

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 April 27, 2018 appellant, then a 66-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he developed a left shoulder strain due to factors of his federal employment, including repetitive lifting, pulling, and carrying. He noted that he sustained an employment injury in October 2014 and performed physical therapy treatment. Appellant stopped work on April 27, 2018.

In support of his claim, appellant submitted a June 15, 2017 report from Dr. Kurt Wohlrab, a Board-certified orthopedic surgeon, who provided physical examination findings. Dr. Wohlrab diagnosed shoulder pain and right rotator cuff tendinitis. He noted appellant's work restrictions of no overhead lifting of more than 30 pounds.

In a development letter May 7, 2018, 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. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor and an explanation of appellant's work activities. It afforded both parties 30 days to submit the necessary evidence.

OWCP subsequently received a May 27, 2018 narrative statement from appellant who noted that he felt discomfort in his left shoulder while repetitively loading a belt with mail and containers weighing up to 45 pounds. Appellant indicated that his left shoulder was previously injured in October 2014 and that he took extra precautions not to pull or push mail that was too heavy. He reported that despite using proper lifting procedures, the repetitive motion of lifting mail caused him significant discomfort and he had to stop work. Appellant noted that he continued to experience left shoulder pain after stopping work and that he informed his supervisor of his condition on April 27, 2018.

By decision dated June 13, 2018, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis causally related to the accepted factors of his federal employment. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received a May 21, 2018 report from Dr. Mark Brenner, a Board-certified orthopedic surgeon, who noted that appellant experienced left shoulder pain while lifting packages on April 22, 2018. Dr. Brenner examined appellant and diagnosed left shoulder pain and left shoulder sprain.

A magnetic resonance imaging (MRI) scan of appellant's left shoulder, dated May 31, 2018, revealed small full-thickness tear of the anterior fibers of the supraspinatus, moderate hypertrophic degenerative change of the acromioclavicular (AC) joint with inferior spurring, mild degenerative change of the glenohumeral joint, and mild subacromial/subdeltoid bursitis.

In a June 5, 2018 report, Dr. Brenner noted that appellant continued to experience throbbing left shoulder pain. He examined appellant and diagnosed left shoulder pain. Dr. Brenner recommended surgical intervention for appellant's left shoulder.

In a June 6, 2018 preoperative report, Dr. Brenner noted that appellant was a retired 66-year-old mail handler with a several-year history of left shoulder pain. He reviewed x-rays and an MRI scan of appellant's left shoulder and provided physical examination findings. Dr. Brenner diagnosed symptomatic rotator cuff dysfunction and AC joint dysfunction and recommended surgical repair.

On July 24, 2018 appellant requested reconsideration and submitted a July 9, 2018 report from Dr. Brenner who provided physical examination findings and diagnosed left shoulder pain and rotator cuff tear. Dr. Brenner opined that it was probable that appellant's rotator cuff dysfunction was related to factors of his federal employment, including repetitive lifting of objects greater than 30 pounds.

By decision dated August 29, 2018, OWCP modified the June 13, 2018 decision, finding that appellant had established a medical diagnosis causally related to the accepted factors of his federal employment. The claim remained denied, however, because the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and factors of his federal employment.

On November 19, 2018 appellant requested reconsideration and submitted a September 6, 2018 letter from Dr. Brenner who noted that appellant experienced a left shoulder injury on October 3, 2014 and was treated conservatively. Dr. Brenner indicated that appellant experienced a new onset of pain and discomfort on April 22, 2018. He reported that, since that date, appellant had recurrent left shoulder pain and that he had x-rays and an MRI scan that were consistent with an anterior rotator cuff tear. Dr. Brenner opined that, in the absence of an injury, it was difficult to establish issues regarding causation.

By decision dated February 6, 2019, OWCP denied modification of the August 29, 2018 decision.

OWCP subsequently received a March 19, 2019 report from Dr. Brenner who examined appellant and noted active problems of right shoulder pain, left shoulder pain, rotator cuff tendinitis, and left shoulder sprain and diagnosed localized osteoarthritis of the left shoulder. Dr. Brenner opined that appellant's lifting of mail and tubs weighing 30 pounds or more was the probable cause of his anterior shoulder pain due to the strain of his rotator cuff.

