

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

M.O., Appellant)	
)	
and)	Docket No. 19-1677
)	Issued: February 25, 2020
U.S. POSTAL SERVICE, AKRON HUB,)	
Akron, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 6, 2019 appellant, through counsel, filed a timely appeal from a May 29, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated November 6, 2018, which became final 30 days after issuance, and is not subject to further review.² As there is no merit decision issued by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ 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.

² 20 C.F.R. § 501.6(d); see *J.M.*, Docket No. 19-0252 (issued January 8, 2020).

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.³ 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 March 11, 2016 appellant, then a 67-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained a left shoulder condition causally related to factors of his federal employment. He attributed his condition to repetitively turning a steering wheel on a forklift. Appellant stopped work on March 6, 2016.

In a March 11, 2016 statement, appellant related that in 2002 he began experiencing bilateral shoulder problems due to repetitively lifting mail trays and driving a fork lift. He indicated that he had undergone surgery on his left rotator cuff in 2005.

On April 11, 2016 Dr. Michael R. Magoline, a Board-certified orthopedic surgeon, discussed appellant's history of a rotator cuff repair some years earlier and advised that his current complaints were due to a work injury. He noted that he had experienced sharp pain with repetitive driving of a forklift. Dr. Magoline diagnosed a complete left shoulder rotator cuff tear.

By decision dated May 23, 2016, OWCP denied appellant's occupational disease claim. It found that the medical evidence was insufficient to show that he sustained a diagnosed medical condition causally related to the accepted employment factors.

In a report dated May 25, 2016, Dr. Magoline opined that appellant had developed rotator cuff arthropathy of the left shoulder due to the prior work injury and requested authorization for a reverse total shoulder arthroplasty.

On May 31, 2016 appellant requested reconsideration.

On July 11, 2016 Dr. Magoline noted that appellant had previously experienced a left rotator cuff tear that was repaired by another surgeon. He advised that he had reinjured his left shoulder repetitively lifting bins causing rotator cuff arthropathy that required surgical intervention.

In an August 2, 2016 report, Dr. Magoline opined that appellant had sustained a rotator cuff tear due to repetitively turning a steering wheel on a forklift that had failed to heal following surgery. He opined that he had developed left shoulder rotator cuff arthropathy due to the prior injury.

³ Docket No. 18-1056 (issued November 6, 2018).

In a January 5, 2017 progress report, Dr. Magoline advised that appellant had a “clear cut case of rotator cuff arthropathy which was created and caused by his original work[-]related rotator cuff tear.” He advised that the tear had failed to heal and resulted in arthritis and rotator cuff arthropathy.

On June 7, 2017 appellant, through counsel, requested reconsideration.⁴

By decision dated March 26, 2018, OWCP denied modification of its May 23, 2016 decision. It found that the medical evidence of record was insufficient to establish that the accepted work factors caused the rotator cuff tear and rotator cuff arthropathy.

Appellant appealed to the Board. By decision dated November 6, 2018, the Board affirmed OWCP’s March 26, 2018 decision, finding that the medical evidence of record was insufficient to establish a left shoulder condition causally related to the accepted factors of federal employment.⁵

On March 1, 2019 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a report dated February 12, 2019, Dr. Magoline evaluated appellant for left shoulder pain and indicated that he had sustained an injury on March 6, 2016. He diagnosed rotator cuff arthropathy and a complete left shoulder rotator cuff tear. Dr. Magoline opined that appellant had sustained an employment-related injury to his left shoulder treated with failed surgery. Due to the unrepaired rotator cuff tear, he experienced pain and loss of function. Dr. Magoline advised that appellant sustained rotator cuff arthropathy due to continuing to perform his job duties.

By decision dated May 29, 2019, OWCP denied appellant’s request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a). It found that the newly submitted medical evidence was substantially similar to evidence previously of record and thus insufficient to warrant reopening his case for further 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. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a

⁴ On January 19, 2017 Dr. Magoline requested that OWCP expand the acceptance of appellant’s claim to include rotator cuff arthropathy of the left shoulder.

⁵ *Supra* note 3.

⁶ 5 U.S.C. § 8128(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.⁷

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ 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.¹⁰

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).

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. Consequently, he 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).¹¹

The Board further finds that appellant has not provided relevant and pertinent new evidence in support of his request for reconsideration. Appellant submitted a report dated February 12, 2019 from Dr. Magoline, who opined that appellant had sustained an employment-related injury to his left shoulder. He diagnosed rotator cuff arthropathy and a complete left shoulder rotator cuff tear and noted that, after failed surgery to treat the rotator cuff tear, appellant had continued pain and reduced function. Dr. Magoline opined that his continued performance of his employment duties resulted in rotator cuff arthropathy. While this report is new, it is not relevant as it is substantially similar to Dr. Magoline's prior reports already of record and previously reviewed. Providing additional evidence that either duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.¹² As appellant did not provide relevant and

⁷ 20 C.F.R. § 10.606(b)(3); *see also B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁸ *Id.* at § 10.607(a). 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 (February 2016). 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. *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see also A.P.*, Docket No. 19-0224 (issued July 11, 2019).

¹⁰ *Id.* at § 10.608(b); *A.G.*, Docket No. 19-0113 (issued July 12, 2019).

¹¹ *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹² *See V.Q.*, Docket No. 19-1309 (issued January 3, 2020).

pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. §10.606(b)(3).¹³

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.¹⁴

On appeal counsel contends that OWCP failed to properly apply the causation standard or give adequate deference to the findings of appellant's attending physician. As explained above, the Board lacks jurisdiction to review the merits of the claim.

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 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ 20 C.F.R. § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

¹⁴ *D.G.*, Docket No. 19-1348 (issued December 2, 2019).