

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

C.U., Appellant	)	
	)	
and	)	<b>Docket No. 21-0965</b>
	)	<b>Issued: April 19, 2023</b>
<b>DEPARTMENT OF THE NAVY, NAVAL SEA</b>	)	
<b>SYSTEMS COMMAND PUGET SOUND</b>	)	
<b>NAVAL SHIPYARD AND INTERMEDIATE</b>	)	
<b>MAINTENANCE FACILITY, Bremerton, WA,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
Cathy Deno, 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  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On June 7, 2021 appellant, through his representative, filed a timely appeal from a February 16, 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 April 14, 2020, to the

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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.

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.<sup>3</sup>

### **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 February 25, 2020 appellant, then a 45-year-old shipwright, filed a traumatic injury claim (Form CA-1) alleging that on August 3, 2019 at approximately 8:30 p.m. he tore his labrum and developed tendinitis with impingement while in the performance of duty. He explained that he was erecting/passing scaffolding materials, which required him to reach below his waist and pass materials, such as an 8'5" steel planks, various lengths of steel pipe, and steel pipe couplers, overhead. Appellant noted that he sustained a 270-degree tear in his labrum and tendinitis with impingement as a result. He did not stop work.

In a September 23, 2019 physical therapy report, Thayne Bosh, a physical therapist, evaluated appellant for complaints of soreness in his left shoulder. He noted that appellant's symptoms began a little over 30 days prior and that the mechanism of injury was lifting. Mr. Bosh observed diagnoses of shoulder joint pain, shoulder impingement syndrome, a strain of the shoulder rotator cuff, and a strain of the shoulder biceps.

Appellant submitted a February 20, 2020 medical note with an illegible signature providing work restrictions following a surgical procedure.

An unsigned February 20, 2020 form report of work provided temporary work restrictions related to a July 2019 injury.

In a February 24, 2020 statement, M.S., appellant's coworker, explained that over the past six months appellant had been icing his shoulder after performing jobs and complaining about it. He noted that this behavior was out of character, as appellant never complained about, or tried to avoid work. Eventually, appellant was unable to lift anything above his shoulder and experienced difficulty lifting himself into a forklift. M.S. asserted that appellant was unable to lift anything at all, and that he complained about the pain in his shoulder constantly over the previous two weeks.

In a February 26, 2020 operative report, Dr. Christopher Rankin, a Board-certified orthopedic surgeon, diagnosed a left shoulder posterior labral tear, a left shoulder type II superior labrum from anterior to posterior (SLAP) lesion, left shoulder rotator cuff tendinosis with

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

<sup>3</sup> The Board notes that, following the February 16, 2021 decision, OWCP received additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

subacromial impingement, and a left shoulder anterior labral tear. He performed multiple left shoulder surgical procedures to treat appellant's conditions.

Appellant also submitted an undated information sheet for rehabilitation following a labral repair or bankart lesion from Dr. Rankin.

In a March 9, 2020 development letter, OWCP advised appellant of the deficiencies of his claim. It advised him of the factual and medical evidence necessary to establish his claim and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In a September 7, 2019 medical report, Dr. Roger Ludwig, Board-certified in family medicine, noted that appellant had been experiencing pain in his left shoulder for approximately one and a half months from lifting steel planks. On examination, he diagnosed left bicipital tendinitis. Appellant related that his injury was not caused by a specific trauma or injury to his shoulder, although he was performing many more lifting activities with his arms and shoulders prior to the onset of his symptoms.

In a diagnostic report of September 7, 2019, Dr. Patricia Buckart, a Board-certified radiologist, performed an x-ray scan of appellant's left shoulder, observing normal bone mineralization, no fracture, and normal joint alignments.

Appellant submitted physical therapy reports dated September 23 through December 16, 2019 detailing treatment for his left shoulder condition.

In a February 25, 2020 statement, J.R., appellant's coworker, explained that he had worked with appellant for a year, and that around August, 2019 he began to complain about his shoulder every few days. His complaints increased daily over the last few weeks.

In a separate statement also dated February 25, 2020, B.M., appellant's coworker, indicated that he had worked with appellant for a year, and that he had been complaining about his shoulder for the previous sixth months. He noted that it got to the point where appellant was having a hard time performing basic shipwright tasks.

In another February 25, 2020 statement, W.A., appellant's coworker observed that appellant had been complaining about pain in his shoulder for some time, and that he had gone from doing his job with complaints to not being able to do the work at all. He noted that the most drastic change was towards the end of the 2019 summer.

In a March 4, 2020 letter, the employing establishment controverted appellant's claim, contending that he did not file his claim within 30 days of his injury.

In a March 16, 2020 form report, Lisa Laurian, a physician assistant, provided work restrictions for appellant related to a July 2019 injury and February 26, 2020 surgical procedure.

Appellant accepted a limited-duty work assignment from February 24 through April 10, 2020.

In a March 28, 2020 attending physician's report (Form CA-20), Dr. Ludwig noted that appellant injured his left shoulder on August 3, 2019 and diagnosed left biceps tendinitis. He opined, by checking a box marked "Yes," that appellant's condition was caused or aggravated by his employment activity.

Appellant also submitted multiple information sheets with surgery discharge instructions.

By decision dated April 14, 2020, 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 noted that he had not responded to the development questionnaire and that his statements described an occupational disease and not a traumatic injury. OWCP therefore, concluded that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence. In a July 21, 2020 medical note, Dr. Rankin provided work restrictions through October 1, 2020.

Appellant accepted an offer of limited duty from July 22 to December 11, 2020.

On December 15, 2020 appellant requested reconsideration of OWCP's April 14, 2020 decision. He submitted additional evidence in support of his request.

In a November 20, 2020 medical report, Brandon Turnbo, a registered nurse, noted that appellant injured his left shoulder while pulling and passing scaffolding pipes for approximately three to four hours. He reviewed the history of treatment for appellant's left shoulder conditions. Mr. Turnbo diagnosed a superior glenoid labrum lesion of the left shoulder, impingement syndrome of the left shoulder, chondromalacia of the left shoulder, and bicipital tendinitis of the left shoulder. He opined that it was more probable than not that appellant's left shoulder injury was due to his employment duties consisting of repetitive heavy lifting overhead.

Appellant also submitted a November 20, 2020 duty status report (Form CA-17) with an illegible signature which indicated that he could return to work with restrictions.

By decision dated February 16, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim.

### **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.<sup>4</sup>

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

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<sup>4</sup> 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).

OWCP; or (3) constitutes 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 OWCP's 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>

### 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's December 15, 2020 request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently, he was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>9</sup>

The Board further finds that appellant did not fulfill the third requirement under 20 C.F.R. § 10.606(b)(3) because he did not submit relevant and pertinent new evidence not previously considered by OWCP. In support of his request for reconsideration, appellant submitted additional medical evidence. However, the issue on reconsideration was whether appellant established that the August 3, 2019 employment incident occurred as alleged, which is factual in nature. 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.<sup>10</sup> As such, appellant is not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>11</sup>

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<sup>5</sup> 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).

<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 the merit 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). *Id.* at 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).

<sup>9</sup> *Supra* note 5.

<sup>10</sup> *C.B.*, Docket No. 19-0419 (issued July 22, 2019); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>11</sup> 20 C.F.R. § 10.606(b)(3)(iii).

Accordingly, the Board finds that appellant has not met any of the requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**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 February 16, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 19, 2023  
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