

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

C.M., Appellant	)	
	)	
and	)	Docket No. 19-0651
	)	Issued: September 13, 2019
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, East Alton, IL, Employer	)	
	)	

*Appearances:*  
Fred Patrick Schuman, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 1, 2019 appellant, through counsel, filed a timely appeal from an August 13, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated July 13, 2017, to the 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.

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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.

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

## **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 April 10, 2012 appellant, then a 37-year-old lock and dam equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left shoulder injury on that date when he bent over and held a torch wrench up with one arm while using the other arm to move some caster while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that he stopped work on the date of injury. Appellant submitted medical evidence in support of his claim.

By decision dated April 20, 2016, OWCP accepted that the April 10, 2012 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim finding that the medical evidence of record was insufficient to establish causal relationship between the accepted employment incident and the claimed left shoulder condition.

On March 7, 2017 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

By decision dated April 4, 2017, OWCP denied appellant's hearing request as untimely filed.

On April 20, 2017 appellant requested reconsideration of the April 20, 2016 decision.

By decision dated July 13, 2017, OWCP denied modification of its April 20, 2016<sup>3</sup> decision.

OWCP received an October 3, 2017 document entitled "Notice of Taking Evidence Deposition" indicating that a deposition of a physician was scheduled for November 14, 2017.

By decision dated August 13, 2018, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant a merit review.

## **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.<sup>4</sup> The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.<sup>5</sup>

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<sup>3</sup> The Board notes that, in its July 13, 2017 decision, OWCP references April 20, 2017 as the prior decision date; however, this is a typographical error, as the prior decision was dated April 20, 2016.

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> *Id.*

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>6</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>7</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</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>9</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 his July 10, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He also did not advance a relevant legal argument not previously considered by OWCP. Accordingly, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board also finds that appellant failed to submit relevant and pertinent new evidence not previously considered by OWCP. The underlying issue on reconsideration was causal relationship, which generally requires submission of relevant medical evidence.<sup>10</sup>

In support of his request for reconsideration, appellant submitted an October 3, 2017 document entitled "Notice of Taking Evidence Deposition" indicating that a deposition was scheduled to be held on November 14, 2017. While new, this evidence fails to address the underlying issue of causal relationship, which is medical in nature, and therefore, is insufficient to warrant further merit review.<sup>11</sup> Thus, appellant is also 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).

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<sup>6</sup> 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>10</sup> *See* *K.J.*, Docket No. 16-0611 (issued May 13, 2016); *Carol A. Lyles*, 57 ECAB 265 (2005) (causal relationship is a medical issue which must be resolved by competent medical opinion).

<sup>11</sup> *Id.*

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.<sup>12</sup>

On appeal, counsel contends that a physician provided an opinion supportive of causal relationship during the November 14, 2017 deposition and that OWCP disregarded this new and relevant evidence in its August 13, 2018 nonmerit decision. However, the Board notes that the referenced deposition was not part of the record at the time of OWCP's August 13, 2018 decision. 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."<sup>13</sup>

### **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).

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<sup>12</sup> C.C., Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

<sup>13</sup> 20 C.F.R. § 501.2(c)(1).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 13, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board