

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

M.E., Appellant)	
)	
and)	Docket No. 20-0067
)	Issued: October 15, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Millbrae, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On October 8, 2019 appellant filed a timely appeal from July 1 and September 19, 2019 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated February 14, 2019, 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 over 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).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision is incorporated herein by reference. The relevant facts are set forth below.

On December 3, 2016 appellant, then a 53-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a left shoulder tear and tendinitis due to his repetitive federal employment duties. He stopped work on November 1, 2016.

In a statement dated December 2, 2016, appellant noted that his federal employment duties included driving, carrying packages, and walking long hours at times while carrying a satchel on his shoulder weighing from 15 to 30 pounds. He contended that carrying this heavy satchel caused pain in both shoulders. Appellant also noted that most of the houses he delivered to had more than 25 steps to the mailbox and that he had tripped multiple times on slippery surfaces and uneven sidewalks.

A May 7, 2016 magnetic resonance imaging (MRI) scan of appellant's left shoulder demonstrated acromioclavicular (ACL) joint arthritis with edema and marked capsular hypertrophy, and moderate supraspinatus tendon thinning and partial insertional tearing with bursitis, and degenerative changes.

On November 14, 2016 Dr. Alberto Bolanos, a treating Board-certified orthopedic surgeon, performed left shoulder arthroscopic repair. He noted that intra-operative findings included a full-thickness rotator cuff tear, and that a mini open rotator cuff repair was performed.

By decision dated February 9, 2017, OWCP denied appellant's claim. It determined that the medical evidence of record did not establish that the claimed medical condition was causally related to the accepted employment events.

On February 22, 2017 appellant requested an oral hearing before OWCP's Branch of Hearings and Review.

At the hearing, held on August 29, 2017, appellant testified that he had not worked since his November 14, 2016 surgery. He stated that his federal job duties included carrying satchels weighing 30 to 35 pounds and that he had fallen many times when delivering mail.

By decision dated October 2, 2017, OWCP's hearing representative affirmed the February 9, 2017 decision denying appellant's claim.

Appellant filed an appeal with the Board on November 7, 2017. By decision dated June 13, 2018, the Board affirmed the October 2, 2017 decision. The Board found that appellant had not met his burden of proof to establish bilateral shoulder conditions causally related to the accepted factors of his federal employment.

² Docket No. 18-0525 (issued November 12, 2018).

During the pendency of appellant's appeal to the Board, OWCP received a June 11, 2018 report in which Dr. Fulton S. Chen, Board-certified in physical medicine and rehabilitation and in pain medicine, noted seeing appellant for constant, sharp left shoulder pain. Dr. Chen reported that appellant had been employed as a full-time letter carrier since 2014 on a park loop route and continued to work until he had left shoulder surgery in 2016. He indicated that appellant reported that his left shoulder pain developed gradually over time and was worsened by work activities such as carrying a satchel, reaching in order to case mail, when lifting heavy packages, and when opening and closing his postal vehicle doors. Dr. Chen described appellant's medical history, noting that the November 14, 2016 left shoulder surgery had not helped, that a recent MRI scan showed a persistent left shoulder rotator cuff tear that was not repairable, and that appellant did not have shoulder pain prior to 2015. He provided upper extremity examination findings and indicated that appellant had limited left shoulder range of motion, positive supraspinatus sign, and positive left crossed arm and drop arm tests. Dr. Chen reviewed May 7, 2016 and May 8, 2018 left shoulder MRI scan reports, noted reviewing additional medical reports, and provided medical literature. He diagnosed left shoulder rotator cuff tear and left shoulder ACL arthritis. Dr. Chen advised that appellant's usual duties required forceful and heavy lifting and overhead work, and that casing mail required repetitive shoulder movements for 1 to 1.5 hours per day, delivering mail required repetitive shoulder movements 8 to 12 hours per day, that he had to open and close the rear and side doors of the delivery vehicle over 100 times daily each, and that he had to carry a mail satchel weighing 35 pounds over his left shoulder for 8 to 12 hours each day. He explained that appellant's usual and customary duties were all occupational risk factors for developing rotator cuff tendinitis and tears due to cumulative trauma caused by these activities. Dr. Chen then provided a detailed description of each of the occupational factors and how it contributed to tendinitis and/or tears, and opined that the medical literature submitted supported his conclusions. He also opined that, while appellant's usual work duties would not be the only cause all of his ACL joint osteoarthritis, these duties would cause an aggravation of the preexisting ACL joint osteoarthritis by cumulative trauma because appellant's work duties placed an additional load on the shoulder joints and damaged or inflamed the articular cartilage. Dr. Chen reasoned that, due to his left shoulder condition, appellant's functional status had materially worsened causing further permanent impairment and disability. He concluded that it was his opinion that appellant's usual and customary duties of forceful and repetitive use of the shoulder plus carrying a mail satchel caused left shoulder tendinitis/tear and aggravated the shoulder osteoarthritis over the shoulder by placing heavier biomechanical loads onto the ACL shoulder joint.

A June 11, 2018 left shoulder MRI scan demonstrated status post rotator cuff repair with evidence of a full-thickness re-tear, with retraction of the tendon, an associated high riding humeral head, and atrophy of the supraspinatus muscle, suggestive of a chronic tear.

