



## ISSUE

The issue is whether OWCP properly denied appellant's August 13, October 29, and December 5, 2018 requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On December 23, 2016 appellant, then a 42-year-old certified nursing assistant (CNA), filed a traumatic injury claim (Form CA-1) alleging that on January 19, 2016<sup>3</sup> she injured her right shoulder down to her elbow when she repositioned a patient in bed while in the performance of duty. She did not stop work.<sup>4</sup>

Appellant submitted a duty status report form (Form CA-17) dated January 16, 2017 by an unidentifiable provider who diagnosed frozen right shoulder and indicated that appellant could work with restrictions.

In a January 18, 2017 development letter, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and also provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the necessary factual information and medical evidence.

Appellant submitted an employing establishment incident report that described how an incident occurred on January 19, 2016 as she was positioning a heavy patient in bed when she felt pain and strain in her right shoulder down to the elbow.

In a January 21, 2016 work status letter, Dr. Antonio J. Carrasco, a Board-certified family physician, noted that appellant was seen in their urgent care facility on that date and could return to work on January 29, 2016.

In a January 28, 2016 letter, Jeffrey L. Smith, a certified physician assistant, indicated that appellant was treated in urgent care on that date and could return to work on January 30, 2016.

Appellant submitted prescription notes dated July 19 and August 2, 2016 by Dr. Steven Lu, a Board-certified internist, who indicated a diagnosis of right frozen shoulder and right arm strain. Dr. Lu recommended that appellant work part-time, limited duty for four hours per shift from August 2 to 16, 2016.

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<sup>3</sup> Appellant initially reported a date of injury of January 20, 2016, but in an e-mail dated January 17, 2017 she indicated that the correct date of injury was January 19, 2016.

<sup>4</sup> The record reflects that appellant was working part-time, limited duty for six hours per day due to a previously accepted work-related injury under OWCP File No. xxxxxx555. Under that claim, OWCP accepted that on December 1, 2015 appellant strained her right forearm when pulling up a patient while in the performance of duty. It accepted appellant's claim for right elbow lateral epicondylitis. OWCP has not administratively combined the claims.

A November 7, 2016 right shoulder magnetic resonance imaging (MRI) scan demonstrated chronic posterior labral injury with paralabral cyst with intraosseous extension and mild acromioclavicular (AC) joint degenerative changes.

In a November 22, 2016 report and work restriction form, Dr. Lu provided examination findings and diagnosed right tennis elbow and right shoulder tendinitis. He opined that the inflammation of appellant's right shoulder was caused by the job-related injury and recommended that appellant's claim be accepted for right rotator cuff syndrome.

In a November 22, 2016 prescription note, Dr. Lu reported that appellant suffered inflammation of the right shoulder "caused by the job-related injury."

On January 21, 2017 appellant responded to OWCP's development questionnaire. She recounted that she had previously injured her elbow in December 2015 by lifting a patient and had filed an incident report. Appellant indicated that a month later she sustained another injury to her right shoulder. She explained that she had complained about her shoulder from the onset of the injury, but her claim had not been accepted so she filed a new one.

In a February 7, 2017 examination report and Form CA-17, Dr. Lu described the claimed January 19, 2016 employment incident and indicated that appellant's right shoulder symptoms remained unchanged. He provided examination findings and diagnosed right frozen shoulder. Dr. Lu reported that the nature, symptoms, and timing of the injury, and physical findings were all consistent with the right rotator cuff initially caused by her job and gradually developed into a frozen shoulder due to the chronic inflammation.

Appellant began to receive medical treatment from Dr. Jerry Fisher, a family physician. In a February 9, 2017 examination report, Dr. Fisher noted a date of injury of January 19, 2016 and recounted that appellant had a new workers' compensation claim related to her right shoulder. He reviewed appellant's history and reported examination findings of abnormal range of motion, stiffness in the shoulder, pain, and swelling. Dr. Fisher diagnosed shoulder sprain and right elbow lateral epicondylitis.

Dr. Fisher also provided a February 9, 2017 letter wherein he requested that an OWCP claims examiner review his previous notes with regard to the sequence of events leading up to the recent MRI scan of her right shoulder. He indicated that appellant, on that date, had almost no symptoms in the elbow, but had significant pathology in her shoulder and needed to be evaluated by an orthopedist. Dr. Fisher requested that the claims examiner accept the condition of right shoulder sprain.

In examination reports dated March 2 and 23, 2017, Dr. Fisher noted that appellant was seen for follow-up examination of right shoulder strain and continued right shoulder pain. He noted that appellant injured herself a year ago when working as a CNA. Dr. Fisher conducted a physical examination and diagnosed shoulder sprain. He completed work restriction forms indicating that appellant could work with restrictions.

