

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish disability from work for the periods February 18 through March 4, 2019 and September 11 through 20, 2019 causally related to his accepted employment injury; and (2) 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 November 7, 2018 appellant, then a 66-year-old consumer safety inspector, filed an occupational disease claim (Form CA-2) alleging that he developed sore shoulders due to repetitive duties of his federal employment. He noted that he first became aware of his condition and realized its relation to his federal employment on October 10, 2018. Appellant did not stop work. On May 7, 2019 OWCP accepted the claim for other specified disorders of tendon in the bilateral shoulder.

In a February 4, 2019 letter, Dr. Patrick S. Coleman, Board-certified in internal medicine, opined that appellant developed tendinitis due to his work duties, which involved repetitive motion to his shoulders. He held him off work from February 18 through March 4, 2019.

September 5, 2019 x-rays of the shoulders revealed degenerative change and mild bilateral acromioclavicular joint arthrosis.

In a September 30, 2019 medical note, Dr. Eric Stiefel, a Board-certified orthopedic surgeon, noted his treatment of appellant that day. He referred him to physical therapy.

Physical therapy notes dated October 11 through November 15, 2019, noted that appellant underwent physical therapy treatments.

On November 17, 2020 appellant filed a claim for compensation (Form CA-7) disability from work for the period February 18 through March 4, 2019. A time analysis form (Form CA-7a) and leave buy back worksheet/certification and election (Form CA-7b), appellant indicated that appellant claimed 80 hours of wage-loss compensation for the period February 18 through March 4, 2019. OWCP also received a separate Form CA-7 for disability from work for the period September 11 through 20, 2019. Accompanying CA-7a and CA-7b forms indicated that appellant claimed a total of 64 hours of wage-loss compensation for the period September 11 through 20, 2019.

In November 18, 2020 development letters, OWCP requested that appellant submit additional evidence in support of his claims for compensation for the periods February 18 through March 4, 2019 and September 11 through 20, 2019, including a physician's opinion supported by a thorough explanation as to how the claimed dates of disability were causally related to his accepted employment conditions. It afforded him 30 days from the letters to respond.

In a September 9, 2019 medical report, Dr. Jonathan R. Parrott, a physician Board-certified in emergency medicine, noted that appellant presented with bilateral shoulder pain and sought to get a work excuse note for two weeks to rest his shoulders. He reported that his condition had not improved since the last appointment. Dr. Parrott observed no numbness, tingling, or weakness in the extremities. He conducted a physical examination and diagnosed bicipital tendinitis of the

shoulder and bilateral shoulder pain. Dr. Parrott noted that appellant requested a work excuse note to rest his shoulders because rest helped with his discomfort.

Appellant also submitted a work excuse note dated September 9, 2019, wherein Dr. Parrott excused appellant from work for the period September 10 through 23, 2019 to rest his arms.

In a February 14, 2020 progress report, Dr. Coleman noted that appellant presented with no new medical complaints.

In an undated statement, appellant related that a work excuse note dated February 14, 2019 was generated after his physician conducted a medical examination. He noted that he was diagnosed with tendinitis and recommended to rest his arms and refrain from activities that caused his conditions for two weeks. Appellant explained that he requested that the period of rest would not begin until February 18, 2019 due to short staffing at the employing establishment and he did not want to hamper its mission by taking time off.

By decision dated December 23, 2020, OWCP denied appellant's claims for compensation, finding that he had not submitted sufficient medical evidence to establish disability from work for the periods February 18 through March 4, 2019 and September 11 through 20, 2019.

OWCP continued to receive evidence. Appellant submitted an August 5, 2015 and December 12, 2018 report from Dr. Richard Rickman, Board-certified in family medicine, who diagnosed lateral epicondylitis and a May 11, 2018 report from Maria C. Newham, a physician assistant, who diagnosed bilateral shoulder pain.

Appellant also resubmitted Dr. Coleman's February 4, 2019 letter and February 14, 2020 progress report.

In a February 14, 2020 medical note, Dr. Stiefel noted that appellant was seen that day and excused him from work for the period February 18 through 26, 2020 to rest his shoulder.

On January 21, 2021 appellant requested reconsideration. In an accompanying statement dated January 15, 2021, he related that he was diagnosed with bilateral tendinitis and that he opted for the least invasive treatment remedy, which was to rest his shoulders, and that his physician would not have approved his request for the rest method unless he believed that it would help.

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

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁵ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled

⁴ *Supra* note 2.

⁵ *See L.S.*, Docket No. 18-0264 (issued January 28, 2020); *B.O.*, Docket No. 19-0392 (issued July 12, 2019).

from work as a result of the accepted employment injury.⁶ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of the reliable, probative, and substantial medical opinion evidence.⁷ Findings on examination are generally needed to support a physician's opinion that an employee is disabled from work.⁸

The term "disability" is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.⁹ Disability is, thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.¹⁰ An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹¹

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish disability from work for the periods February 18 through March 4, 2019 and September 11 through 20, 2019 causally related to his accepted employment conditions.

