

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

L.W., Appellant)
and) Docket No. 21-0607
DEPARTMENT OF VETERANS AFFAIRS,) Issued: October 18, 2022
WEST LOS ANGELES VA MEDICAL)
CENTER, Los Angeles, CA, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On March 9, 2021 appellant filed a timely appeal from two December 3, 2020 merit decisions, a January 11, 2021 merit decision, and January 29 and March 3, 2021 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include additional conditions causally related to the accepted October 13, 2020 employment injury; (2) whether she has met her burden of proof to establish total disability from work for the period December 1 through 8, 2020 causally related to the accepted October 13, 2020 employment injury; (3) whether OWCP abused its discretion in denying appellant's request for authorization of cervical surgery; (4) whether OWCP properly denied her request for

¹ 5 U.S.C. § 8101 *et seq.*

reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a); and (5) whether OWCP properly denied appellant's request for a review of the written record.

FACTUAL HISTORY

On October 14, 2020 appellant, then a 51-year-old health aid/technician, filed a claim for a traumatic injury (Form CA-1) alleging that on October 13, 2020 she sustained injury when she transferred a patient from an examination chair to a wheelchair while in the performance of duty. She asserted that the patient tightly gripped and scratched her forearms, fell into her, and then flopped back into the wheelchair. Appellant reported pain, tingling, and tightness in her shoulders (right greater than left), which radiated up to her neck and down into her arm. She did not stop work.

Appellant submitted a report dated September 9, 2020 from Dr. Christopher S. Lee, a Board-certified orthopedic surgeon, who indicated that he was performing a follow-up evaluation for adhesive capsulitis of the right shoulder. Appellant reported right shoulder pain at the 10/10 level, as well as limited motion and weakness of the shoulder. Dr. Lee noted that an April 15, 2019 magnetic resonance imaging (MRI) scan contained an impression of mild-to-moderate acromioclavicular joint arthropathy and that a May 26, 2020 MRI scan of the right shoulder showed supraspinatus tendinosis with fraying of bursae fibers, thickened interior joint capsule concerning for adhesive capsulitis, and acromioclavicular joint osteoarthritis/hypertrophy. He diagnosed right shoulder pain due to adhesive capsulitis and concerning for a rotator cuff tear.

On September 24, 2020 Dr. Lee reported that appellant presented with right shoulder pain due to impingement, nearly resolved adhesive capsulitis, and a new C6 cervical radiculopathy. Appellant reported that her pain was at the 9/10 level. Dr. Lee indicated that additional diagnostic testing for the cervical spine would be requested, which would help determine whether cervical surgery would be needed. A September 24, 2020 MRI scan of the right shoulder contained an impression of supraspinatus and infraspinatus mild tendinosis without significant tearing, moderate acromioclavicular joint arthropathy without narrowing of the supraspinatus outlet, and small joint effusion with a trace amount of fluid in the subacromial subdeltoid bursa. An October 1, 2020 MRI scan of the cervical spine contained an impression of broad-based protrusion/disc bulge at C5-6 and disc bulge at C6-7.

In an October 13, 2020 report, Dr. Jeffrey R. Spine, a Board-certified internist, advised that appellant could return to work with restrictions of lifting, carrying, pushing, or pulling no more than 10 pounds; no overhead work/reaching with the right arm; and no repeated overhead work/reaching with the right arm.

In an October 26, 2020 report, Dr. Lee indicated that appellant reported suffering an injury at work on October 13, 2020 when a patient clutched her arms and fell back into a wheelchair. Appellant advised that the incident exacerbated her prior symptoms and reported a new symptom of burning and tightness in the lateral aspect of her cervical spine. Dr. Lee diagnosed right shoulder pain due to impingement and rotator cuff strain, and cervical spine pain due to herniated nucleus pulposus. He advised that appellant would be off work for six weeks.

In an October 26, 2020 note, Dr. Lee indicated that she was unable to return to work until December 1, 2020.