In a March 7, 2017 letter, appellant expressed frustration that OWCP had not yet accepted her claim and alleged that Dr. Lu had answered all of OWCP's questions. She noted that she had

not gone to the doctor for her elbow between the injuries of December 1, 2015 and January 19, 2017.

In a prescription note dated March 7, 2017, Dr. Lu indicated that appellant was restricted to work six-hour shifts due to her tennis elbow.

In an April 11, 2017 report and work restriction form, Cheryl Einerson, a certified nurse practitioner, indicated that appellant was seen for follow-up of her right shoulder and elbow conditions and provided examination findings. She assessed right shoulder sprain and right elbow lateral epicondylitis. Ms. Einerson reported that appellant could return to limited duty.

Appellant received medical treatment from Dr. Mark R. Colville, a Board-certified orthopedic surgeon. In an April 27, 2017 report, Dr. Colville noted that appellant continued to have right shoulder pain and remained on light-duty working in a secretarial position. He described the claimed January 20, 2016 employment incident and discussed the medical treatment that appellant received. Dr. Colville concluded that appellant's shoulder symptoms could be related to her labral tear and her AC joint.

In reports dated May 4 and 18, 2017, Dr. Fisher noted appellant's history and her active problems of right elbow lateral epicondylitis and right shoulder sprain. He completed work restriction forms indicating that appellant could return to limited-duty employment.

By decision dated May 31, 2017, OWCP denied appellant's claim. It accepted that the January 19, 2016 incident occurred as alleged and that a right shoulder condition had been diagnosed. However, OWCP denied her claim finding that the medical evidence of record was insufficient to establish causal relationship between the accepted employment incident and the diagnosed medical conditions.

On June 1, 2017 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 18, 2017.

Appellant subsequently submitted reports dated June 1 and 22, 2017 by Dr. Colville who noted that appellant continued to have right shoulder pain and difficulty with overhead lifting. Dr. Colville explained that since it had been one and one-half years since her injury and appellant had failed nonsurgical treatment, he recommended arthroscopic surgery to include labral repair. He described the January 19, 2016 employment incident and reported that a posterior labral tear "could be consistent with mechanism of injury."

In a July 6, 2017 report and work restriction form, Dr. Fisher noted appellant's history of injury and indicated that she was seen for follow-up of her right shoulder and elbow. He noted active problems of right elbow lateral epicondylitis and right shoulder sprain.

Dr. Fisher related, in an October 5, 2017 letter, that appellant sprained her shoulder when she was moving a heavy patient in his bed. He indicated that the sprain was subsequently shown to be a combination of tears in her shoulder and internal derangement. Dr. Fisher reported that the incident was the cause of appellant's injury, which needed treatment at that time.

In a November 3, 2017 report and letter, Dr. Colville noted that he had seen appellant on several occasions for right upper extremity difficulties sustained during an on-the-job injury. He indicated that appellant reinjured her right shoulder on October 25, 2017 when she was taking a basic life support class. Dr. Colville assessed anterior shoulder pain, numbness, and tingling. He did not see an anatomic cause for appellant's problem and could not explain why she was having difficulty.

By decision dated December 26, 2017, OWCP's hearing representative affirmed the May 31, 2017 decision.

On April 19, 2018 appellant requested reconsideration and submitted additional evidence.

In examination reports dated March 5 to 22, 2018, Dr. Peter L. Kung, a Board-certified orthopedic surgeon, described that in January 2016 appellant felt a tear in her right shoulder when she lifted a heavy patient at work. He noted that it had gotten slightly better, but appellant reinjured her shoulder on October 25, 2017. Dr. Kung reviewed appellant's history and conducted an examination. He diagnosed right shoulder superior glenoid labrum lesion and right shoulder pain. Dr. Kung reported that he discussed with appellant that while the October 2017 incident could have aggravated her shoulder, the tear and cysts were there since 2016. He opined that it could be related and due to her injury at work while lifting a 300-pound patient. Dr. Kung explained that given the fact that appellant did not have any symptoms before that incident, this incident "is likely the cause on a more-probable-than-not basis."

Appellant underwent a right shoulder MRI scan on March 12, 2018, which revealed trace fluid undermining the posterior mid-glenoid labrum consistent with partial detachment and mild acromioclavicular joint osteoarthritis.

By decision dated June 29, 2018, OWCP denied modification of the December 26, 2017 decision.

