

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

C.S., Appellant)	
)	
and)	Docket No. 20-0634
)	Issued: September 25, 2020
U.S. POSTAL SERVICE, LAKE POST OFFICE,)	
Lake, MI, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 10, 2019 appellant filed a timely appeal from an October 3, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 4, 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.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the October 3, 2019 decision, OWCP received additional evidence. However, 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.*

FACTUAL HISTORY

On April 24, 2017 appellant, then a 35-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that day she sustained a right shoulder strain when she pulled on a mailbox door to open it while in the performance duty.³ On the reverse side of the claim form, the employing establishment indicated that she stopped work on the date of injury. Appellant returned to part-time limited-duty work on April 28, 2017.

On May 30, 2017 OWCP accepted appellant's claim for right shoulder and upper arm level unspecified muscle, fascia and tendon strain, initial encounter.

On June 27, 2017 appellant returned to full-time regular-duty work with no restrictions as advised by Dr. Charles J. Lilly, a Board-certified orthopedic surgeon. She stopped work on April 20, 2019 and on April 22, 2019 she filed a notice of recurrence (Form CA-2a) alleging that her work stoppage on April 20, 2019 was due to her accepted employment injury of right shoulder and upper arm strain. Appellant asserted that at approximately 3:30 p.m. on April 20, 2019 a piece of hair flipped into her face and as she reached with her right arm to flip it back into place her shoulder slipped out of the socket. She had excruciating pain for which she sought medical treatment. Appellant noted that her shoulder instability had progressively worsened.

In support of her claim, appellant submitted an April 20, 2019 letter from Dr. Michelle Lim, a Board-certified family practitioner, who indicated that appellant was treated in the emergency room on that day. Dr. Lim advised that appellant may return to work on April 24, 2019.

Appellant also submitted an undated medical report by Dr. Michael J. Moutsatson, an orthopedic surgeon, who examined appellant on April 22, 2019. Dr. Moutsatson noted a history that on April 20, 2019 she felt a pop in her right shoulder when she tried to wipe her hair out of her eyes. He reported findings on physical examination and diagnosed pain in the right shoulder and acromioclavicular (AC) joint, unspecified subluxation of the right shoulder joint, initial encounter, and bicipital tendinitis of the right shoulder.

Thereafter, OWCP received additional medical evidence from Dr. Moutsatson. In an April 22, 2019 prescription, Dr. Moutsatson ordered physical therapy to treat appellant's diagnosed conditions of right shoulder and AC joint pain, bicipital tendinitis, and unspecified subluxation of the right shoulder. In a work status report of even date, he reiterated his prior diagnosis of unspecified subluxation of the right shoulder, initial encounter. Dr. Moutsatson placed appellant off work until April 24, 2019 when she could return to work with no restrictions. In an April 24, 2019 work status report, he reiterated her diagnosed right shoulder conditions and advised that she could return to work with restrictions as of the date of his report.

Dr. Lim, in an April 20, 2019 report, related a history that, on that day, appellant may have dislocated her right shoulder when she brushed hair away from her face. She discussed findings on physical and x-ray examination. Dr. Lim provided a clinical impression of acute right shoulder pain.

³ Appellant had filed prior claims before OWCP. These claims include OWCP File No. xxxxxx563 and OWCP File No. xxxxxx516 for right shoulder injuries. These claims have been administratively combined with the current claim, which OWCP designated as the master file.

In an April 30, 2019 development letter, OWCP informed appellant that it had received her claim for a recurrence of disability. It informed her that the evidence submitted was insufficient to establish how her current condition worsened and rendered her unable to work. OWCP advised appellant of the type of medical and factual evidence needed to establish her recurrence of disability claim. It afforded her 30 days to submit the requested information.

In an April 26, 2019 duty status report (Form CA-17), Dr. Moutsatson listed a date of injury as March 7, 2011. He reiterated his prior diagnosis of right shoulder pain and that appellant injured her right shoulder while lifting hair out of her face. Dr. Moutsatson described clinical findings and diagnosed right shoulder pain due to injury. He advised that appellant was unable to perform her regular work, but she could work with restrictions as of the date of his examination.

On April 26, 2019 appellant accepted the employing establishment's offer of a full-time modified-duty position.

In a May 1, 2019 work capacity evaluation, Dr. Moutsatson continued to advise that appellant was unable to perform her usual job, but she could work eight hours per day with restrictions.

Appellant responded to OWCP's questionnaire on May 9, 2019. She reported that her claimed recurrence of disability on April 20, 2019 occurred when she was at home and not while she was working. Appellant contended that her accepted right shoulder condition had progressed to the current level of instability.

In additional narrative and work status reports dated May 8, 2019, Dr. Moutsatson continued to reiterate appellant's right shoulder conditions and indicate that she could work with restrictions.

