

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).

FACTUAL HISTORY

On December 26, 2015 appellant, then a 59-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on December 24, 2015 he suffered a lower back/lumbar spine injury when attempting to open the roll-up door of his trailer standing on a scissor lift while in the performance of duty. On the reverse side of the claim form the employing establishment acknowledged that appellant was injured in the performance of duty. Appellant stopped work on December 25, 2015.

In support of his claim, appellant submitted a computerized tomography (CT) scan of his lumbar spine, dated December 24, 2015, which revealed degenerative changes and multilevel lumbar stenosis. He further submitted hospital discharge instructions and a work excuse note of even date.

In a December 28, 2015 duty status report (Form CA-17), Dr. John Ferro, a chiropractor, diagnosed lumbar disc injury and right shoulder rotator cuff injury and listed appellant's work restrictions.

In a development letter dated January 14, 2016, OWCP informed appellant that the evidence of record was insufficient to establish 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.

OWCP subsequently received an authorization for examination and/or treatment (Form CA-16), dated December 26, 2015, in which the employing establishment authorized appellant to seek medical care for a sprain to the lower back/lumbar area.

In an undated statement, appellant indicated that after his December 24, 2015 injury, he was taken to the hospital and subsequently discharged under heavy medication. On or about December 27, he began to feel substantial pain in his upper right arm and shoulder area. Appellant was examined by a doctor on December 28, 2016, for back and shoulder injuries. He indicated that he omitted the shoulder injury from his Form CA-1 because he had not felt that pain until after the medication he received at the emergency department wore off.

A magnetic resonance imaging (MRI) scan of appellant's right shoulder, dated January 13, 2016, demonstrated rotator cuff impingement, partial tear of the acromioclavicular ligament, and partial tears involving the distal supraspinatus, infraspinatus, and subscapularis tendons.

On January 19, 2016 appellant responded to OWCP's development questionnaire noting that he was standing on a scissor lift when he injured his lower back and right shoulder while attempting to lift a trailer door weighing approximately 500 pounds. He indicated that he had suffered from back pain before, but did not require heavy medication or time off from work.

Appellant submitted progress notes from Dr. Ferro, dated December 28, 2015 through January 25, 2016, who examined appellant and diagnosed lumbar spine sprain, right shoulder sprain, and intervertebral disc disorders with radiculopathy.

By decision dated February 17, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed conditions and the accepted December 24, 2015 employment incident.

On February 22, 2016 appellant requested an oral hearing before OWCP's Branch of Hearings and Review.

OWCP subsequently received January 27 and February 10, 2016 reports from Dr. Julian Cameron, a Board-certified orthopedic surgeon, who examined appellant and diagnosed right shoulder arthralgia with partial rotator cuff tear, acute impingement syndrome, L5-S1 disc herniation, and nonradicular lumbago.

In progress notes dated February 16 and 18, 2016, Dr. Ferro examined appellant and diagnosed lumbar spine sprain, right shoulder sprain, and intervertebral disc disorders with radiculopathy.

In a February 23, 2016 report, Dr. Fausto Castillo, a specialist in family medicine, noted that appellant lifted a truck door on December 24, 2015 and felt a sharp pain in his lower back. He examined appellant and diagnosed right shoulder rotator cuff injury, partial tear of the infraspinatus tendon, extensive tear of the supraspinatus tendon, disc bulging at L3-4 and L4-5, and central stenosis. Dr. Castillo opined that appellant's conditions were work related.

In March 3, 2016 statements, Z.A. and R.H., appellant's coworkers, corroborated his account of the employment incident.

Appellant submitted diagnostic testing, including a March 3, 2016 nerve conduction velocity study, and an April 27, 2016 MRI scan of his lumbar spine. He also submitted physical therapy treatment notes, dated April 6, 2016.

OWCP received an April 6, 2016 psychotherapy progress note from Dr. Francisco Martinez-Mesa, Psy.D., a licensed neuropsychologist.

In a letter dated May 17, 2016, Dr. Christopher Woodman, Ph.D., a clinical psychologist, noted that appellant was suffering from high levels of depression and anxiety. He indicated that appellant was fearful and anxious of exacerbating his physical pain and further injuring his back. Dr. Woodman diagnosed major depression and anxiety.

In a September 23, 2016 report, Dr. Castillo noted appellant's medical history and described the employment incident. He diagnosed insomnia, lower back muscle spasm, lumbar spine sprain, persistent mood affective disorders, right shoulder sprain, right arm strain, lower back strain, right shoulder strain, left shoulder rotator cuff injury, right shoulder rotator cuff injury, and adjustment disorder with mixed anxiety and depressed mood. Dr. Castillo opined that appellant's conditions were caused by factors of his federal employment, including excessive and repetitive lifting, pushing, pulling, carrying, twisting, bending, sorting, and casing parcels, bins, letters, and

trays. He also attributed the conditions to appellant's repetitious and continuous standing, walking, and reaching while working five to six days per week.

OWCP received partially legible Form CA-17 reports from Dr. Castillo, dated February 23 through August 16, 2016, who provided diagnoses and listed appellant's work restrictions.