On May 1, 2019 appellant requested reconsideration.

In a letter dated April 2, 2019, Dr. Brenner noted that appellant experienced continued pain in his left shoulder. He again opined that appellant's lifting of mail and tubs weighing 30 pounds or more was the probable cause of his anterior shoulder pain due to the strain of his rotator cuff. Dr. Brenner indicated that if appellant's pain persisted, surgical reconstruction of his rotator cuff would be recommended.

By decision dated November 8, 2019, OWCP modified the February 6, 2019 decision, finding that the newly submitted medical evidence established that appellant sustained a left shoulder rotator cuff strain. It noted, however, that appellant's claim remained denied for rotator

cuff tear, degenerative joint disease, rotator cuff dysfunction, AC joint dysfunction, osteoarthritis, rotator cuff tendinitis, and right shoulder sprain. By decision of even date, OWCP accepted appellant's claim for left shoulder rotator cuff strain.

OWCP subsequently received an April 2, 2019 report from Dr. Brenner who examined appellant and diagnosed left shoulder sprain.

In a December 10, 2019 report, Dr. Brenner examined appellant and diagnosed non-traumatic incomplete tear of the left rotator cuff and left shoulder osteoarthritis.

Dr. Brenner noted in a December 11, 2019 preoperative report that appellant experienced neck and left shoulder pain after lifting mail and containers weighing 30 pounds. He indicated that appellant's pain had persisted and recommended arthroscopic rotator cuff reconstruction. Dr. Brenner provided physical examination findings and diagnosed left shoulder rotator cuff tear with AC joint dysfunction.

On March 26, 2020 appellant requested reconsideration and asserted that the medical evidence of record established that he had a left shoulder rotator cuff tear. He resubmitted a May 31, 2018 MRI scan of his left shoulder, a July 9, 2018 report from Dr. Brenner, and an April 2, 2019 letter from Dr. Brenner.

By decision dated April 16, 2020, 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.⁴

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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens

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

⁵ 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).

⁶ *Id.* at § 10.607(a); *see M.M.*, Docket No. 20-0523 (issued August 25, 2020). 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). *Id.* at Chapter 2.1602.4b.

and reviews the case on its merits.⁷ 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.⁸

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 filed a timely request for reconsideration on March 26, 2020. In support of his request, he argued that the medical evidence of record established that he sustained a left shoulder rotator cuff tear. The Board finds that this argument does not show that OWCP erroneously applied or interpreted a specific point of law, nor does it 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).⁹

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request under 20 C.F.R. § 10.606(b)(3). The underlying issue on reconsideration is whether appellant's diagnosed left shoulder rotator cuff tear is causally related to the accepted factors of his federal employment. This is a medical issue which is addressed by relevant medical evidence not previously considered.¹⁰

With his request for reconsideration, appellant resubmitted a May 31, 2018 MRI scan of his left shoulder, a July 9, 2018 report from Dr. Brenner, and an April 2, 2019 letter from Dr. Brenner. Providing additional medical evidence that either duplicates or is substantially similar to evidence of record does not constitute a basis for reopening a case.¹¹ Appellant also submitted April 2, December 10 and 11, 2019 reports from Dr. Brenner who provided physical examination findings and diagnosed left shoulder rotator cuff tear with AC joint dysfunction. However, Dr. Brenner's reports failed to address causal relationship and are, therefore, irrelevant to the underlying issue in this case.¹² 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.¹³ 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).¹⁴

⁷ *Id.* at § 10.608(a); *see M.M.*, Docket No. 20-0574 (issued August 19, 2020); *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *see J.V.*, *supra* note 5; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *Supra* note 5.

¹⁰ *Y.L.*, Docket No. 20-1025 (issued November 25, 2020).

¹¹ *See B.S.*, Docket No. 20-0927 (issued January 29, 2021); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹² *See Y.L.*, *supra* note 10.

¹³ *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).

¹⁴ *Supra* note 5.

The Board, therefore, 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.¹⁵

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).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 2021
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

¹⁵ 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).