

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

_____)	
T.T., Appellant)	
)	
and)	Docket No. 19-0319
)	Issued: October 26, 2020
DEPARTMENT OF AGRICULTURE, FOOD)	
SAFETY & INSPECTION SERVICE,)	
Kinston, NC, Employer)	
_____)	

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
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 26, 2018 appellant filed a timely appeal from a September 5, 2018 merit decision and October 26 and November 2, 2018 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated April 16, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-0319 (issued April 16, 2020).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 2, 2018 decision, OWCP received additional evidence. 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.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that he sustained renal failure and post-traumatic stress disorder (PTSD) as a consequence of his accepted bilateral upper extremity conditions; and (2) whether OWCP properly denied appellant's October 2, 2018 requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has been previously before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 15, 2012 appellant, then a 30-year-old food inspector, filed an occupational disease claim (Form CA-2) alleging that he sustained bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, and a right trigger thumb while inspecting poultry in the performance of duty. OWCP accepted the claim for bilateral carpal tunnel syndrome. It subsequently expanded acceptance of the claim to include the additional conditions of bilateral cubital tunnel syndrome and right trigger finger.⁵

On April 19, 2015 appellant filed an occupational disease claim (Form CA-2) alleging that, on or before June 27, 2014, he sustained renal failure and PTSD as a consequence of the accepted bilateral upper extremity conditions. He contended that medications he took for his accepted conditions had worsened his preexisting kidney condition.

Following initial development of the claim, by decision dated November 3, 2015, OWCP denied appellant's claim for consequential PTSD and renal failure finding that the medical evidence of record did not contain sufficient medical rationale to establish causal relationship between those conditions and the accepted employment injury.

On October 24, 2016 appellant requested reconsideration. He submitted reports dated from February 4, 2015 to November 18, 2016 by Dr. Graham V. Bynum, an attending Board-certified internist specializing in nephrology. Dr. Bynum opined that appellant's long-term use of nonsteroidal anti-inflammatory drugs (NSAIDs) to treat accepted carpal tunnel syndrome could accelerate the progression of appellant's underlying chronic kidney disease and cause interstitial nephritis.

⁴ Docket No. 17-1084 (issued April 2, 2018).

⁵ Appellant underwent the following OWCP-authorized procedures: right carpal tunnel release on January 31, 2013; left carpal tunnel release and left ulnar nerve transposition on April 18, 2013; right carpal tunnel release, right ulnar nerve artery repair, and right ulnar nerve release at the wrist on May 22, 2014; right anterior ulnar nerve transposition at the elbow on July 16, 2015; right ulnar nerve neurolysis at the elbow and releases of the right middle, ring, and little fingers on July 13, 2017; and left carpal tunnel release and revision of left ulnar nerve decompression at the wrist on November 16, 2017. OWCP granted his schedule award compensation totaling 10 percent permanent impairment of the right upper extremity and 20 percent permanent impairment of the left upper extremity.

By decision dated December 2, 2016, OWCP denied modification. Appellant then appealed to the Board.⁶

By decision issued April 2, 2018,⁷ the Board affirmed OWCP's December 2, 2016 decision finding that appellant had not established that he sustained renal failure and PTSD consequential to his accepted bilateral upper extremity conditions. The Board explained that the medical evidence of record was insufficient to establish a causal relationship between the use of NSAID medication for his accepted carpal tunnel syndrome and the development of renal failure. The Board noted that appellant had not submitted medical evidence addressing the additional claimed condition of PTSD.

On April 11, 2018 appellant requested reconsideration of the April 2, 2018 decision, contending that NSAID use following eight authorized upper extremity surgeries had caused renal failure. He submitted a February 15, 2018 report by Dr. Harrison G. Tuttle, a Board-certified orthopedic surgeon, who recommended additional evaluation of appellant's right shoulder. In a May 17, 2018 reports, Dr. Semaan El-Khoury, an internist, opined that appellant's end-stage renal disease was "multifactorial and in part can be related to the use of NSAID over the years for [appellant's] pain." He found appellant permanently and totally disabled from work. Appellant also provided a report by Margaret Ann Dillon, a nurse practitioner.

By decision dated June 26, 2018, OWCP denied modification of its prior decision finding that the reports of Dr. El-Khoury and Ms. Dillon were insufficient to establish causal relationship between the claimed conditions of renal failure and PTSD to the accepted bilateral upper extremity conditions, "including the NSAIDs taken during treatment of the accepted conditions."⁸

On July 2, 2018 appellant requested reconsideration of the June 26, 2018 decision. In an August 22, 2018 statement, he noted that his physicians had opined that the NSAIDs he had taken to treat the accepted upper extremity conditions had caused kidney failure. Appellant submitted additional evidence.

