

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

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T.M., Appellant)	
)	
and)	Docket No. 21-0961
)	Issued: December 1, 2021
U.S. POSTAL SERVICE, BUSTLETON POST)	
OFFICE, Philadelphia, PA, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 11, 2021 appellant filed a timely appeal from a May 28, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated September 3, 2020, to 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.

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

OWCP accepted that on November 12, 1992 appellant, then a 27-year-old letter carrier, sustained lumbar strain when she tripped and fell on her left knee while in the performance of

¹ 5 U.S.C. § 8101 *et seq.*

duty.² It subsequently expanded its acceptance of the claim to include left shoulder instability, a superior glenoid labrum lesion of the left shoulder, and a rotator cuff tear or rupture of the left shoulder, not specified as traumatic. OWCP paid appellant wage-loss compensation on the periodic rolls.³

On January 10, 2018 OWCP referred appellant to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated January 31, 2018, Dr. Didizian diagnosed lumbar sprain and a dislocation of the left shoulder status post an arthroscopic labral repair in 1996. He opined that appellant could work full time reaching for two hours per day, lifting, pushing, and pulling up to 20 pounds, and performing no overhead reaching.

On February 13, 2019 the employing establishment offered appellant a position as a modified carrier technician. The physical requirements of the position included driving and walking for four hours per day, standing, kneeling, and bending no more than four hours per day, lifting, pushing, and pulling up to 20 pounds intermittently no more than four hours per day, and simple grasping no more than four hours per day. Appellant declined the position on February 14, 2019 claiming it violated his work restrictions.

On July 18, 2019 Dr. Richard A. Cautilli, Jr., a Board-certified orthopedic surgeon, diagnosed left shoulder instability and tendinitis causally related to the accepted November 12, 1992 employment injury. He noted positive Neer and Hawkin's impingement signs on examination. Dr. Cautilli opined that appellant could perform light-duty lifting no more than five pounds.

On September 30, 2019 OWCP referred appellant to Dr. Steven J. Valentino, an osteopath certified by the American Osteopathic Association in orthopedic surgery, for a second opinion examination.

In a report dated October 15, 2019, Dr. Valentino reviewed appellant's history of injury and the medical evidence of record. On examination he found no spasm or tenderness of the spine and no impingement or instability of the left shoulder. Dr. Valentino diagnosed resolved lumbar strain and status post a left shoulder labral repair. He found mild loss of range of motion of the left shoulder. Dr. Valentino advised that appellant could perform the position offered on August 18, 2018 as a carrier technician. In a work capacity evaluation (OWCP-5c), he found that appellant could work full time with limitations of reaching above the shoulder no more than two hours per day and lifting, pushing, and pulling no more than 20 pounds.

On May 27, 2020 OWCP advised appellant that it had determined that the February 13, 2019 offered position was suitable and afforded her 30 days to accept the position or provide

² The traumatic injury claim (Form CA-1) is not contained in the case record.

³ Appellant accepted a rehabilitation position with the employing establishment on January 25, 2000; however, on November 30, 2010 the employing establishment withdrew the position. OWCP accepted that she had sustained a recurrence of disability beginning November 30, 2010.

reasons for her refusal.⁴ It indicated that the opinion of Dr. Valentino constituted the weight of the evidence. OWCP informed appellant that an employee who refused an offer of suitable work without cause was not entitled to wage-loss or schedule award compensation. It further advised that she would receive any difference in pay between the offered position and the current pay rate of the position held at the time of injury.

By letter dated August 7, 2020, OWCP notified appellant that her reasons for refusing the position were not valid and provided her 15 days to accept the position or have her entitlement to wage-loss compensation benefits terminated. It advised her that the offered position remained available.

Subsequently, OWCP received a July 2, 2020 report from Dr. Cautilli identical to his report of July 18, 2019. It further received a July 6, 2020 statement from appellant, who asserted that her physician, Dr. Cautilli, was also a Board-certified orthopedic surgeon and had treated her for over 25 years. Appellant maintained that Dr. Valentino had performed a cursory examination.

In a July 22, 2020 attending physician's report (Form CA-20), Dr. Cautilli diagnosed left shoulder tendinitis and found that appellant could not work.

By decision dated September 3, 2020, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective August 16, 2020, as she had refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It noted that she had not accepted the offered position and resumed work following its 15-day letter. OWCP determined that "the greater weight of medical evidence rests with Dr. Steven J. Valentino because he is a Board[-]certified orthopedic surgeon, and is the appropriate specialist to address and advise on this issue." It further determined that Dr. Valentino's report was rationalized and based on a complete and accurate medical history.

On September 9, 2020 Dr. Cautilli advised that appellant was "status post a left shoulder instability reconstruction with superimposed rotator cuff tendinitis related to a work injury...." He found that, based on her functional capacity evaluation, physical examination, and history, she could perform light duty lifting up to five pounds. Dr. Cautilli provided his qualifications.

Appellant submitted the last page of a January 17, 2013 report from Dr. Robert Franklin Draper, Jr., who provided a second opinion examination. Dr. Draper diagnosed a left shoulder strain and labral tear, status post labral repair, and resolved back strain. He found that appellant could perform lift-duty lifting no more than 10 pounds frequently or 20 pounds occasionally.

Appellant further submitted the results of an online search for Dr. Valentino's credentials as a Board-certified orthopedic surgeon, which had yielded no results. She further provided evidence that her physician, Dr. Cautilli, was a Board-certified orthopedic surgeon.

⁴ On November 20, 2019 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation. The rehabilitation counselor submitted reports until March 21, 2021, when she closed rehabilitation services.

On March 2, 2021 appellant requested reconsideration.

By decision dated May 28, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a). It found that the medical evidence from Dr. Cautilli was substantially similar to that already of record.

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 own motion or on application.⁵

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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

ANALYSIS

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

On reconsideration appellant submitted new evidence relevant to the underlying issue of OWCP's terminating of her wage-loss compensation for refusing suitable work. OWCP referenced the credentials of Dr. Valentino in its September 3, 2020 termination decision and

⁵ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also 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).

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

⁷ *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 (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 (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

found that his report constituted “the greater weight” of the evidence, noting he was a Board-certified orthopedic surgeon, which is a specialty designated by the American Board of Medical Specialists (ABMS). Appellant submitted the results of a computer search that failed to document Dr. Valentino’s credentials as a Board-certified orthopedic surgeon. She further submitted the qualifications of her attending physician, Dr. Cautilli, showing that he is Board-certified in orthopedic surgery by the ABMS. As OWCP based its finding that Dr. Valentino’s report constituted “the greater weight” of the evidence, in part, on his credentials, this evidence is relevant and pertinent and not previously considered. Therefore, the Board finds that the submission of this evidence requires reopening of appellant’s claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).¹⁰

Consequently, the Board will set aside OWCP’s May 28, 2021 decision and remand the case for an appropriate merit decision on appellant’s claim.

CONCLUSION

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

¹⁰ *Supra* note 6; *see also J.T.*, Docket No. 20-1301 (issued July 28, 2021).

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: December 1, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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