A telephonic hearing was held on October 17, 2016.

By decision dated January 5, 2017, OWCP's hearing representative affirmed the February 17, 2016 decision.

On March 21, 2017 appellant requested reconsideration.

In support of his request, appellant submitted a March 15, 2017 report from Dr. Erick Salado, a specialist in family medicine, who noted that appellant was injured on December 25, 2015 while lifting a tractor-trailer door. He reviewed appellant's medical records and diagnosed right shoulder ankylosis, right shoulder disorder, rotator cuff tear, right shoulder impingement, right shoulder traumatic arthropathy, lumbar disc disorder, traumatic spondylopathy of the lumbosacral region, bone hypertrophy at multiple sites, back muscle spasm, and lumbar spine sprain. Dr. Salado opined that appellant's conditions were caused by his job duties which were excessively repetitious.

In reports dated March 21 and May 19, 2017, Dr. Castillo opined that appellant's conditions were caused by the December 24, 2015 employment incident. He found that appellant's conditions resulted from acute trauma when he used excessive force to push a trailer door upwards, which applied force to his lumbar spine and right shoulder.

By decision dated June 19, 2017, OWCP denied modification of its January 5, 2017 decision.

OWCP subsequently received form reports from Dr. Castillo, dated February 23 through July 19, 2016. Dr. Castillo provided diagnoses and checked boxes marked "Yes" to indicate that appellant's conditions were work related.

In an August 2, 2017 report, Dr. Stuart Krost, a Board-certified specialist in physical medicine and rehabilitation, described the employment incident and reviewed appellant's medical history. He examined appellant and diagnosed right rotator cuff injury, mechanical low back pain, lumbar facet arthropathy, lumbar disc herniation, and muscle spasm. Dr. Krost opined that appellant's conditions were work related and placed him off work.

In a letter dated August 3, 2017, Dr. Castillo confirmed that he was treating appellant and noted that he was unable to perform his work duties.

On August 30, 2017 appellant requested reconsideration.

OWCP subsequently received form reports and partially legible Form CA-17 reports from Dr. Castillo, dated January 19 through July 19, 2017, who provided diagnoses, indicated that appellant's conditions were work related, and listed his work restrictions.

In a September 25, 2017 report, Dr. Castillo clarified that appellant's conditions were caused by the December 24, 2015 employment incident and that he did not have any significant lumbar injuries prior to the incident. He noted appellant's medical history and provided objective findings. Dr. Castillo diagnosed lumbar disc disorder with radiculopathy, right shoulder traumatic arthropathy, right shoulder bursitis, nerve root injury of the lumbar spine, right shoulder impingement syndrome, right shoulder rotator cuff tear, adjustment insomnia, and traumatic spondylopathy. He opined that the excessive force and movement used to lift a trailer door caused appellant's right shoulder and lower back conditions. Dr. Castillo further opined that the employment incident was the sole contributor to appellant's conditions.

By decision dated November 27, 2017, OWCP denied modification of the June 19, 2017 decision.

On September 12, 2018 appellant requested reconsideration and resubmitted an August 2, 2017 report from Dr. Krost.

By decision dated November 8, 2018, OWCP denied modification of its November 27, 2017 decision.

On November 7, 2019 appellant, through counsel, requested reconsideration and submitted a November 6, 2019 report from Dr. Kevin Kessler, a Board-certified orthopedic surgeon, who reviewed x-rays of appellant's right shoulder and lumbar spine. Dr. Kessler diagnosed spasm of the back muscles, right shoulder impingement syndrome, right shoulder subacromial bursitis, and degeneration of the lumbar intervertebral disc.

By decision dated November 18, 2019, OWCP 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.³

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.⁴

³ 5 U.S.C. § 8128(a); *see J.T.*, Docket No. 19-1829 (issued August 21, 2020); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see J.V.*, Docket No. 19-0990 (issued August 26, 2020); *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.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

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).

Appellant's timely November 7, 2019 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

With his request for reconsideration, appellant submitted a November 6, 2019 report from Dr. Kessler who diagnosed spasm of the back muscles, right shoulder impingement syndrome, right shoulder subacromial bursitis, and degeneration of the lumbar intervertebral disc. However, Dr. Kessler failed to identify the employment incident or provide any history of injury. His report further failed to provide an opinion on causal relationship and is therefore irrelevant to the underlying issue.⁸ The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹ As such, appellant is not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹⁰

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.¹¹

⁵ *Id.* at § 10.607(a); *see M.M.*, Docket No. 20-0523 (issued August 25, 2020).

⁶ *Id.* at § 10.608(a); *see M.M.*, Docket No. 20-0574 (issued August 19, 2020); *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *see J.V.*, *supra* note 4; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *Id.*

⁹ *See T.T.*, Docket No. 19-0319 (issued October 26, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000).

¹⁰ *Supra* note 4 at § 10.606(b)(3).

¹¹ *See C.M.*, Docket No. 19-1610 (issued October 27, 2020); *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).

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).¹²

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹² The Board notes that the employing establishment issued a Form CA-16, dated December 26, 2015. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).