

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

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**H.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Oakland, CA, Employer**

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**Docket No. 20-0799  
Issued: November 6, 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

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 28, 2020 appellant filed a timely appeal from a February 13, 2020 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 August 2, 2019, 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.

**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).

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<sup>1</sup> On his application for review (AB-1 Form), appellant indicated that he was appealing from a November 19, 2019 OWCP decision. The Board notes, however, that the record does not contain an adverse final decision issued by OWCP on that date. The only final adverse decision within the Board's jurisdiction is the February 13, 2020 nonmerit decision.

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

## **FACTUAL HISTORY**

On December 26, 2018 appellant, then a 71-year-old tractor trailer operator, filed an occupational disease claim (Form CA-2) alleging that he developed right and left shoulder pain due to factors of his federal employment including repetitive motion of pulling and pushing overweight equipment. He noted that he first became aware of his condition and its relationship to factors of his federal employment on December 21, 2018.

In a January 2, 2019 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. OWCP afforded appellant 30 days to submit the necessary evidence.

On January 28, 2019 appellant responded to OWCP's development questionnaire, further attributing his claimed bilateral shoulder injury to his repetitive work duties, which included loading and unloading a 48- to 53-foot trailer twice nightly.

Appellant submitted an October 6, 2018 bilateral shoulder x-ray medical report by Dr. Babatunde A. Salako, a Board-certified family practitioner, who found significant degenerative changes in both shoulders.

Thereafter, OWCP received a December 21, 2018 prescription by Dr. Lance Miller, a chiropractor. Dr. Miller listed a date of injury as December 10, 2018. He prescribed modified work with no pushing or pulling more than 50 pounds through February 1, 2019.

OWCP also received a January 25, 2019 activity status report by Dr. Salako who noted that appellant's shoulder condition worsened with pushing of a heavy object weighing over 1,000 pounds. Dr. Salako noted the onset date of appellant's condition was January 14, 2019. He indicated that appellant had been advised to minimize pushing at work.

The employing establishment controverted appellant's claim in a January 3, 2019 letter, received by OWCP on February 27, 2019 contending that his claim should be denied because he had not established fact of injury.

OWCP subsequently received a hospital record and progress note dated November 19, 2018 and a February 20, 2019 progress note by Dr. Nathan D. Hart, an orthopedic surgeon. Dr. Hart noted a history that appellant suffered bilateral shoulder pain that was aggravated by pushing very heavy carts of mail at work. He discussed examination findings and diagnosed osteoarthritis of the left glenohumeral joint. Dr. Hart indicated that appellant was scheduled for total left shoulder arthroplasty. He provided appellant's work restrictions from February 20 to July 26, 2019.

OWCP also received an additional progress note dated November 2, 2018 from Dr. Salako who examined appellant and diagnosed arthritis of the right and left glenohumeral joints.

A November 14, 2018 progress note by Claire E. Kerney, a certified physician assistant, noted appellant's chief complaint of bilateral shoulder pain. She described a problem list which

included arthritis of the right and left glenohumeral joints and osteoarthritis of the right glenohumeral joint.

OWCP, by decision dated March 26, 2019, denied appellant's occupational disease claim finding the medical evidence of record insufficient to establish that his diagnosed bilateral shoulder conditions were causally related to the accepted factors of his federal employment.

On April 1, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 1, 2019.

By decision dated August 2, 2019, an OWCP hearing representative affirmed the March 26, 2019 decision finding that appellant had not provided a rationalized medical opinion explaining how his diagnosed bilateral shoulder conditions were caused or aggravated by the accepted employment factors.

OWCP subsequently received an August 20, 2019 industrial work status report by Dr. Maile J. Sera, Board-certified in emergency medicine, who diagnosed arthritis of the bilateral glenohumeral joints and placed appellant on modified activity at work and home with restrictions through September 27, 2019. Dr. Sera advised that if the employing establishment was unable to accommodate modified activity, then appellant was considered temporarily totally disabled from his regular work for the designated time period.

In a September 27, 2019 report, Dr. Gurinder S. Dhindsa, Board-certified in occupational medicine, noted a primary diagnosis of arthritis of the bilateral glenohumeral joints and a secondary diagnosis of aftercare for arthroplasty. He placed appellant on modified activity with restrictions at work and home from the date of his report through October 29, 2019.

On November 22, 2019 appellant requested reconsideration of the August 2, 2019 decision.

OWCP, by decision dated February 7, 2020, 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 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 or her own motion or on application.<sup>3</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

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<sup>3</sup> 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>4</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>5</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</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>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).

In his timely request for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance 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>8</sup>

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request under 20 C.F.R. § 10.606(b)(3). The underlying issue in this case is whether the accepted employment factors caused or aggravated the diagnosed conditions. This is a medical issue that must be addressed by relevant medical evidence, including the rationalized opinion of a physician.<sup>9</sup>

On reconsideration, appellant submitted an August 20, 2019 industrial work status report from Dr. Sera who diagnosed arthritis of the bilateral glenohumeral joints and placed appellant on modified activity at work and home with restrictions through September 27, 2019. While this evidence is new, it is not relevant as it did not address causal relationship between the diagnosed condition, work restrictions, and the accepted employment factors. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not

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<sup>4</sup> 20 C.F.R. § 10.606(b)(3); *see C.C.*, Docket No. 19-1622 (issued May 28, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>5</sup> *Id.* at § 10.607(a); *see K.T.*, Docket No. 18-0927 (issued May 13, 2020).

<sup>6</sup> *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *see C.C.*, *supra* note 4; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>8</sup> *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>9</sup> *Supra* note 4; *D.B.*, Docket No. 19-1963 (issued July 1, 2020); *M.C.*, Docket No. 18-0841 (issued September 13, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

constitute a basis for reopening a case.<sup>10</sup> As such, this evidence is insufficient to warrant merit review.

Similarly, the September 27, 2019 report of Dr. Dhindsa, is new, but does not contain an opinion on the causal relationship between appellant's arthritis of the bilateral glenohumeral joints, left shoulder arthroplasty, and work restrictions, and the accepted employment factors.<sup>11</sup> As such, his report is also insufficient to warrant merit review. As appellant failed to provide relevant and pertinent new evidence related to the underlying issue of causal relationship, he was not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>12</sup>

On appeal appellant contends that he sustained a bilateral shoulder injury causally related to the accepted factors of his federal employment. As explained above, however, the Board lacks jurisdiction to review the merits of his claim.

### **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).

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<sup>10</sup> *Supra* note 4; *J.R.*, Docket No. 19-1280 (issued December 4, 2019); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>11</sup> *Id.*

<sup>12</sup> *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 13, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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