Dr. Coleman, in his February 4, 2019 letter, opined that appellant developed tendinitis due to his work duties, which involved repetitive motion of his shoulders, and excused him from work for the period February 18 through March 4, 2019. However, he did not provide an opinion on causal relationship between the claimed dates of disability and the accepted employment injury. The Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹³ This evidence is therefore insufficient to establish the disability claim.

Dr. Parrott, in his September 9, 2019 medical report and work excuse note, noted that appellant presented with persisting bilateral shoulder pain and sought a work excuse note to rest

⁶ *T.W.*, Docket No. 19-1286 (issued January 13, 2020).

⁷ *S.G.*, Docket No. 18-1076 (issued April 11, 2019); *V.H.*, Docket No. 18-1282 (issued April 2, 2019); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁸ *C.S.*, Docket No. 20-1621 (issued June 28, 2021); *Dean E. Pierce*, 40 ECAB 1249 (1989).

⁹ 20 C.F.R. § 10.5(f); *J.S.*, Docket No. 19-1035 (issued January 24, 2020); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹⁰ *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

¹¹ *See* C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

¹² *See M.J.*, Docket No. 19-1287 (issued January 13, 2020); *C.S.*, Docket No. 17-1686 (issued February 5, 2019); *William A. Archer*, 55 ECAB 674 (2004).

¹³ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

his shoulders because rest helped with his discomfort. He diagnosed bicipital tendinitis of the shoulder and bilateral shoulder pain. Dr. Parrot excused appellant from work for the period September 10 through 23, 2019. However, he did not provide an opinion that appellant sustained disability due to his accepted employment injury. As noted above, the Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹⁴ Therefore, this evidence is also insufficient to establish appellant's claim.

In his February 14, 2020 report, Dr. Coleman noted that appellant was treated that day and had no new complaints. However, he did not provide an opinion on whether appellant was disabled from work during the claimed period due to his accepted employment injury. As such, this report is also of no probative value and is insufficient to establish the claim.¹⁵

Appellant submitted physical therapy treatment notes signed by physical therapists. These reports, however, do not constitute competent medical evidence because physical therapists are not considered physicians as defined under FECA.¹⁶ Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to compensation benefits.¹⁷

OWCP also received September 5, 2019 x-rays of the shoulders. However, diagnostic studies, standing alone, lack probative value as they do not address whether the accepted employment injury caused appellant to be disabled from work during the claimed periods.¹⁸

As the medical evidence of record does not contain sufficient rationale to establish disability during the claimed periods, the Board finds that appellant has not met his burden of proof.

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.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8101(2) provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *R.L.*, Docket No. 19-0440 (issued July 8, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

¹⁷ *Id.*

¹⁸ *M.J.*, Docket No. 19-1287 (issued January 13, 2020); *M.M.*, Docket No. 18-0817 (issued May 17, 2019).

LEGAL PRECEDENT -- ISSUE 2

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 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 2

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).

On reconsideration appellant argued that his physicians approved his leave requests to rest his shoulders during the claimed period because this helped with his recovery. However, the Board notes that OWCP previously considered and rejected these arguments when it denied his disability claim. As noted above, the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis

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).

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, *supra* note 17 at Chapter 2.1602.4 (February 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).

for reopening a case.²⁶ Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).²⁷

In support of his reconsideration request, appellant resubmitted evidence previously considered by OWCP in its December 23, 2020 decision. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.²⁸ Appellant also submitted a February 14, 2020 note, wherein Dr. Stiefel excused appellant from work for the period February 18 through 26, 2020 to rest his shoulder. The underlying issue in this case is whether appellant has established causal relationship between his disability for the periods February 18 through March 4, 2019 and September 11 through 20, 2019 and his accepted employment injury. This is a medical issue which must be addressed by relevant medical evidence not previously considered.²⁹ While Dr. Stiefel addressed part of the claimed period of disability in his February 14, 2020 note, he did not provide an opinion on causal relationship between the claimed disability and the accepted employment injury. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.³⁰ Appellant is therefore not entitled to a review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).³¹

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 merit review.³²

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish disability from work for the periods February 18 through March 4, 2019 and September 11 through 20, 2019 causally related to his accepted employment conditions. The Board further finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁶ *Id.*

²⁷ *Supra* note 23.

²⁸ *Id.*; *see also* *S.W.*, Docket No. 19-1498 (issued January 9, 2020).

²⁹ *Y.L.*, Docket No. 20-1025 (issued November 25, 2020).

³⁰ *Id.* *See also* *B.C.*, Docket No. 18-0692 (issued June 5, 2020); *T.H.*, Docket No. 19-0992 (issued February 4, 2020).

³¹ *Supra* note 23.

³² *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2020 and February 5, 2021 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 18, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board