

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

<hr/>		
<b>F.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 19-0672</b>
	)	<b>Issued: September 11, 2019</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Fort Knox, KY, Employer</b>	)	
<hr/>	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 5, 2019 appellant, through counsel, filed a timely appeal from a December 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a decision of the Board dated November 2, 2018, which became final after 30 days of issuance, and is not subject to further review.<sup>2</sup> As there was no merit decision issued by OWCP within 180 days from the filing of this appeal, pursuant to the Federal Employees'

---

<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> 20 C.F.R. § 501.6(d); *see M.S.*, Docket No. 18-0222 (issued June 21, 2018); *J.P.*, Docket No. 17-0053 (issued May 23, 2017); *R.M.*, Docket No. 14-1213 (issued October 15, 2014).

Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c), 501.3, and 501.6(d), the Board lacks jurisdiction over the merits of this case.

### **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**

This case was previously before the Board.<sup>4</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 21, 2015 appellant, then a 58-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2015 she experienced right shoulder pain as a result of repetitive motion while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant had not stopped work.

In a statement dated December 19, 2015, appellant explained that, on December 9, 2015, she extended her right arm to place two letters inside a mailbox and felt a stinging sensation in her upper arm. She noted that prior to this incident she had not experienced issues with her right shoulder. Appellant sought treatment that day, but was unable to see a physician because the paperwork provided by her supervisor did not contain sufficient information to bill the visit as a workers' compensation claim. She further explained that on December 15, 2015 she was examined by a physician and referred for a magnetic resonance imaging (MRI) study.

In support of her claim, appellant submitted treatment notes from Dr. Nison Abayev, a Board-certified family practitioner, who diagnosed right rotator cuff tendinitis.

In a treatment note dated December 16, 2015, Dr. Abayev noted that appellant injured her right shoulder at work on December 9, 2015. She reported decreased range of motion in her right shoulder and pain radiating to her neck and across her collar bone. Appellant was referred for an MRI scan study.

On December 23, 2015 Dr. Abayev held appellant off from work from December 23, 2015 through January 3, 2016.

In a development letter dated December 29, 2015, OWCP advised appellant of the additional factual and medical evidence needed to establish her claim and provided a questionnaire for her completion. It afforded her 30 days to submit the necessary evidence.

In a response dated December 6, 2016, appellant reiterated that she injured her right shoulder on December 9, 2015 while in the performance of duty when she extended her right arm

---

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Docket No. 17-1547 (issued November 2, 2018).

out to place two letters in a customer's mailbox. She noted that at that time she felt a sharp pain in her right shoulder and she had no issues with her shoulder prior to this incident.

In a duty status report (Form CA- 17) dated December 23, 2015 and January 5, 2016, Dr. Abayev continued to diagnose right rotator cuff tendinitis and held appellant off work until she underwent a right shoulder MRI scan.

In reports dated January 5, 2016, Dr. Abayev noted that appellant was still awaiting authorization to undergo a right shoulder MRI scan and continued to hold her off work pending the completion of the MRI scan and to prevent further injury.

Appellant submitted a negative diagnostic report of the right shoulder dated January 19, 2016.

By decision dated February 2, 2016, OWCP accepted that the December 9, 2015 employment incident occurred as alleged. However, it denied her traumatic injury claim finding that the medical evidence of record was insufficient to establish a causal relationship between the accepted employment incident and the claimed right shoulder condition.

On April 11, 2016 appellant requested an oral hearing before an OWCP hearing representative.

Appellant provided testimony at a telephonic hearing held on October 4, 2016. The hearing representative held the case record open for 30 days for the submission of additional evidence.

Appellant subsequently submitted a progress report dated February 10, 2016 from Dr. Abayev in which he opined that constant repetitive motions of the right arm, while in the performance of duty, caused small partial ruptures to the right supraspinatus tendon until it progressed to a complete rupture. Dr. Abayev concluded that this mechanism of injury caused appellant's sudden onset of worsening pain, loss of range of motion and traumatic pain on the date of injury.

A January 25, 2016 MRI scan of appellant's right shoulder revealed a small thickness tear of the supraspinatus tendon and mild findings in the acromioclavicular joint and biceps.

