

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

M.K., Appellant

and

**U.S. POSTAL SERVICE, SEAFORD POST
OFFICE, Seaford, NY, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 22-0069
Issued: July 25, 2022**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 18, 2021 appellant filed a timely appeal from a June 30, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated November 8, 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.

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 15, 2014 appellant, then a 57-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a right shoulder condition due to factors of her

¹ 5 U.S.C. § 8101 *et seq.*

federal employment including repetitive upper extremity motion when sorting mail, pulling down her route, arranging parcels, and delivering a mounted route. She indicated that she initially became aware of her condition and related it to her employment factors on March 17, 2014. Appellant accepted a modified-duty position on July 22, 2014.

In a September 29, 2014 report, Dr. James L. Marzec, a Board-certified orthopedic surgeon, noted tenderness at the anterolateral corner at the insertion of the supraspinatus tendon into the greater tuberosity. He requested authorization for a right rotator cuff repair and preoperative physical therapy.

In reports from December 16, 2014 through May 1, 2015, Dr. Marzec opined that appellant sustained chronic right rotator cuff tendinitis, right rotator cuff tear, and right shoulder impingement. He explained that disproportionate strengthening of the deltoid muscle from repetitive lifting and raking was causally related to the alleged employment incident.

On June 19, 2015 OWCP accepted the claim for right shoulder impingement syndrome, right shoulder tendinitis, and a right rotator cuff tear.

On October 21, 2015 Dr. Marzec performed OWCP-authorized right shoulder arthroscopy, complete arthroscopic synovectomy with extensive debridement and multiple tenotomies, arthroscopic acromioplasty, arthroscopic rotator cuff repair, arthroscopic thermal capsulorrhaphy, and a Mumford procedure.

On November 17, 2015 OWCP accepted a recurrence of disability (Form CA-2a) commencing October 21, 2015. It paid appellant wage-loss compensation on the supplemental roll commencing October 21, 2015 and on the periodic rolls commencing December 13, 2015. Appellant returned to light-duty work for four hours a day commencing May 11, 2016.

In a May 16, 2016 report, Dr. Marzec noted that appellant had returned to work for four hours a day, with lifting limited to 10 pounds. On examination he observed weakness in the right upper extremity and limited active range of right shoulder motion secondary to pain. Dr. Marzec administered a cortisone injection. He submitted periodic reports through August 23 2016 noting appellant's continued right shoulder pain.² Dr. Marzec prescribed physical therapy.

On August 30, 2016 OWCP obtained a second opinion report regarding the nature and extent of the accepted condition from Dr. Leon Sultan, a Board-certified orthopedic surgery. Dr. Sultan reviewed a statement of accepted facts (SOAF) and the medical record. On examination of the right shoulder he noted well-healed arthroscopic puncture scars, full range of motion in all planes, negative impingement, drop arm, and Hawkins tests, and no sensory impairment.

² A June 24, 2016 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated interval healing of the anterior supraspinatus tendon, moderate infraspinatus and supraspinatus tendinopathy with a small low grade articular surface tear, mild-to-moderate tendinopathy/articular surface fraying of the subscapularis tendon, tendinosis and high-grade partial tearing of the long head biceps tendon, mild glenohumeral chondral degeneration with mild degeneration of the superior labrum, negligible subacromial/subdeltoid bursitis, moderate hypertrophic acromioclavicular joint degeneration with evidence of prior acromioplasty.

Dr. Sultan opined that the accepted right shoulder conditions had resolved with surgery and physical therapy. He returned her to full-duty work with no restrictions.

In a September 13, 2016 report, Dr. Marzec opined that appellant may have spontaneously ruptured the long head of the right biceps tendon. He administered a cortisone injection to the right shoulder.

In a report dated December 12, 2016, Dr. Marzec increased appellant's work schedule to five hours a day and maintained the 10-pound lifting limitation. He submitted periodic reports through March 7, 2017 diagnosing degeneration of the long head of the right biceps tendon.

On January 6, 2017 OWCP authorized physical therapy treatments for the period September 15 through November 15, 2016.

On July 24, 2017 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits, finding that the report of second opinion physician Dr. Sultan represented the weight of the medical evidence that appellant no longer had any continuing disability or residuals from work due to her accepted employment conditions. It afforded her 30 days to submit additional evidence or argument.