On June 26, 2018 appellant requested reconsideration. In an attached statement, he wrote that he had been a letter carrier for approximately four years and described specific job duties. Appellant indicated that he sorted and delivered mail to approximately 500 stops. Duties described included approximately 1.5 to 2 hours daily sorting mail into a sorting case and about 5 to 6 hours delivering mail each day. Appellant indicated that he had to reach above his shoulder to sort mail, and that he could work overtime up to 12 hours, sometime 6 days each week. He described the specific physical activity performed for each job duty and indicated that the satchel shoulder strap was like a thick rope that seemed to cut into his shoulder as he walked over uneven terrain from house to house delivering mail.

Dr. Bolanos completed a duty status report (Form CA-17) on September 6, 2018. He noted clinical findings of left shoulder pain, weakness, and stiffness, and diagnosed arthropathy.

By decision dated September 24, 2018, OWCP denied modification. It found Dr. Chen's report insufficient to establish appellant's claim because he failed to provide a rationalized medical explanation of how he arrived at his conclusion that appellant's customary duties caused or aggravated his bilateral shoulder condition.

On November 20, 2018 appellant requested reconsideration. In support of his request, he resubmitted a personal statement and forwarded a supplemental medical report, dated November 13, 2018, in which Dr. Chen provided further explanation on his opinion relative to causation. Dr. Chen opined that appellant had an overuse injury of the rotator cuff, which was the result of cumulative trauma associated with the physical activity of "eccentric tensile overloading of the rotator cuff tendon." He noted that appellant's usual and customary duties involving the shoulder including repetitive movements, overhead work, forceful and heavy lifting, and satchel carrying were occupational risk factors for developing rotator cuff tears because of the cumulative trauma caused by these activities. Dr. Chen concluded that, based on appellant's history, medical records, physical examination findings, and diagnostic imaging, his rotator cuff tear was industrial in nature, and the preexisting ACL arthritis was aggravated by his work duties which caused compressive and shear forces over the shoulder ACL joint, which caused the bones of the ACL joint to come into contact with each other and rub against each other, and this resulted in trauma to the surface articular cartilage.

By decision dated February 14, 2019, OWCP again denied modification. It found that Dr. Chen's report was of insufficient probative value to alter its prior decision.

On April 5, 2019 appellant again requested reconsideration. In support of his request, he submitted a March 28, 2019 supplemental report in which Dr. Chen citing his June 11, 2018 report responded to the deficiencies in his prior report noted by OWCP in its denial of the claim. Dr. Chen reported on prior examination findings, noting limited range of motion over the left shoulder, weakness over the left shoulder, and that provocative maneuvers supported a rotator cuff injury. Referencing OWCP's denial decision, under five separate headings, he set forth the claimed deficiency and provided a responsive statement. Dr. Chen indicated that, in his June 11, 2018 report, he had specifically discussed in detail the causal connection between appellant's left shoulder conditions and his specific work duties. He also questioned OWCP's statement that the May 8, 2018 MRI scan did not explain preexisting conditions, explaining that the MRI was "moot" as it was performed following the left shoulder surgical procedure. In his conclusory paragraph, Dr. Chen advised that the medical data provided in this report was a reiteration of the data that was already provided in his previous reports, but cited to his statements of reasoning contained on pages 5, 6, 7, 8, and 9 of his prior report.

By decision dated July 1, 2019, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found the evidence submitted was insufficient to warrant merit review.

Appellant next requested reconsideration on July 29, 2019. In a July 22, 2019 statement, he indicated that he was in good health and had no shoulder tears prior to walking and driving 12

to 14 hours a day carrying a heavy mail satchel up and down streets, stairs, and hills. Appellant resubmitted Dr. Chen's March 28, 2019 report.

By decision dated September 19, 2019, OWCP again denied merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found the evidence and argument submitted repetitious and duplicative and, thus, insufficient to warrant merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵

A timely application for reconsideration, including all supporting documents, must 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.⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

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

Appellant 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 in either his April 5 or July 29, 2019 reconsideration requests. In statements submitted, he merely reiterated his previous argument that his job duties had caused his left shoulder condition. Consequently, appellant was not entitled to a review of the merits based on the first or second above-noted requirements.⁸

³ *Supra* note 1 at § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *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). Chapter 2.1602.4b.

⁶ *Supra* note 4 at § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

⁷ *Id.* at § 10.608.

⁸ 20 C.F.R. § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

The underlying issue on reconsideration is the medical question of whether appellant sustained a left shoulder injury causally related to his employment duties as a city carrier. Along with the April 5 and July 29, 2019 reconsideration requests, he submitted Dr. Chen's March 28, 2019 supplemental report in which he specifically responded to the deficiencies of his prior report noted by OWCP in its denial of appellant's claim. In five separate sections of his supplemental report, Dr. Chen provided a response to OWCP's prior findings. He specifically reiterated his prior opinion and provided an explanation as to why OWCP's reliance on a May 8, 2018 MRI scan was improper. Dr. Chen also provided citation to his prior rationale as to how the employment factors were sufficient to support his continued opinion that they had caused or aggravated the left shoulder conditions. The Board finds that Dr. Chen's March 28, 2019 report specifically addressed all of the deficiencies noted in OWCP's denial of appellant's claim and provided further explanation to cure those deficiencies. As such, the report constitutes relevant and pertinent new evidence in support of appellant's claim for a left shoulder condition. Therefore, the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third prong of section 10.606(b).⁹

The Board will therefore set aside OWCP's July 1 and September 19, 2019 decisions and remand the case for an appropriate merit decision on appellant's claim.

CONCLUSION

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

⁹ See *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

ORDER

IT IS HEREBY ORDERED THAT the September 19 and July 1, 2019 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 15, 2020
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board