A May 1, 2019 magnetic resonance imaging scan report was received from Dr. Nriprendra Devanath, a Board-certified diagnostic radiologist.

In an April 20, 2019 provider notes, Dr. Lim reiterated the history of appellant's claimed recurrence of disability, discussed examination findings, and noted her prior diagnosis of acute right shoulder pain.

By decision dated June 4, 2019, denied appellant's claim for a recurrence of disability commencing April 20, 2019 finding that the medical evidence of record was insufficient to establish that she was disabled from work due to a material change/worsening of her accepted April 24, 2017 employment-related conditions.

OWCP subsequently received copies of Dr. Moutsatson's April 22, 2019 physical therapy prescription and April 24, 2019 work status report. It also received a June 5, 2019 report in which he provided examination findings and continued to diagnose right shoulder and AC joint pain, bicipital tendinitis of the right shoulder, and unspecified subluxation of the right shoulder joint, subsequent encounter. Dr. Moutsatson advised that appellant could perform light-duty work with restrictions.

Additionally, chart, reports, and progress and daily notes dated April 29 to May 28, 2019 and signed by appellant's physical therapists were received which addressed the treatment of

appellant's pain, effusion, and bicipital tendinitis of the right shoulder, and unspecified subluxation of the right shoulder joint, subsequent encounter.

On July 8, 2019 appellant requested reconsideration of the June 4, 2019 decision and submitted a report in which Dr. Moutsatson noted that on June 21, 2019 she presented for a follow-up evaluation of her right shoulder pain. Dr. Moutsatson indicated that she was doing well until three days ago when her pain acutely worsened. Appellant denied any new injury. She related to Dr. Moutsatson that her right shoulder pain felt the same as the pain she experienced when she injured her right shoulder at work on April 24, 2017, but it had lasted longer. Dr. Moutsatson reported findings on physical examination and reviewed diagnostic test results. He noted his prior diagnoses of right shoulder and AC joint pain and bicipital tendinitis of the right shoulder and diagnosed unspecified subluxation of the right shoulder joint, subsequent encounter. Dr. Moutsatson again advised that appellant could perform light-duty work with restrictions.

OWCP thereafter continued to receive work status reports dated May 8, June 21, and August 26, 2019 by Dr. Moutsatson who again noted his right shoulder diagnoses and advised that appellant could work with restrictions. In an additional physical therapy prescription dated June 5, 2019, Dr. Moutsatson ordered physical therapy for her diagnosed right shoulder conditions.

Additional physical therapy reports and daily notes dated from July 25 to September 13, 2019 were received by OWCP which again addressed the treatment of appellant's diagnosed right shoulder conditions.

By decision dated October 3, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously

⁴ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *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). *Id.* at Chapter 2.1602.4b.

considered by OWCP.⁷ When a timely request 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.⁸

ANALYSIS

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

Although appellant timely requested reconsideration, she neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, she did not advance relevant legal arguments not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. OWCP previously denied her claim because the medical evidence of record was insufficient to establish that she sustained a recurrence of disability commencing April 20, 2019 causally related to the accepted April 24, 2017 employment injury. In support of her request for reconsideration, appellant submitted Dr. Moutsatson's May 8, June 21, and August 26, 2019 reports in which he reiterated his prior diagnoses of right shoulder and AC joint pain, and bicipital tendinitis of the right shoulder, and unspecified subluxation of the right shoulder joint, initial and subsequent encounters, and opinion that she could work with restrictions. 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.⁹ Appellant also submitted a chart, reports, and progress and daily notes dated between April 29 to May 28, 2019 and July 25 and September 13, 2019 of her physical therapists. Physical therapists are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.¹⁰ As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹¹

⁷ *Supra* note 5 at § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁸ *Id.* at § 10.608(a), (b).

⁹ *See B.H.*, Docket No. 19-0169 (issued June 24, 2019); *G.Q.*, Docket No. 18-1697 (issued March 21, 2019).

¹⁰ Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); *see also supra* note 6 at Chapter 2.805.3a(1) (January 2013); *J.R.*, Docket No. 20-0496 (issued August 13, 2020) (physical therapists are not considered physicians as defined by FECA); *David P. Sawchuk*, 57 ECAB 316, 322 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

¹¹ *Supra* note 5 at § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

The Board, accordingly, finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹²

On appeal appellant contends that she submitted sufficient evidence to establish that she sustained an employment-related recurrence of disability in 2019. As noted, the Board does not have jurisdiction over the merits of her claim. The evidence submitted with appellant's July 8, 2019 reconsideration request was insufficient to warrant a merit review of her claim.

CONCLUSION

The Board finds that OWCP properly 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 October 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 25, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹² *D.G.*, Docket No. 19-1348 (issued December 2, 2019); *S.H.*, Docket No. 19-1115 (issued November 12, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