In response, appellant submitted an October 13, 2017 report by Dr. Marzec recommending an arthroscopic biceps tenotomy. Dr. Marzec noted that appellant had sustained a left shoulder injury that resulted in overloading of the right shoulder. On November 15, 2017 appellant underwent left shoulder arthroscopy to repair a rotator cuff tear.

By decision dated February 5, 2018, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective February 6, 2018. It found that the weight of the medical evidence, represented by Dr. Sultan's report, established that she no longer had disability or residuals from work due to the accepted right shoulder conditions.

On July 13, 2018 appellant requested reconsideration. She submitted reports from Dr. Marzec dated from June 20 through July 23, 2018, requesting authorization for an arthroscopic right biceps tenotomy and Mumford procedure. Dr. Marzec noted that appellant no longer had work limitations regarding the right shoulder.

By decision dated October 11, 2018, OWCP denied modification of the prior decision.³

On February 5, 2019 appellant requested reconsideration. She submitted October 1, 2018 and February 13, 2019 reports by Dr. Marzec requesting authorization for an arthroscopic Mumford procedure and biceps tenotomy of the right shoulder.

By decision dated November 8, 2019, OWCP denied modification of the prior decision.

On June 4, 2020 OWCP received a May 20, 2020 appointment of representative.

³ Appellant voluntarily retired from the employing establishment on October 31, 2018.

On November 5, 2020 appellant, through her representative, requested reconsideration. She contended that OWCP erred by predicating its termination of her wage-loss compensation and medical benefits on stale medical evidence, as Dr. Sultan's August 30, 2016 second opinion report was prepared more than 17 months prior to the February 5, 2018 termination decision. Additionally, appellant asserted that OWCP acknowledged that the accepted conditions had not ceased as it authorized physical therapy treatments from September 15 through November 15, 2016, a period subsequent to Dr. Sultan's August 30, 2016 second opinion examination. She also noted that Dr. Marzec supported continuing right shoulder symptoms in his October 1, 2018 report. Appellant submitted copies of the September 6, 2016 denial and January 6, 2017 approval for physical therapy treatments previously of record.

By decision dated June 30, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a). It found that the physical therapy authorization was a duplicate copy of evidence previously of record, and that Dr. Marzec's findings were previously discussed in the November 8, 2019 decision.

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.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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 also 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 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 improperly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(a).

⁸ *Id.* at § 10.608(b).

On reconsideration appellant, through her representative, contended that OWCP improperly based its termination of appellant's wage-loss compensation and medical benefits on stale medical evidence. She noted that Dr. Sultan's August 30, 2016 second opinion report was more than 17 months old at the time of OWCP's February 5, 2018 termination decision. Additionally, appellant contended that OWCP acknowledged that the accepted injury remained active after Dr. Sultan's August 30, 2016 report as it authorized physical therapy treatments from September 15 through November 15, 2016. She also referred to Dr. Marzec's October 1, 2018 report supporting continued right shoulder symptoms after the February 5, 2018 termination decision. In its June 30, 2021 decision, OWCP mentioned appellant's argument regarding Dr. Marzec's October 1, 2018 report and acknowledged the physical therapy authorization. However, it did not discuss her legal arguments that Dr. Sultan's report was stale at the time of OWCP's termination decision, or that OWCP had continued to authorize physical therapy treatments following Dr. Sultan's finding that the accepted condition had resolved without residuals. The Board finds that appellant's legal arguments are new and relevant to the underlying issue of whether OWCP properly found that the accepted injury had ceased without disability or residuals.⁹ These legal arguments, therefore, require reopening of her claim for merit review pursuant to the second prong of 20 C.F.R. § 10.606(b).¹⁰

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.¹¹

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).

⁹ *B.F.*, Docket No. 21-1088 (issued February 14, 2022); *K.N.*, Docket No. 20-1188 (issued July 20, 2021); *J.H.*, Docket No. 20-1312 (issued April 26, 2021).

¹⁰ *B.F.*, *id.*; *K.N.*, *id.*

¹¹ *V.S.*, Docket No. 20-0502 (issued December 31, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 30, 2021 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: July 25, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board