

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

M.S., Appellant)

and)

U.S. POSTAL SERVICE, SAINT LOUIS POST)
OFFICE, St. Louis, MO, Employer)

**Docket No. 24-0258
Issued: May 20, 2024**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 19, 2024 appellant filed a timely appeal from a September 25, 2023 merit decision and a January 2, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an injury in the performance of duty, as alleged; and (2) 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

On July 16, 2023 appellant, then a 54-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed a shoulder injury due to factors of her federal

¹ 5 U.S.C. § 8101 *et seq.*

employment, including repetitively lifting heavy trays.² She indicated that she first became aware of her condition on May 15, 2023 and realized its connection to her federal employment on July 13, 2023. Appellant stopped work on July 16, 2023.

In a July 19, 2023 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and provided a factual questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor. It afforded appellant 60 days to submit the requested evidence and afforded the employing establishment 30 days.

On July 26, 2023 OWCP received appellant's job description.

In an August 28, 2023 follow-up development letter, OWCP advised appellant that it had conducted an interim review, and the evidence remained insufficient to establish her claim. It noted that she had 60 days from the July 19, 2023 development letter to submit the requested supporting evidence. OWCP further advised that if the evidence was not received during this time, it would issue a decision based on the evidence contained in the record. No additional evidence was received.

By decision dated September 25, 2023, OWCP denied appellant's claim, finding that she had not submitted sufficient evidence to establish that the implicated employment factors. It noted that she did not respond to its developmental questionnaire. Consequently, OWCP found that appellant had not met the requirements to establish an injury as defined by FECA.

On December 26, 2023 appellant requested reconsideration and submitted additional medical evidence. On July 19, 2023 Dr. Nicholas S. Aberle II, an orthopedic surgeon, examined appellant due to intermittent shoulder pain. He recounted that appellant performed repetitive lifting and transporting of packages and trays at work. Dr. Aberle also noted that several days prior to his examination appellant experienced an acute exacerbation when she felt a pop in her shoulder while carrying a large tray. He diagnosed a possible left rotator cuff tear and recommended a magnetic resonance imaging (MRI) scan. Dr. Aberle reviewed the MRI scan in an August 16, 2023 note and diagnosed a left rotator cuff tear with full-thickness supraspinatus tear.

By decision dated January 2, 2024, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United

² OWCP assigned the present claim OWCP File No. xxxxxx257. Appellant previously filed a traumatic injury claim (Form CA-1) for a November 2, 2019 head and left shoulder injury under OWCP File No. xxxxxx267. OWCP designated that claim a short form closure. These two files have not been administratively combined by OWCP.

³ *Supra* note 1.

States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁴ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty, as alleged.

In her Form CA-2, appellant indicated that she developed a shoulder injury as a result of repetitively lifting heavy trays at work. OWCP, in its July 19, 2023 development letter, requested that she complete an attached questionnaire and provide a detailed factual description of the alleged employment factors. Appellant, however, did not respond to OWCP's July 19, 2023 development letter or otherwise provide an additional factual statement identifying employment factors alleged to have caused or contributed to a medical condition.⁸

As the evidence of record is insufficient to establish the alleged employment factors, the Board finds that appellant has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

⁴ *A.R.*, Docket No. 23-0111 (issued December 14, 2023); *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

⁸ *A.R.*, *supra* note 4; *id.*; *C.H.*, Docket No. 21-0932 (issued February 10, 2022).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁹ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁰ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.¹¹ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹² When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

On December 26, 2023 appellant timely requested reconsideration of OWCP's September 25, 2023 decision, which denied her occupational disease claim, finding that she did not submit sufficient evidence to establish the alleged factors of her federal employment which she attributed her conditions. She submitted reports dated July 19 and August 16, 2023 from Dr. Aberle. Dr. Aberle described appellant's work duties, including repetitive lifting and transporting of packages and trays at work, and diagnosed a left rotator cuff tear with full-thickness supraspinatus tear.

The Board finds that the reports dated July 19 and August 16, 2023 from Dr. Aberle constitute relevant and pertinent new evidence as they specifically address the underlying factual issue in this case, *i.e.*, whether appellant established factors of her federal employment which she believed caused or aggravated her diagnosed left shoulder condition.¹⁴ Therefore, the submission of this evidence requires reopening of her claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).

⁹ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application.” 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.607.

¹¹ *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 (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.

¹² *Id.* at § 10.606(b)(3).

¹³ *Id.* at § 10.606(b)(3).

¹⁴ *M.P.*, Docket No. 20-0948 (issued August 11, 2022).

The Board will therefore set aside OWCP's January 2, 2024 decision and remand the case for an appropriate merit decision.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty, as alleged. The Board further finds that OWCP improperly denied her request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2023 decision of the Office of Workers' Compensation Programs is affirmed. The January 2, 2024 decision is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 20, 2024
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