In an October 27, 2020 report, Dr. Edmund Choi, a Board-certified orthopedic surgeon, noted that appellant presented with a chief complaint of progressive right arm radiculopathy/weakness. He indicated that appellant had been treated for over a year for neck, right shoulder, and right arm symptoms, but that she reported a new symptom of burning and tightness in the lateral aspect of her cervical spine after an October 13, 2020 incident at work when a patient clutched her arms and fell back into a wheelchair. Dr. Choi diagnosed cervicalgia and cervical disorder at C5-6 with radiculopathy and discussed the option of undergoing cervical surgery in the form of arthroplasty decompression at C5-6.

In an October 28, 2020 form report, Dr. Choi diagnosed C5-6 disc herniation with radiculopathy and advised that appellant was unable to work for an unspecified period. In a November 2, 2020 report, he diagnosed cervicalgia and radiculopathy of the cervical region.

Appellant also submitted an administrative report of accident completed by an employing establishment official on October 13, 2020.

In a November 4, 2020 development letter, OWCP informed appellant of the deficiencies in her claim. It advised her of the type of additional factual and medical evidence required and provided a questionnaire for her completion. By separate development letter of even date, OWCP requested additional information from the employing establishment, including comments from a knowledgeable supervisor regarding appellant's allegations. It afforded both parties 30 days to respond.

Appellant subsequently submitted a November 17, 2020 note from Dr. Choi who continued to advise that she was unable to return to work. She also submitted administrative reports of accidents completed by employment establishment officials on October 14 and 26, 2020.

Appellant requested authorization to undergo anterior cervical discectomy/fusion surgery at C5-6 and C6-7 and on November 18, 2020 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA). OWCP requested that he evaluate whether the requested anterior cervical discectomy/fusion surgery at C5-6 and C6-7 was necessitated by a work-related condition.

In a November 23, 2020 report, Dr. Katz opined that appellant sustained a temporary aggravation of preexisting adhesive capsulitis, impingement syndrome, and supraspinatus tendinitis of the right shoulder. He opined, however, that appellant did not sustain a work-related aggravation of her acromioclavicular arthritis, as the acromioclavicular joint would not be expected to be loaded to a significant degree by the described mechanism of injury on October 13, 2020. Dr. Katz also opined that the mechanism of injury on October 13, 2020 would not be competent to cause an aggravation of the preexistent cervical condition, which was already of such severity prior to October 13, 2020 that surgical management was discussed. He referenced a September 24, 2020 report, that predated appellant's employment injury, noting that the right shoulder complaints at that time were much the same as the complaints on October 14, 2020. Dr. Katz advised that on September 24, 2020 appellant report pain at 9/10 with decreased function

and indicated that her cervical symptoms at that time also were significant such that Dr. Lee had discussed the option of surgery. He noted an October 1, 2020 MRI scan of the cervical spine demonstrated pathology involving the left foramina, and none on the right. Dr. Katz indicated that appellant's shoulder and cervical spine symptoms were of such severity prior to the October 13, 2020 work-related injury that opioids were prescribed. Based on these factors, he recommended that the requested cervical surgery not be authorized because the medical reports of record did not establish causation between a work-related condition and the need for such surgery.

Appellant submitted a November 17, 2020 narrative report in which Dr. Choi indicated that she had a chief complaint of progressive right arm radiculopathy, which was now accompanied by a new left arm radiculopathy with weakness. Dr. Choi diagnosed cervical disc disorder at C5-6 and C6-7 with radiculopathy and noted that he was awaiting authorization for anterior cervical discectomy/fusion surgery at C5-6 and C6-7. Appellant also submitted a November 23, 2020 report showing that on that date she underwent unauthorized neck surgery, including anterior cervical discectomy and fusion at C5-6 and C6-7, anterior plate fixation at C5 through C7, and bilateral medial uncinate resection at C5-6 and C6-7.