On August 13, 2018 appellant requested reconsideration. She contended that she injured her right shoulder in January 2016, reported it to her supervisor, and completed the correct paperwork. Appellant alleged that many doctors had written to OWCP about how she was injured in 2016.

Appellant resubmitted Dr. Fisher's March 2, 23, and May 18, 2017 examination reports and the last page of Dr. Kung's March 16, 2018 report.

By decision dated October 11, 2018, OWCP denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

On October 29, 2018 appellant again requested reconsideration. She described the accepted January 19, 2016 employment incident and the medical treatment that she had received for her shoulder. Appellant alleged that for the past two and a half years, her arm has been limited and she had been unable to complete her work duties, such as basic life support training for work.

Appellant resubmitted Mr. Smith's January 28, 2016 letter; right shoulder MRI scan reports dated November 7, 2016 and March 12, 2018; Dr. Colville's April 27 and June 1, 2017

reports; and Dr. Kung's March 14 and 22, 2018 reports. OWCP also received a copy of an article entitled "Paralabral Cysts associated with Posterior Labral Tear" and the position description for appellant's job.

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

On December 5, 2018 appellant again requested reconsideration. She described the January 19, 2016 employment incident and her duties as a nursing assistant. Appellant alleged that nursing assistants had very active, stressful, and strenuous jobs that required her to use her legs and arms correctly.

Appellant resubmitted the January 19, 2016 employing establishment incident report and a copy of the position description for a nursing assistant.

Appellant also submitted a December 3, 2018 after visit summary note, Dr. Kung noted that appellant was seen for follow-up after a posterior labral repair was done in May 2017 due to a work-related injury. He noted that the mechanism of injury was first "due to lifting a 300+ lb. patient when she injured her shoulder." Dr. Kung indicated that this was further exacerbated by participating in a basic life support course. He reported that appellant complained of improved pain and some stiffness in her shoulder. Dr. Kung provided examination findings and diagnosed status post labral repair. In a conclusory paragraph to his report he noted that appellant was almost six months post injury, that she had reached maximum medical improvement (MMI), and that "lifting this large patient and pulling with a posterior directed force on her labrum due to the [basic life support] and the lifting could have torn her posterior labrum as this was a large abnormal force."

By decision dated December 20, 2018, OWCP denied appellant's request for reconsideration of the merits of the 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 own motion or on application.<sup>5</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 OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup>

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<sup>5</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).

<sup>6</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).

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>7</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</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>9</sup>

### ANALYSIS

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

Appellant disagreed with the June 29, 2018 OWCP decision and timely requested reconsideration on August 13, October 29, and December 5, 2018. The underlying issue is whether appellant has established causal relationship between the accepted January 19, 2016 employment incident and the diagnosed right shoulder condition. Thus, the Board must determine if appellant presented sufficient evidence or argument regarding causal relationship to warrant a merit review pursuant to 5 U.S.C. § 8128(a).<sup>10</sup>

With her December 5, 2018 reconsideration request, appellant submitted a December 3, 2018 after visit summary note by Dr. Kung who noted that appellant was seen for follow-up after a posterior labral repair due to a work-related injury. Dr. Kung provided an opinion that the diagnosed condition and subsequent medical treatment was causally related to the accepted employment incident. In this report he more specifically found that appellant was at MMI for the injury and opined "lifting this large patient and pulling with a posterior directed force on her labrum due to [basic life support] and the lifting could have torn her posterior labrum as this was a large abdominal force." The opinion as set forth by Dr. Kung is a new statement on causal relationship which is stated differently and with additional detail from his prior conclusory opinions and comes from appellant's attempt to obtain an appropriate opinion on causal relationship from her attending physician without the assistance of the claims examiner. Thus, the Board finds that this attending physician's report constitutes relevant and pertinent new evidence under the third requirement of 20 C.F.R. § 10.606(b). Appellant's request for reconsideration

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<sup>7</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). Chapter 2.1602.4b.

<sup>8</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>10</sup> *S.W.*, Docket No. 18-1261 (issued February 22, 2019); *S.V.*, Docket No. 17-2012 (issued October 18, 2018).

therefore has met the third standard of her case under 20 C.F.R. § 10.606(b)(3) and, accordingly, she is entitled to a merit review of her claim.<sup>11</sup>

The Board will therefore set aside OWCP's December 20, 2018 decision 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 her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 20, 2018 decision 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: September 10, 2020  
Washington, DC

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

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

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

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<sup>11</sup> See *J.W.*, Docket No.18-0822 (issued July 1, 2020); *M.C.*, Docket No. 17-1983 (issued August 17, 2018); *S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).