In a July 10, 2018 report, Dr. Bruce D. Wilhelmsen, a Board-certified orthopedic surgeon, noted that appellant had a dialysis port in his left upper extremity. He obtained x-rays showing a normal right shoulder. In reports dated August 7 and 8, 2018, Dr. Lawrence N. Larabee, Jr., an attending Board-certified orthopedic surgeon, diagnosed right ulnar neuropathy at the elbow, right

⁶ During the pendency of the prior appeal, appellant claimed a consequential right shoulder condition, denied by OWCP in decisions dated August 8, 2016 and January 5, 2017. By decision dated February 23, 2017, OWCP denied his schedule award claim for additional upper extremity permanent impairment, and subsequently denied reconsideration by decision dated April 13, 2017. On March 14, 2018 appellant requested reconsideration of OWCP's January 5, 2017 decision. By decision dated June 8, 2018, OWCP denied reconsideration as the request was untimely filed and failed to demonstrate clear evidence of error.

⁷ *Supra* note 4.

⁸ OWCP actually referred to the Board's April 2, 2018 decision. However, it has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Appellant had 30 days from the date of the Board's April 2, 2018 decision to file a petition for reconsideration with this Board of its decision. *Id.* at § 501.7. *See also C.M.*, Docket No. 19-1211 (issued August 5, 2020). Therefore, the reconsideration shall be considered to be from OWCP's December 2, 2016 merit decision.

scapular winging, and right shoulder impingement. Appellant also provided a December 8, 2016 electrodiagnostic study and a July 31, 2018 report by Penny Brown, a nurse practitioner

By decision dated August 29, 2018, OWCP granted appellant a schedule award for an additional 9 percent permanent impairment of the right upper extremity in addition to the 10 percent previously paid,⁹ for a total of 19 percent.

By decision dated September 5, 2018, OWCP denied modification of its June 26, 2018 decision.

On October 2, 2018 appellant requested reconsideration of the September 5, 2018 decision. On that same date he also requested reconsideration from the August 29, 2018 decision that granted a schedule award. In support thereof, appellant submitted a March 6, 2018 report by Ms. Dillon, a nurse practitioner, and a September 5, 2018 report by Ms. Brown. He also provided copies of reports previously of record.

By decision dated October 26, 2018, OWCP denied appellant's October 2, 2018 request for reconsideration of the August 29, 2018 merit decision pursuant to 5 U.S.C. § 8128(a).

Appellant submitted a Social Security Administration (SSA) benefits statement dated October 27, 2018.

By decision dated November 2, 2018, OWCP denied appellant's request for reconsideration of the September 5, 2018 merit decision pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

The claimant bears the burden of proof to establish a claim for a consequential injury.¹⁰ As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, establishing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.¹¹

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹² Neither the mere fact that a disease or condition

⁹ See *supra* note 4. On June 27, 2018 OWCP obtained a second opinion regarding the appropriate percentage of bilateral upper extremity impairment from Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon, who found 20 percent permanent impairment of the right upper extremity and 18 percent permanent impairment of the left upper extremity. In a July 12, 2018 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as a DMA, reviewed Dr. Wardell's report and found 19 percent permanent impairment of the right upper extremity and 14 percent permanent impairment of the left upper extremity.

¹⁰ *V.K.*, Docket No. 19-0422 (issued June 10, 2020); *A.H.*, Docket No. 18-1632 (issued June 1, 2020); *I.S.*, Docket No. 19-1461 (issued April 30, 2020).

¹¹ *K.W.*, Docket No. 18-0991 (issued December 11, 2018).

¹² *G.R.*, Docket No. 18-0735 (issued November 15, 2018).

manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.¹³

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The basic rule is that, a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that he sustained renal failure and PTSD as a consequence of his accepted bilateral upper extremity conditions.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's December 2, 2016 merit decision. The Board considered evidence in its April 2, 2018 decision and found that it was insufficient to establish that he sustained renal failure and PTSD as a consequence of accepted upper extremity conditions. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁵

In support of his claim appellant provided a May 17, 2018 report by Dr. El-Khoury, opining that appellant's end-stage renal disease was possibly related, in part, to NSAID use over a period of years. While Dr. El-Khoury provided an affirmative opinion that supported causal relationship, he did not offer a rationalized medical explanation to support his opinion. Medical evidence that provides a conclusion, but does not offer a rationalized medical explanation regarding the cause of an employee's condition, is of limited probative value on the issue of causal relationship.¹⁶ Thus, Dr. El-Khoury's opinion is insufficient to meet appellant's burden of proof.