Appellant stopped work after her surgery, including the period December 1 to 8, 2020.

By decision dated December 3, 2020, OWCP accepted appellant's claim for temporary aggravation of preexisting adhesive capsulitis, impingement syndrome, and supraspinatus tendinitis of the right shoulder.

By separate decision dated December 3, 2020, OWCP denied expansion of the acceptance of appellant's claim to include additional conditions. It specifically denied her claim for the conditions of acromioclavicular arthritis/arthropathy, cervical radiculopathy, cervicalgia, and C6 cervical radiculopathy.

By separate decision dated December 3, 2020, OWCP denied appellant's request for authorization of anterior cervical discectomy/fusion surgery at C5-6 and C6-7.

On December 8, 2020 appellant filed a claim for wage-loss compensation (Form CA-7) for disability for the period December 1 through 8, 2020 causally related to the accepted October 13, 2020 employment injury.

In a December 10, 2020 development letter, OWCP advised appellant of the deficiencies of her claim for compensation. It advised her of the type additional medical evidence needed and afforded her 30 days to provide the necessary evidence. No response was received.

By decision dated January 11, 2021, OWCP denied her disability claim, finding that the medical evidence of record was insufficient to establish disability from work during the claimed period due to the accepted conditions.

On January 21, 2021 appellant requested reconsideration of the January 11, 2021 decision. In a statement accompanying her reconsideration request, she asserted that her attending physician would be sending information by the end of the week.

By decision dated January 29, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On February 16, 2021 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review in connection with the January 11, 2021 denial of disability. She submitted additional reports dated April 11, 2019 through January 19, 2021, wherein Dr. Lee and other attending physicians diagnosed various cervical, shoulder, and arm conditions.

By decision dated March 3, 2021, OWCP's hearing representative determined that appellant was not entitled to a review of the written record as a matter of right because she had previously requested reconsideration of her claim. The representative indicated that appellant's request for a review of the written record had been considered, in a discretionary manner, but was denied for the reason that her disability claim could equally well be addressed by requesting reconsideration and submitting new evidence.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.² The medical evidence required to establish causal relationship between a specific condition, and the employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to the accepted October 13, 2020 employment injury.

OWCP accepted appellant's October 13, 2020 employment injury for temporary aggravation of preexisting adhesive capsulitis, impingement syndrome, and supraspinatus tendinitis of the right shoulder. Appellant submitted reports in which attending physicians diagnosed medical conditions in addition to these accepted conditions. The September 9 and 24, and October 26, 2020 reports of Dr. Lee and the October 27 and 28, and November 2 and 17, 2020 reports of Dr. Choi contain diagnoses for the additional conditions of preexisting right adhesive capsulitis, preexisting right shoulder impingement syndrome, preexisting right supraspinatus tendinosis, rotator cuff strain, acromioclavicular joint arthropathy/osteoarthritis/hyper trophy, cervicalgia, C5-6 cervical disc disorder with radiculopathy, and C5-6 disc herniation with

² *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

³ See *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

radiculopathy. In addition, in a November 23, 2020 report, Dr. Katz, the DMA, opined that appellant did not sustain any work-related conditions other than those already accepted.

However, these reports are of no probative value regarding the expansion of the accepted October 13, 2020 conditions because they do not contain an opinion that appellant sustained a specific work-related condition in addition to those already accepted by OWCP. The Board has held that medical evidence that does not provide an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.⁴ Therefore, these reports are insufficient to establish appellant's expansion claim.

As the medical evidence of record does not contain a rationalized opinion establishing causal relationship between appellant's additional diagnosed conditions and the accepted October 13, 2020 employment injury, the Board finds that appellant has not met her burden of proof to establish her expansion claim.

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁶ When the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for loss of wages.⁷ The medical evidence required to establish causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the claimed disability and the accepted employment injury.⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish total disability from work for the period December 1 through 8, 2020 causally related to the accepted October 13, 2020 employment injury.

