

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

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<b>E.R., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-1279</b>
	)	<b>Issued: January 10, 2023</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>San Jose, CA, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. McGINLEY, Alternate Judge

**JURISDICTION**

On August 29, 2022 appellant filed a timely appeal from a May 26, 2022 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated July 21, 2021, to the filing of this appeal, pursuant to the Federal Employees’ Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. § § 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the May 26, 2022 decision, OWCP received additional evidence. 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.*

## 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

This case has previously been before the Board on different issues.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 6, 2000 appellant, then a 52-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that he injured his left ribs, right arm, and back when he was struck by a mail container while in the performance of duty. OWCP accepted the claim for left rib contusion/left chest wall contusion and a right shoulder sprain. It paid appellant wage-loss compensation on the supplemental rolls for the period October 24, 2002 to February 24, 2003.<sup>4</sup>

On January 21, 2021 appellant filed a notice of recurrence (Form CA-2a) for the need for medical treatment only. He noted that January 1, 2020 was the date of recurrence, and he first received medical treatment following the recurrence on December 10, 2020. Appellant indicated that he was limited in performing his usual duties following the original injury of September 6, 2000. He noted that when he retired on October 31, 2003 he had limited range of motion in his right shoulder and left shoulder pain and that he took anti-inflammatory drugs. Appellant indicated that on January 1, 2020 he had increased pain and decreased range of motion in both shoulders.

In a development letter dated February 1, 2021, OWCP provided the definition of a recurrence of disability and requested that appellant provide rationalized medical opinion evidence to support that his need for medical treatment was due to a worsening of the accepted work-related conditions without intervening cause. It also provided a questionnaire for his completion and afforded him 30 days to respond. No response was received.

By decision dated March 4, 2021, OWCP denied appellant's recurrence claim, finding that he had not established that he required additional medical treatment due to a worsening of his accepted work-related conditions without an intervening cause.

On April 7, 2021 appellant requested reconsideration. He provided a February 9, 2021 response to OWCP's questionnaire and a March 31, 2021 statement in which he indicated that he was diagnosed with adhesive capsulitis in both shoulders.<sup>5</sup>

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<sup>3</sup> Docket No. 05-892 (issued September 19, 2005); Docket No. 07-1769 (issued April 28, 2008), *denying petition for recon.*, Docket No. 07-1769 (issued November 28, 2008).

<sup>4</sup> Appellant retired from the employing establishment on October 31, 2003.

<sup>5</sup> A September 26, 2003 request to change physicians was also provided.

OWCP also received an August 28, 2003 report from Dr. Richard D. Heater, a Board-certified orthopedic surgeon, which provided an impression of bilateral adhesive capsulitis. In an undated attending physician's report (Form CA-20), Dr. Satish K. Shirma, an anesthesiologist, opined, with an affirmative checkmark, that appellant's bilateral adhesive capsulitis was caused or aggravated by an employment activity.

By decision dated July 1, 2021, OWCP denied modification of its March 4, 2021 decision, finding that the medical evidence of record was insufficient to establish that appellant's current need for medical treatment was causally related to the September 5, 2000 work injury without an intervening cause.

On July 19, 2021 appellant requested reconsideration. He requested that his claim be amended to include a recurrence of medical treatment for "consequential and intervening injury for adhesive capsulitis." Appellant also addressed the medical treatment he received in 2002 through 2019 for adhesive capsulitis.

By decision dated July 21, 2021, OWCP denied modification of its July 1, 2021 decision.

On February 28, 2022 appellant requested reconsideration. He reargued that his claim was for a "consequential injury and intervening injury for adhesive capsulitis." Evidence previously of record was resubmitted, including copies of appellant's prior request for reconsideration, a copy of the first page of OWCP's July 21, 2021 decision, a full copy of the July 21, 2021 decision, and OWCP's February 2 and 11, 2022 letters.

By decision dated May 26, 2022, OWCP denied appellant's request for reconsideration of the merits of appellant's 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.<sup>6</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 OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a); *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).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3); *L.D.*, *id.*; *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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>8</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>9</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>10</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).

In support of his timely reconsideration request, appellant reargued that his claim was for a "consequential injury and intervening injury for adhesive capsulitis." His argument, however, was previously addressed in OWCP's July 21, 2021 decision. This argument did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP. It therefore properly determined that appellant's request did not warrant a review of the merits of the claim based on the first and second requirements of 20 C.F.R. § 10.606(b)(3).<sup>11</sup>

In support of his reconsideration request, appellant resubmitted copies of his July 14, 2021 letter, a copy of the first page of OWCP's July 21, 2021 decision, a full copy of the July 21, 2021 decision, and OWCP's February 2 and 11, 2022 letters. The Board notes that this evidence is duplicative of evidence previously considered by OWCP.<sup>12</sup> As appellant did not provide relevant and pertinent new medical evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>13</sup>

As appellant has not met any of the regulatory requirements of 20 C.F.R. § 10.606(b)(3), pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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<sup>8</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). *Id.* at Chapter 2.1602.4b.

<sup>9</sup> *Id.* at § 10.608(a); *M.S.*, 59 ECAB 231 (2007).

<sup>10</sup> *Id.* at § 10.608(b); *O.P.*, Docket No. 19-0445 (issued July 24, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>11</sup> *S.W.*, Docket No. 21-1094 (issued April 18, 2022); *see M.C.*, Docket No. 18-1278 (issued March 7, 2019); *see S.M.*, Docket No. 17-1899 (issued August 3, 2018).

<sup>12</sup> *R.B.*, Docket No. 21-0035 (issued May 13, 2021); *V.L.*, Docket No. 19-0069 (issued February 10, 2020); *A.K.*, Docket No. 19-1210 (issued November 20, 2019); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *Richard Yadron*, 57 ECAB 207 (2005); *Eugene F. Butler*, 36 ECAB 36 ECAB 393, 398 (1984).

<sup>13</sup> *See T.W.*, Docket No. 18-0821 (issued January 13, 2020).

**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 May 26, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 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