>12</sup> *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *E.L.*, Docket No. 17-1445 (issued December 18, 2018); *L.W.*, 59 ECAB 471 (2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>13</sup> See *P.L.*, Docket No. 18-0260 (issued April 14, 2020).

OWCP did not abuse its discretion by relying on Dr. Kuhn's opinion to deny approval for the proposed left shoulder surgery.

In support of his request for authorization of surgery, appellant submitted progress notes dated May 15 to July 17, 2019 by Dr. Woodhead. In a June 10, 2019 progress note, Dr. Woodhead noted examination findings of crepitus and no pain with palpation. He diagnosed left shoulder stiffness and chronic shoulder pain. Dr. Woodhead reported that appellant would benefit from shoulder arthroplasty and that a total shoulder replacement was the standard approach to the management of right shoulder arthritis. The Board finds, however, that Dr. Woodhead did not provide a sufficient explanation as to how and why the proposed left shoulder replacement surgery would cure, give relief, reduce the degree or period of disability, or aid in lessening the amount of monthly compensation.<sup>14</sup> Dr. Woodhead did not relate any specific objective findings which noted that appellant's accepted conditions had improved or would improve in the future due to the proposed surgery.

Appellant also submitted progress notes dated September 6 and October 7, 2019, by Mr. Bertelsen, a certified physician assistant. These reports are of no probative value, however, because a physician assistant is not considered a physician as defined under FECA.<sup>15</sup>

As noted, the only restriction on OWCP's authority to authorize medical treatment is one of reasonableness.<sup>16</sup> In the instant case, OWCP obtained a well-rationalized report from Dr. Kuhn in which he opined that the requested surgery was not warranted for appellant's accepted May 7, 2013 employment injury. It, therefore, had sufficient evidence upon which it made its decision to deny surgery and did not abuse its discretion.

### **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>

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<sup>14</sup> See *L.S.*, Docket No. 18-1746 (issued April 9, 2019).

<sup>15</sup> 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. See also *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *George H. Clark*, 56 ECAB 162 (2004) (a physician assistant is not considered a physician under FECA); *James A. White*, 34 ECAB 515, 518 (1983) (physical therapist); *Nemat M. Amer*, Docket No. 03-0338 (issued April 7, 2005) (an acupuncturist is not considered a physician under FECA).

<sup>16</sup> *Id.*; see also *A.W.*, Docket No. 14-0708 (issued January 2, 2015) (the Board found that OWCP did not abuse its discretion by relying on the opinion of its second opinion examiner as the weight of evidence to deny approval for elective spinal surgery).

<sup>17</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).

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>

### **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 disagreed with the September 13, 2019 decision and timely requested reconsideration on October 23, 2019. In his October 23, 2019 reconsideration request, he did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>22</sup>

Along with his reconsideration request, appellant submitted an October 7, 2019 progress note, by Mr. Bertelsen. He discussed recent left shoulder x-ray examination findings and explained that shoulders with these findings have benefitted from shoulder arthroplasty. Mr. Bertelsen indicated that appellant had failed to improve with conservative management and that it was unlikely that nonoperative management would improve appellant's shoulder comfort or function. While this report is new, it is not relevant as it is substantially similar to Dr. Bertelsen's September 6 and October 7, 2019 reports, which were already of record and previously reviewed by OWCP. Providing additional medical evidence that either duplicates or is substantially similar

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<sup>18</sup> 20 C.F.R. § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2010); *see also 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. 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>20</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>21</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>22</sup> *Supra* note 19; *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

to evidence of record does not constitute a basis for reopening a case.<sup>23</sup> This report, therefore, is insufficient to warrant further merit review.

Appellant also submitted October 7, 2019 left shoulder x-ray examination and MRI scan reports. None of the reports, however, included any discussion on whether the proposed left shoulder surgery was medically necessary to treat his accepted May 7, 2013 employment injury. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>24</sup> As appellant did not provide relevant and pertinent evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>25</sup>

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied his request for reconsideration without reopening the case for review on the merits.<sup>26</sup>

### **CONCLUSION**

The Board finds that OWCP did not abuse its discretion in denying appellant's request for authorization of additional left shoulder surgery. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>23</sup> *L.K.*, Docket No. 18-1183 (issued May 12, 2020); *M.O.*, Docket No. 19-1677 (issued February 25, 2020).

<sup>24</sup> *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>25</sup> *Supra* note 19.

<sup>26</sup> *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 6, 2020 and September 14, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 5, 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