⁴ *T.H.*, Docket No. 18-0704 (issued September 6, 2018). See also *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018); *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

⁵ *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ 20 C.F.R. § 10.5(f).

⁷ See *D.R.*, Docket No. 18-0323 (issued October 2, 2018).

⁸ *Y.S.*, Docket No. 19-1572 (issued March 12, 2020).

In an October 26, 2020 report, Dr. Lee diagnosed right shoulder pain due to impingement and rotator cuff strain, and cervical spine pain due to herniated nucleus pulposus. He advised that appellant would be off work for six weeks. Although Dr. Lee found disability extending into the period claimed by appellant, *i.e.*, December 1 through 8, 2020, his report is of limited probative value because he did not provide a rationalized medical report relating the disability to the October 13, 2020 employment injury. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/level of disability has an employment-related cause.⁹ Therefore, this report is insufficient to establish appellant's disability claim.

In an October 13, 2020 report, Dr. Spine advised that appellant could return to work with restrictions of lifting, carrying, pushing, or pulling no more than 10 pounds; no overhead work/reaching with the right arm; and no repeated overhead work/reaching with the right arm. In an October 26, 2020 note, Dr. Lee indicated that appellant was unable to return to work until December 1, 2020. In an October 28, 2020 form report, he noted that appellant was unable to work for an unspecified period. However, these reports are of no probative value regarding appellant's disability claim because they do not contain an opinion expressly relating to the claimed period of disability.¹⁰

As the medical evidence of record is insufficient to establish the claimed period of disability, the Board finds that appellant has not met her burden of proof.

LEGAL PRECEDENT -- ISSUE 3

Section 8103(a) of FECA states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation."¹¹

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.¹² The only limitation on OWCP's authority is that of reasonableness.¹³ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.¹⁴ In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for

⁹ See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹⁰ See *supra* note 4.

¹¹ 5 U.S.C. § 8103.

¹² *R.C.*, Docket No. 18-0612 (issued October 19, 2018); *Vicky C. Randall*, 51 ECAB 357 (2000).

¹³ *B.L.*, Docket No. 17-1813 (issued May 23, 2018); *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

¹⁴ *S.W.*, Docket No. 18-1529 (issued April 19, 2019); *Rosa Lee Jones*, 36 ECAB 679 (1985).

treatment of the effects of a work-related injury or condition.¹⁵ Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.¹⁶

ANALYSIS -- ISSUE 3

The Board finds that OWCP did not abuse its discretion in denying appellant's request for authorization of cervical surgery.

Appellant requested authorization to undergo anterior cervical discectomy/fusion surgery at C5-6 and C6-7, which was performed on November 23, 2020. She submitted several reports in which cervical surgery was discussed. In a September 24, 2020 report, Dr. Lee indicated that additional diagnostic testing for the cervical spine would be requested, which would help determine whether cervical surgery would be needed. In an October 27, 2020 report, Dr. Choi discussed the option of appellant undergoing cervical surgery in the form of arthroplasty decompression at C5-6. In a November 17, 2020 report, he noted that he was awaiting authorization for anterior cervical discectomy/fusion surgery at C5-6 and C6-7. Appellant also submitted a November 23, 2020 report showing that on that date she underwent neck surgery, including anterior cervical discectomy and fusion at C5-6 and C6-7, anterior plate fixation at C5 through C7, and bilateral medial uncinate resection at C5-6 and C6-7.

However, these reports do not contain an opinion that the surgery was necessitated by the accepted October 13, 2020 employment injury.¹⁷ In addition, in a November 23, 2020 report, Dr. Katz, the DMA, opined that the medical evidence of record did not show that the requested cervical surgery was necessitated by a work-related condition. The Board finds that there is no evidence that OWCP abused its discretion in denying authorization for appellant's requested cervical surgery.¹⁸

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 4

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.¹⁹ To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence

¹⁵ *J.R.*, Docket No. 17-1523 (issued April 3, 2018); *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

¹⁶ *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

¹⁷ See *supra* note 4.

