

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 August 15, 2019 appellant, then a 50-year-old lieutenant, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his left shoulder when pulling a compound side door while in the performance of duty. He stopped work on August 15, 2019. OWCP accepted the claim for strain of the muscle and tendons of the left rotator cuff. On January 27, 2020 it expanded acceptance of the claim to include sprain of the ligaments of the cervical spine.

On April 2, 2020 appellant requested medical authorization for a cervical spine surgery based on the March 31, 2020 examination and recommendation of Dr. Justin Bundy, a Board-certified orthopedic surgeon. Dr. Bundy diagnosed cervical disc disorder at C5-6 with radiculopathy and cervical disc degeneration at C5-6. He reported that appellant had not improved with physical therapy or injections and that no further nonoperative treatment options were available.

In an April 6, 2020 development letter, OWCP requested additional medical evidence explaining how appellant's accepted employment injuries resulted in the need for cervical spine surgery. It afforded him 30 days to respond. No response was received.

By decision dated May 12, 2020, OWCP denied authorization of cervical spine surgery because the medical evidence of record did not support that it was medically necessary to address the effects of his work-related injury. It explained that there was no medical evidence to establish that the requested surgery would be appropriate for the accepted condition of cervical sprain.

On September 3, 2020 appellant requested reconsideration of the May 12, 2020 decision and submitted additional evidence from Dr. Bundy. He continued to provide reports dated May 26 through September 14, 2020 diagnosing cervical sprain, cervical disc degeneration, and cervical disc disorder with radiculopathy at C5-6 and recommending surgery.

By decision dated November 16, 2020, OWCP denied modification of the May 12, 2020 decision. It found that appellant had not established that the acceptance of his claim should be expanded to include cervical disc degeneration at C5-6 with radiculopathy and, therefore, had not established that the requested surgery was medically necessary to treat an accepted condition.³

Appellant subsequently submitted additional medical evidence including a series of reports dated December 8, 2020 through June 8, 2021 from Dr. Bundy diagnosing cervical disc disorder

³ OWCP referenced a separate claim appellant filed for a February 5, 2020 traumatic neck injury under OWCP File No. xxxxxx116. The record reflects that he filed a Form CA-1 on February 6, 2020 alleging that on February 5, 2020 he was injured when he assisted a staff member with an inmate who was under the influence of an unknown substance. By decision dated March 16, 2020, OWCP denied the claim finding that he had not established a diagnosed medical condition causally related to the accepted February 5, 2020 employment incident. Appellant's claims have not been administratively combined by OWCP.

at C5-6 with radiculopathy and recommending an anterior cervical discectomy at C5-6. In reports dated December 16, 2020 through February 16, 2021, Dr. Shalin Shah, an osteopath, diagnosed cervical radiculopathy and performed cervical epidural steroid injections.

On July 20, 2021 OWCP expanded the acceptance of appellant's claim to include cervical disc degeneration at C5-6 with cervical disc disorder at C5-6 with radiculopathy.

OWCP received additional evidence. Dr. Shah completed a report dated March 3, 2021 diagnosing cervical radiculopathy and cervical disc disorder with myelopathy. He noted that there was an option for one more injection and that if this did not provide relief then surgery would be the best option.

On August 16, 2021 Dr. Bundy diagnosed cervical disc disorder at C5-6 with radiculopathy and again recommended an anterior cervical discectomy at C5-6.

On September 10, 2021 appellant requested reconsideration of the November 16, 2020 decision. He resubmitted medical evidence of record and provided a copy of the July 20, 2021 decision accepting his claim for the additional condition of cervical disc degeneration at C5-6 with cervical disc disorder at C5-6 with radiculopathy.

By decision dated December 3, 2021, OWCP denied appellant's request for reconsideration of the merits of the claim, pursuant to 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 or her 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 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.⁵

A request for reconsideration must 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

⁴ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.606(b)(3); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *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).

⁶ *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). *Id.* at Chapter 2.1602.4b.

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.⁸

ANALYSIS

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

In support of his request for reconsideration of OWCP's November 16, 2020 decision denying authorization for neck surgery, appellant submitted a copy of OWCP's subsequent decision dated July 20, 2021 expanding the acceptance of his claim to include additional cervical conditions. As such, this report constitutes relevant and pertinent new evidence with regard to the threshold issue. Therefore, the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b).⁹ Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his or her burden of proof.¹⁰ Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹¹

As appellant has submitted new and relevant evidence, he is entitled to a review of the merits of the claim under 20 C.F.R. § 10.606(b)(3).¹² Consequently, the case shall be remanded to OWCP for a review of the merits of the claim. Following any further development as 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.

⁷ *Supra* note 5 at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁸ *Supra* note 5 at § 10.608(b); *S.K.*, Docket No. 22-0248 (issued June 27, 2022); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *F.F.*, Docket No. 20-1542 (issued April 9, 2021); *see C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁰ *B.S.*, Docket No. 20-0555 (issued April 22, 2021); *P.M.*, Docket No. 19-1253 (issued January 23, 2020); *R.T.*, Docket No. 18-1263 (issued February 7, 2019).

¹¹ *B.S.*, *id.*; *F.E.*, Docket No. 20-0070 (issued August 4, 2020); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹² *F.F.*, *supra* note 9; *see also J.M.*, Docket No. 21-1208 (issued February 6, 2023); *J.T.*, Docket No. 19-1829 (issued August 21, 2020); *T.P.*, Docket No. 18-0608 (issued August 2, 2018).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2021 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 28, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy 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