

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).

FACTUAL HISTORY

On July 16, 2013 appellant, then a 61-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained shoulder pain causally related to factors of her federal employment, including pushing, pulling, grasping, reaching, casing, and driving. She stopped work on May 20, 2013. OWCP assigned the claim OWCP File No. xxxxxx163 and accepted it for a sprain of the right rotator cuff, right shoulder adhesive capsulitis, enthesopathy of the right elbow, and adhesive capsulitis of the left shoulder.⁴ It paid her wage-loss compensation on the supplemental rolls, effective May 22, 2013, and on the periodic rolls, effective September 22, 2013.

On April 11, 2019 OWCP referred appellant to Dr. Charles F. Xeller, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated May 8, 2019, Dr. Xeller diagnosed a traumatic rotator cuff injury to the shoulder with a rheumatoid arthritis component bilaterally. He advised that appellant could not lift over 15 pounds or work overhead, and that she had foot bunions that limited her ability to stand. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Xeller indicated that she should not perform lifting over 15 pounds, no overhead lifting, and that she could not work due to problems with her knee, foot, neck, and hands primarily as a result of rheumatoid arthritis. In a July 13, 2019 addendum, he indicated that appellant could work eight hours per day in a sedentary position.

On July 23, 2019 OWCP referred appellant for vocational rehabilitation.

On August 16, 2019 the employing establishment offered appellant a position as a modified city carrier in Eureka, CA. The physical requirements included one to four hours of standing and sitting while casing mail, one to two hours of sitting while sorting, one to two hours of sitting while filing, and one to two hours using a computer. OWCP, by letter dated August 29, 2019, advised the employing establishment that the offered position was not suitable as it was over three hours from appellant's residence and there was no evidence that it had first searched for positions in her geographical area.

On October 22, 2019 the employing establishment submitted evidence showing that it had searched for suitable employment within appellant's geographical area, but had found no available position.

⁴ OWCP previously accepted that appellant sustained right shoulder sprain and a left closed fracture of the phalanx on June 23, 2012, assigned OWCP File No. xxxxxx526. It administratively combined the claim with the current file number.

In an offer of modified assignment form signed October 28, 2019, the employing establishment offered appellant a position as a modified city carrier in Eureka, CA, effective November 2, 2019. The duties of the position were the same as in its August 16, 2019 offer.

By letter dated November 12, 2019, the employing establishment informed OWCP that it had offered appellant a temporary assignment on October 29, 2019, but she had not reported to work.

On December 11, 2019 OWCP advised appellant that the offered position was suitable and afforded her 30 days to accept the position and report for duty or provide a written explanation of her reasons for refusal.

In a vocational rehabilitation report dated January 3, 2020, the rehabilitation counselor related that appellant had advised him on December 30, 2019 that she had accepted the job offer and was scheduled to resume work on January 12, 2020. Appellant had also applied for disability retirement.

In a rehabilitation action report dated January 9, 2020, an OWCP rehabilitation specialist noted that the employing establishment had advised that appellant had accepted the job offer, but then retired from the employing establishment, effective December 31, 2019.

The employing establishment submitted a December 23, 2019 form, indicating that appellant had retired from work on December 31, 2019.

On January 10, 2020 appellant's representative advised OWCP that appellant was not accepting the offered position as she had retired.

On January 13, 2020 OWCP notified appellant that her reasons for refusing the position were deemed unjustified and afforded her an additional 15 days to accept the job.

Appellant telephoned OWCP on January 17, 2020 and asserted that she had accepted the offered position.

On January 27, 2020 appellant's representative advised that appellant had reported to work to accept the offered position, but that the employing establishment had not allowed her to work as she had retired.

On January 28, 2020 appellant elected retirement benefits from the Office of Personnel Management (OPM) in lieu of workers' compensation benefits from OWCP, effective January 4, 2020.

The employing establishment, on January 31, 2020, again offered appellant a position as a modified city carrier performing sedentary work with no reaching over the shoulder.

On February 19, 2020 the employing establishment advised that appellant had refused the offered position as she had retired. It asserted that the position remained available and was a permanent position.

By decision dated February 20, 2020, OWCP terminated appellant's entitlement to wage-loss and schedule award compensation, effective February 20, 2020, for refusing suitable work under 5 U.S.C. § 8106(c)(2).

On July 22, 2020 appellant, through her representative, requested reconsideration of the February 20, 2020 decision. Her representative contended that, subsequent to OWCP's December 11, 2019 letter, finding the offered position suitable, but before the expiration of the 30 days provided by the letter, appellant had retired from the employing establishment and elected to receive benefits from OPM. As she was no longer receiving wage-loss compensation, the representative argued that the job offer "was no longer relevant." She cited 20 C.F.R. § 10.500(a), which provides that the penalty provision of section 8106(c)(2) "will not be imposed on assignments made under this paragraph."

By decision dated July 27, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim under 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.⁵

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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

⁵ 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).

⁶ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *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). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

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).

In the July 22, 2020 reconsideration request, appellant's representative contended that OWCP should have applied the provisions of 20 C.F.R. § 10.500(a) rather than terminating her wage-loss compensation under section 8106(c). Section 10.500(a) provides that an employee is not prevented from earning the wages earned prior to the work injury if the employing establishment offers a temporary light-duty assignment within his or her work restrictions and further specifies that the penalty provision of 5 U.S.C. § 8106(c) is not imposed on such assignments.¹⁰ On November 12, 2019 the employing establishment advised OWCP that the October 29, 2019 job offered was temporary; however, it subsequently indicated that the position was permanent. It is, thus, unclear from the record whether the October 29, 2019 position offered by the employing establishment was for a temporary or permanent position. The Board finds that appellant's argument is new and relevant to the underlying issue of whether OWCP properly terminated her wage-loss compensation and entitlement to a schedule award for refusing suitable work under section 8106(c). The legal argument requires reopening of her claim for merit review pursuant to the second prong of 20 C.F.R. § 10.606(b).¹¹

Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608. The case shall, therefore, be remanded to OWCP for consideration of the merits of appellant's claim, to be followed by an appropriate merit decision.¹²

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).

¹⁰ *Id.* at § 10.500(a).

¹¹ *See B.F.*, Docket No. 21-1088 (issued February 14, 2022); *K.N.*, Docket No. 20-1188 (issued July 20, 2021).

¹² *B.F.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 10, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board