

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

K.L., Appellant	)	
	)	
and	)	<b>Docket No. 22-0607</b>
	)	<b>Issued: October 13, 2022</b>
<b>U.S. POSTAL SERVICE, SEMINOLE PROCESSING &amp; DISTRIBUTION CENTER, Orlando, FL, Employer</b>	)	
	)	

*Appearances:*  
Wayne Johnson, Esq., for the appellant<sup>1</sup>  
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 16, 2022 appellant filed a timely appeal from a September 17, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated June 22, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## 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 September 19, 2019 appellant, then a 49-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 28, 2019 he strained his right shoulder when lifting a package from a bulk mail container while in the performance of duty. He stopped work on August 28, 2019 and did not return.

In a statement dated September 16, 2019, appellant explained that on August 28, 2019 he was lifting a package from a container that weighed approximately 40 to 50 pounds and his shoulder gave out. He indicated that his supervisor was present when the incident occurred and reported that his shoulder was burning, his fingers were tingling and he could not continue to lift anything. Appellant's supervisor instructed him to go to the manager's office to get an ice pack and go on break the rest of his tour. Appellant reported for work on August 29, 2019 and attempted to work, but experienced extreme pain and went home.

The employing establishment controverted the claim and indicated that appellant reported arm discomfort for a few days that he attributed to working on something at his house. His supervisor subsequently observed appellant standing with his hand on his shoulder and in distress. Appellant declined to file an accident report and advised that it was an injury from a long time ago. He further noted that he previously filed a claim for a shoulder injury and he did not want to file a new claim because it would restart the "process." Appellant returned to work on September 16, 2019 and indicated that his lawyer instructed him to file a new Form CA-1.

Dr. Timothy Clader, a Board-certified orthopedist, treated appellant on August 30, 2019 for a full-thickness tear of his right rotator cuff tendon. He noted that appellant was unable to "lift, do anything overhead, reach, or any other activities with his right arm at this time" and for an additional period after surgery. In a duty status report (Form CA-17) dated September 12, 2019, Dr. Clader diagnosed right rotator cuff tear and indicated that appellant was totally disabled until after surgery.

In a development letter dated October 23, 2019, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of additional evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In an attending physician's report (Form CA-20) dated October 4, 2019, Dr. Caroline Chebli, a Board-certified orthopedist, indicated that appellant was injured at work on August 28, 2019 when he lifted a heavy box. She noted that appellant had a prior rotator cuff repair on the same shoulder. Dr. Chebli diagnosed right shoulder rotator cuff tear and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. She noted that appellant was scheduled to undergo right shoulder rotator cuff repair.

On November 7, 2019 appellant filed a claim for compensation (Form CA-7) for intermittent disability for the period October 13 through 25, 2019 as a result of his employment incident.

By decision dated December 2, 2019, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as he described. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 31, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on May 7, 2020.

By decision dated June 22, 2020, the hearing representative affirmed the December 2, 2019 decision.

On June 22, 2021 appellant requested reconsideration and submitted additional evidence. In a July 3, 2019 report, Dr. Clader noted treating appellant on that date for a flare up of symptoms in the peribicipital aspect of the right shoulder.

Dr. Chebli, in an August 29, 2019 report, noted treating appellant for right shoulder pain and that appellant's history was significant for a right rotator cuff repair seven or eight years prior. She related that appellant was doing well until a few weeks ago when he lifted a box and experienced pain and while at work on August 28, 2019, he lifted another heavy box and dropped it when his arm gave out. Dr. Chebli noted that appellant was unable to forward elevate his right shoulder and underwent a magnetic resonance imaging (MRI) scan that revealed a recurrent full-thickness rotator cuff tear. She diagnosed recurrent acute right shoulder rotator cuff tear and recommended revision right rotator cuff repair. On January 23, 2020 Dr. Chebli advised that appellant was three and one-half months status-post revision of the right rotator cuff repair. Appellant reported progressing well until a couple weeks ago when his dogs knocked him downstairs backwards. He sought treatment in the emergency room. On May 13, 2020 Dr. Chebli treated appellant in follow up for a massive recurrent right rotator cuff tear that occurred after he fell down a flight of stairs. She diagnosed irreparable rotator cuff tears and recommended a nerve block.

In reports dated October 24, 2019 through June 26, 2020, Bobbi L. Feierstein, a physician assistant, treated appellant status post three months right shoulder arthroscopic debridement and revision of rotator cuff repair.

A January 23, 2020 ultrasound of the right shoulder revealed full thickness retear with significant retraction.

Dr. Dency Rivas, a Board-certified family practitioner, treated appellant on February 16 and March 16, 2021, in follow up for his work-related injuries. Appellant reported sustaining a work injury on August 7, 2011 while lifting a heavy sack of mail at work. He was diagnosed with a torn right rotator cuff of the right shoulder and underwent surgical repair in 2012. After rehabilitation appellant reported he was released back to work without restrictions. Dr. Rivas noted that on August 28, 2019, while working as a clerk he lifted a 70-pound box out of a container and felt a tearing sensation in his right shoulder. He was diagnosed with tear of the rotator cuff of

the right shoulder and underwent surgical repair again in 2019. Dr. Rivas indicated that, while he was undergoing rehabilitation therapy, he fell downstairs and hit his right shoulder retearing his rotator cuff. He noted findings on physical examination of cervical tenderness with palpation and limited range of motion of the right shoulder. Dr. Rivas diagnosed right sprain rotator cuff, cervicgia, headaches, depression, anxiety, insomnia, and left shoulder pain. He recommended physical therapy and advised that appellant remained off work.

By decision dated September 17, 2021, 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<sup>3</sup> 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 payment of compensation at any time on his own motion or on application.<sup>4</sup>

To require OWCP to reopen a case for merit review under 5 U.S.C. § 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>5</sup>

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.<sup>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</sup> 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.<sup>8</sup>

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> *Id.* at § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.608(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>6</sup> *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 (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). Chapter 2.1602.4b.

<sup>7</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *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 his claim.

On reconsideration appellant submitted medical records, which documented the August 28, 2019 employment incident. In an August 29, 2019 medical report, Dr. Chebli related the history of appellant's injury on August 28, 2019 at work when he lifted a heavy box and dropped it when his arm gave out. She made note that appellant was unable to forward elevate his right shoulder and underwent an MRI scan that revealed a recurrent full-thickness rotator cuff tear. Dr. Chebli diagnosed recurrent acute right shoulder rotator cuff tear. Additionally, in reports dated February 16 and March 16, 2021, Dr. Rivas related that while working as a clerk on August 28, 2019, appellant lifted a 70-pound box out of a container and felt a tearing sensation in his right shoulder. He was diagnosed with tear of the rotator cuff of the right shoulder and underwent surgical repair in 2019. The Board finds that these reports are new and relevant to the underlying issue of fact of injury because they include contemporaneous accounts of the factual basis of the alleged injury.<sup>9</sup>

Thus, the Board will set aside OWCP's September 17, 2021 decision and remand the case for merit review of appellant's claim. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

### CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

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<sup>9</sup> See S.C., 19-0479 (issued August 8, 2019) (OWCP denied that the employment incident occurred as alleged because the claimant did not respond to the development questionnaire. The Board found that the medical evidence appellant submitted in support of his reconsideration request before OWCP was relevant because it provided a detailed account of the factual basis of the alleged injury).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 17, 2021 decision of the Office of Workers Compensation Programs is reversed.

Issued: October 13, 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