

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 April 4, 2019 appellant, then a 59-year-old area maintenance technician (AMT), filed a traumatic injury claim (Form CA-1) alleging that, on that day, he felt a "pop" in his right shoulder reaching to change a lightbulb while in the performance of duty. OWCP initially accepted the claim for sprain of right shoulder joint. It subsequently expanded its acceptance of the claim to include superior glenoid labrum lesion of right shoulder and complete tear or rupture of the right rotator cuff. On October 4, 2019 appellant underwent an OWCP-authorized right shoulder arthroscopic debridement of the rotator cuff, distal clavicle resection, and tenodesis of the biceps tendon, performed by Dr. Craig T. Arntz, a Board-certified orthopedic surgeon.⁴ OWCP paid appellant appropriate wage-loss compensation on its supplemental rolls for the period October 4 through December 10, 2019. Appellant's last day in pay status was December 10, 2019.

In a February 14, 2020 decision, OWCP denied appellant's claim for wage-loss compensation for the period from December 11 through 20, 2019 pursuant to 20 C.F.R. § 10.500(a) based on his refusal to accept the employing establishment's December 10, 2019 offer for a temporary light-duty assignment of "customer service." It explained that the evidence established that he had medical restrictions in place, a light-duty work assignment within those restrictions available to him, and he was previously notified in writing that such light-duty work was available.

On March 16, 2020 appellant appealed to the Board. By decision dated May 14, 2021, the Board affirmed OWCP's February 14, 2020 decision.⁵ The Board found that the evidence showed that, for the period December 11 through 20, 2019, appellant could perform the temporary modified light-duty position available to him, based upon his medical restrictions. The Board concluded that OWCP properly denied entitlement to wage-loss compensation for that period. The Board noted that its jurisdiction was limited to the issue of appellant's entitlement to disability for the claimed period of December 11 through 20, 2019 and that it would not address appellant's pleadings on appeal asserting issues concerning his denial of compensation and medical treatment, denial of third-party compensation, denial of accommodation, denial of return to work, and involuntary retirement. The Board also noted that while appellant had filed a motion to consolidate the present appeal with his appeal in Docket No. 21-0375, regarding his claim in OWCP File No. xxxxxx400, the Board denied the request as it involved a subsequent OWCP decision, an appeal from which was pending under another docket number.

On May 13, 2022 appellant requested reconsideration. He contended that he was presenting old and new evidence and/or argument and requested that the Board use the omitted, overlooked, and new evidence submitted while setting aside the fraudulent evidence submitted by the employing establishment. Appellant requested that the employment-related injuries under the

³ Docket No. 20-0888 (issued May 14, 2021).

⁴ The surgical report discusses appellant's right shoulder conditions but references his left shoulder regarding the surgical procedure.

⁵ *Supra* note 2.

current claim, OWCP File No. xxxxxx761 and his other claims under OWCP File Nos. xxxxxx400 and xxxxxx140 be reopened and the related issues reviewed together on their merits. He asserted that OWCP and the Board erred by not considering records, doctor reports or the Family and Medical Leave Act record from all of his claims. Appellant also asserted that the employing establishment created fraudulent documents regarding the dates provided for his disability retirement and claim for compensation (Form CA-7). He discussed in detail the alleged errors in his “election” of disability retirement since December 10, 2019, the denial of third-party compensation, denial of accommodation and denial of return to work as an AMT. Appellant asserted that the “holiday helper”/customer service position was not made in good faith, was not a vacant position, and he was not qualified (had not received training) for the out-of-craft reassignment. He further asserted that OWCP did not consider his training and AMT vocational capabilities, or any of the limitations and restrictions which preexisted before the injury in his other claims. This included a lifting restriction of no more than 50 pounds for appellant’s back injury, a color-blind disability and a stress disability.

By decision dated August 2, 2022, OWCP denied appellant’s request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

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.⁶

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.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.⁸ A right to reconsideration within one year also accompanies any subsequent merit decision on the issues.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ If the request is timely but fails to meet at least one

⁶ 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).

⁷ 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).

⁸ *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). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.607(b); *see E.D.*, Docket No. 21-0093 (issued November 9, 2022); *Debra McDavid*, 57 ECAB 149 (2005).

¹⁰ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

ANALYSIS

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

Preliminarily, the Board notes that it is unnecessary to consider the evidence that appellant submitted prior to the issuance of OWCP's February 14, 2020 decision as the Board considered that evidence in its May 14, 2021 decision. Findings made in prior Board decisions are *res judicata*, absent further merit review by OWCP, under section 8128 of FECA.¹²

In his reconsideration request, appellant argued, in relevant part, that OWCP improperly denied his claim for wage-loss compensation for the period December 11 through 20, 2019 pursuant to 20 C.F.R. § 10.500(a) based on his refusal to accept the employing establishment's December 10, 2019 offer for a temporary light-duty assignment of "customer service" as it did not consider his preexisting conditions in his other OWCP claims. The Board finds that this constitutes a new and relevant legal argument not previously considered. Therefore, appellant is entitled to a review of the merits based on the second above-noted requirements under section 10.606(b)(3).¹³ Accordingly, the Board will set aside OWCP's August 2, 2022 decision and remand the case for an appropriate merit decision.

CONCLUSION

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

¹¹ *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).

¹² *B.D.*, Docket No. 20-1365 (issued December 21, 2022); *T.B.*, Docket No. 19-0029 (issued June 21, 2019); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹³ 20 C.F.R. § 10.606(b)(3); *T.H.*, Docket No. 21-1151 (issued January 18, 2022); *M.M.*, Docket No. 20-0806 (issued June 4, 2021).

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 10, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board