¹⁸ See *supra* note 14.

¹⁹ 5 U.S.C. § 8128(a); see *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

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.²⁰

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²¹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.²² 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.²³ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record²⁴ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²⁵

ANALYSIS -- ISSUE 4

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).

On January 21, 2021 appellant filed a timely request for reconsideration of a January 11, 2021 decision denying her disability claim.²⁶ The Board finds, however, that she neither established that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP. In a statement accompanying her reconsideration request, appellant asserted that her attending physician would be sending information by the end of the week. However, she did not submit such evidence nor did she attempt to establish that OWCP erroneously applied or interpreted a specific point of law or present a new and relevant legal argument. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).

²⁰ 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

²¹ 20 C.F.R. § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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.

²² *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

²³ *Id.* at § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁴ *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

²⁵ *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

²⁶ *See supra* note 21.

As noted, appellant did not submit any new medical evidence on reconsideration. Therefore, she is not entitled to further review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3). 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 the request for reconsideration without reopening the case for review on the merits.

LEGAL PRECEDENT -- ISSUE 5

Section 8124(b)(1) of FECA, concerning a claimant's entitlement to a hearing before an OWCP representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."²⁷ Section 10.615 of OWCP's federal regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.²⁸ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.²⁹ The date of filing is fixed by postmark or other carrier's date marking.³⁰

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.³¹ Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,³² when the request is made after the 30-day period for requesting a hearing,³³ when the request is for a second hearing on the same issue,³⁴ and when the request is made after a reconsideration request was previously submitted.³⁵ In these

²⁷ 5 U.S.C. § 8124(b)(1).

²⁸ 20 C.F.R. § 10.615.

²⁹ *T.A.*, Docket No. 18-0431 (issued November 7, 2018); *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

³⁰ See 20 C.F.R. § 10.616(a).

³¹ *Henry Moreno*, 39 ECAB 475, 482 (1988).

³² *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

³³ *D.G.*, Docket No. 20-1254 (April 12, 2021); *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

³⁴ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

³⁵ *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007). Section 10.616(a) of OWCP's regulations provides that the claimant seeking a hearing must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. 20 C.F.R. § 10.616(a).

instances, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.³⁶

ANALYSIS -- ISSUE 5

The Board finds that OWCP properly denied appellant's request for a review of the written record.

Appellant's February 16, 2021 request for a review of the written record by a representative of OWCP's Branch of Hearings and Review, regarding OWCP's January 11, 2021 decision denying her disability claim, was made after she had previously requested reconsideration of the same decision. On January 21, 2021 she had requested reconsideration of the January 11, 2021 decision. OWCP was correct in noting in its March 3, 2021 decision that appellant was not entitled to a hearing in the form of a review of the written record as a matter of right.³⁷

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its March 3, 2021 decision, properly exercised its discretion by indicating that it had carefully considered appellant's request and had determined that the request was denied for the reason that the issue of the case could equally well be addressed by requesting reconsideration and submitting new evidence, which established appellant's disability claim. The Board has held that, as the only limitation on OWCP's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.³⁸ In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing in the form of a review of the written record, which could be found to be an abuse of discretion.

CONCLUSION

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions causally related to the accepted October 13, 2020 employment injury, and has not met her burden of proof to establish total disability from work for the period December 1 through 8, 2020 causally related to the accepted October 13, 2020 employment injury. The Board further finds that OWCP did not abuse its discretion in denying appellant's request for authorization of cervical surgery, her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a), and her request for a review of the written record.

³⁶ See *Rudolph Bermann*, *supra* note 32.

³⁷ See *supra* notes 35 and 36.

³⁸ See *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2020 and January 11 and 29 and March 3, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 18, 2022
Washington, DC

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

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

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