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<b>R.H., Appellant</b>	)	
	)	<b>Docket No. 23-0033</b>
<b>and</b>	)	<b>Issued: September 20, 2023</b>
	)	
<b>U.S. POSTAL SERVICE, RINGGOLD POST</b>	)	
<b>OFFICE, Ringgold, GA, Employer</b>	)	
_____	)	

*Case Submitted on the Record*

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

On October 12, 2022 appellant filed a timely appeal from an August 18, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated August 17, 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>

<sup>2</sup> The Board notes that, following the August 18, 2022 decision, appellant submitted additional evidence to OWCP. 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 her claim, pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

On July 12, 2021 appellant, then a 51-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on April 8, 2020 she tore ligaments in her left arm and neck when she picked up a package to deliver while in the performance of duty. On the reverse side of the claim form, her supervisor acknowledged that she was injured in the performance of duty. Appellant stopped work on February 1, 2021 and did not return.

In a development letter dated July 13, 2021, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of additional evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence. No further evidence was received.

By decision dated August 17, 2021, 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 she described. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant subsequently submitted a July 20, 2021 report from Dr. Richard Cunningham, an osteopath, described her employment duties and related that on April 8, 2020 appellant was about to deliver a package weighing approximately 7 to 10 pounds, reached in to pick it up with her outstretched left arm, and felt a pulling sensation in the forearm between her wrist and elbow. She was able to finish her route on April 8, 2020 and reported the incident to her supervisor, J.W., upon returning to the employing establishment and advised him she was having a burning and tingling sensation in her left arm. Appellant continued to work seven days per week, between 16 and 20 hours a day and complained of the pain daily. On January 16, 2021 she contacted the postmaster, B.M., to advise her that she was unable to work the following day. On January 18, 2021 appellant was in so much forearm pain that she went to the emergency room, underwent an x-ray of the forearm, and was advised that she had edema and possible torn ligaments. She was prescribed steroids, placed in an arm splint, and referred to an orthopedist. As of July 20, 2021, appellant had been unable to return to work.

Dr. Cunningham's examination findings included nonradicular pain and exquisite tenderness to palpation of the left triceps, extensor digitorum, and pronator teres, active trigger points in the left triceps and extensor digitorum, limited range of motion (ROM) in the left elbow, positive findings for lateral epicondylitis, positive Cozen's test, positive Mill's test, cervical paraspinal muscle tenderness, and crepitus, spasmodic motion, and pain in the left shoulder. He reviewed x-rays of the cervical spine, left shoulder, and left elbow, which revealed mild arthritic changes of the cervical spine. Dr. Cunningham diagnosed cervical disc disorder at C4-C5 and C5-C6 with radiculopathy, adhesive capsulitis of left shoulder, lacerated flexor muscle/fascia/tendon right index finger at forearm level, and paresthesia of skin.

Dr. Cunningham opined that appellant's condition developed over a longer period from repetitive work actions, and that the one incident of reaching for a package with her elbow in the wrong position allowed the interosseous ligaments and ligaments to the lateral epicondyle to tear, which resulted in ligament sprain and edema with increasing pressure within the musculature. He explained that this was an overuse injury to the left forearm and shoulder resulting in a ligament injury and overuse lateral epicondylitis with complicating radicular components from C4-C6. Dr. Cunningham noted that the cervical spine and shoulder are part of the kinematic chain and are involved in the same repeated function throughout the day. Thus, failure of the entire chain is common in such overuse injuries. Dr. Cunningham concluded that chronic use of the shoulder, as well as reaction to injuries above and below it, cause a reflexive response to inhibit use or mobility of the connecting joint.

An August 10, 2021 cervical spine magnetic resonance imaging (MRI) scan demonstrated minimal central disc bulging at C5-6 resulting in minimal ventral effacement of the thecal sac. A left shoulder MRI scan of even date revealed no abnormalities.

In an August 12, 2021 work excuse note, Dr. Hommed Minaei, a chiropractor, held appellant off work until her reevaluation on September 2, 2021.

On May 24, 2022 appellant requested reconsideration.

In a December 15, 2021 report, Dr. Cunningham noted treating appellant for left shoulder pain, and again described appellant's employment duties and the alleged April 8, 2020 employment incident. He diagnosed cervical disc disorder at C4-C5 and C5-C6 with radiculopathy, adhesive capsulitis of left shoulder, lacerated flexor muscle/fascia/tendon right index finger at forearm level, and paresthesia of skin. Dr. Cunningham repeated his opinion regarding causal relationship from his previous report.

By decision dated August 18, 2022, OWCP denied appellant's request for reconsideration of the merits of her 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

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at § 8128(a).

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>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

In her May 24, 2022 reconsideration request, appellant 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. Accordingly, the Board finds that she is 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>

In support of her request for reconsideration, appellant submitted additional medical evidence. However, the underlying issue on reconsideration was whether appellant established that the April 8, 2020 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. § 10.608(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).

<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).

The Board accordingly finds that OWCP properly determined that appellant has not met any of the three 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 her claim, pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 18, 2022 decision of the Office of Workers Compensation Programs is affirmed.

Issued: September 20, 2023  
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