By decision dated November 30, 2016, OWCP's hearing representative affirmed the February 2, 2016 decision.

On May 23, 2017 appellant, through counsel, requested reconsideration.

In statements dated October 6 and 7, 2016, Dr. Abayev noted that appellant indicated that she worked for the employing establishment for 22 years, six hours per day, 6 days per week. Appellant was responsible for casing up to 1,000 letters and 100 magazines or large envelopes each morning, which required continuous lifting of her arms above her head. She handled up to 60 parcels daily, weighing up to 50 pounds. Additionally, appellant delivered mail to up to 500 mailboxes per day, which required repetitious extension of her arm and opening and closing these mailboxes. Dr. Abayev indicated that he initially felt she had right rotator cuff tendinitis, but that

a right shoulder MRI scan revealed a rotator cuff tear. He opined that appellant's employment duties contributed to her right shoulder condition.

By decision dated June 14, 2017, OWCP denied modification of its prior decision.

On July 7, 2017 appellant, through counsel, filed an appeal with the Board.

By decision dated November 2, 2018, the Board affirmed OWCP's June 14, 2017 decision denying appellant's traumatic injury claim finding that the medical evidence of record was insufficient to establish a right shoulder injury causally related to the accepted December 9, 2015 employment incident.

On December 4, 2018 counsel requested reconsideration and submitted the following medical evidence: (1) a negative diagnostic report of the right shoulder dated January 19, 2016; (2) diagnostic testing results dated May 11 and December 16, 2016; (3) a September 20, 2016 report from Megan Wade, an advanced practice nurse practitioner, and (4) reports dated December 16 and 23, 2015; January 5 and 19, February 10, April 5, May 10, June 15, and December 15, 2016; and February 17 and March 15, 2017 from Dr. Abayev who continued to diagnose right rotator cuff tendinitis.

By decision dated December 14, 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. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.<sup>5</sup>

A claimant seeking reconsideration of a final decision must present arguments or provide evidence 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> If OWCP determines that at least one of these requirements is met, 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>

---

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(3); *see also* *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>7</sup> *Id.* at § 10.608(a); *see also* *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

<sup>8</sup> *Id.* at § 10.608(b); *J.L.*, Docket No. 19-0586 (issued August 9, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

## 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 December 4, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She 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 her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue on reconsideration was causal relationship, which requires submission of relevant rationalized medical evidence.<sup>9</sup>

In support of her request for reconsideration, OWCP received a duplicative copy of a negative diagnostic report of the right shoulder dated January 19, 2016 and reports dated December 16, 2015 through March 15, 2017 from Dr. Abayev. The Board finds that the diagnostic report and several of Dr. Abayev's reports were previously of record and his additional reports which were new constituted cumulative evidence because they were substantively the same as those already of record. Submitting evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>10</sup> Further, this evidence did not address the relevant issue on reconsideration and is insufficient to warrant further merit review.<sup>11</sup> Therefore, this evidence is insufficient to require OWCP to reopen the case for merit review.

Appellant also submitted a September 20, 2016 report from Ms. Wade, an advanced practice nurse practitioner, and a series of diagnostic testing results dated May 11 and December 16, 2016. While these reports are new, they do not constitute probative medical evidence. The reports of Ms. Wade are of no probative value because they do not contain rationale from a health care provider considered a "physician" as defined under FECA.<sup>12</sup> Additionally, while the diagnostic testing reports are new, they are not relevant as the Board has long held that diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.<sup>13</sup> Therefore, these reports are also insufficient to require

---

<sup>9</sup> *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>10</sup> *O.C.*, Docket No. 19-0106 (issued April 26, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>11</sup> *M.B.*, Docket No. 19-0596 (issued August 6, 2019); *D.K.*, 59 ECAB 141, 147 (2007); *Eugene F. Butler, id.*

<sup>12</sup> FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See* 5 U.S.C. § 8102(2); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *M.M.*, Docket No. 16-1617 (issued January 24, 2017); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See also* *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

<sup>13</sup> *See K.S.*, Docket No. 18-1781 (issued April 8, 2019); *G.S.*, Docket No. 18-1696 (issued March 26, 2019).

OWCP to reopen the claim for a merit review. Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).

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>14</sup>

**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 December 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

---

<sup>14</sup> *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).