Appellant also submitted reports from Dr. Tuttle, Dr. Larabee, and Dr. Wilhelmsen addressing right upper extremity conditions. As this evidence does not address the claimed conditions of PTSD and renal failure, they are of no probative value in establishing causal relationship as to those conditions. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁷ These reports, therefore, are insufficient to establish appellant's claim.

¹³ *Id.*

¹⁴ *K.S.*, Docket No. 17-1583 (issued May 10, 2018).

¹⁵ *A.H.*, *supra* note 10; *I.S.*, *supra* note 10.

¹⁶ *A.H.*, *supra* note 10.

¹⁷ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

The Board finds, additionally, that, as appellant submitted no medical evidence regarding PTSD, he has thus failed to meet his burden of proof to establish this condition.¹⁸

Appellant also submitted reports by Ms. Brown and Ms. Dillon, nurse practitioners. As nurse practitioners are not considered physicians as defined under FECA, their medical findings and opinions are insufficient to establish entitlement to compensation benefits.¹⁹

Appellant also submitted a December 8, 2016 electrodiagnostic study. The Board has held, however, that diagnostic reports, standing alone, lack probative value on the issue of causal relationship as they do not address whether the employment injury caused any of the diagnosed conditions.²⁰

On appeal, appellant asserts that the medical evidence of record was sufficient to meet his burden of proof to establish consequential renal failure and PTSD. As explained above, he submitted no medical evidence regarding PTSD, and insufficient medical opinion evidence to establish the causal relationship asserted between NSAID use and renal failure. As such, appellant has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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.²¹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.²²

¹⁸ *Id.*

¹⁹ 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See id.* at § 8101(2); 20 C.F.R. § 10.5(t); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *P.H.*, Docket No. 19-0119 (issued July 5, 2019); *T.K.*, Docket No. 19-0055 (issued May 2, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See W.Z.*, Docket No. 20-0191 (issued July 31, 2020) (a nurse practitioner is not considered a physician under FECA).

²⁰ *M.C.*, Docket No. 19-1074 (issued June 12, 2020); *N.B.*, Docket No. 19-0221 (issued July 15, 2019).

²¹ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

²² 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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.²³ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.²⁴ 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.²⁵

ANALYSIS -- ISSUE 2

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

On October 2, 2018 appellant requested reconsideration of OWCP's August 29, 2018 schedule award determination and September 5, 2018 decision denying expansion of the claim. He has not contended that OWCP erroneously applied or interpreted a specific point of law, nor has he advanced a new and relevant legal argument not previously considered. Thus, 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).

In support of his reconsideration requests appellant provided additional evidence including reports by Ms. Brown and Ms. Dillon, nurse practitioners, and copies of reports previously of record. The nurse practitioner reports are not relevant to the issue of his claim for consequential PTSD and renal failure as they are not medical evidence.²⁶ In support of reconsideration of the September 5, 2018 decision, appellant also submitted an SSA benefits statement. The SSA benefits statement is irrelevant to the issue of causal relationship of the consequential conditions as it does not address the etiology of those conditions. 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.²⁷

Appellant also submitted copies of evidence previously of record. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.²⁸ As appellant failed to provide relevant and pertinent new evidence related to the underlying issue of expansion, he was not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

²³ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the originally contested decision. 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.

²⁴ *Id.* at § 10.608(a); *see also J.T.*, Docket No. 19-1829 (issued August 21, 2020); *M.S.*, 59 ECAB 231 (2007).

²⁵ *Id.* at § 10.608(b); *L.C.*, Docket No. 18-0787 (issued September 26, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁶ *See supra* note 19.

²⁷ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000); *L.C.*, *supra* note 25.

²⁸ *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *J.B.*, Docket No. 18-1531 (issued April 11, 2019); *see L.R.*, Docket No. 18-0400 (issued August 24, 2018); *Candace A. Karkoff*, 56 ECAB 622 (2005).

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.²⁹

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained renal failure and PTSD as a consequence of his accepted bilateral upper extremity conditions. The Board further finds that OWCP properly denied his requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁹ *L.C.*, *supra* note 25 *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *see A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the November 2, October 26 and September 5, 2018, decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 26, 2020
Washington, DC

Christopher J. Godfrey, Deputy 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