

days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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.⁵ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 6, 2019 appellant, then a 41-year-old rural carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2019 he sustained a left shoulder injury when a customer dropped a pallet on his left shoulder while in the performance of duty. He stopped work on the date of injury.

On December 2, 2019 OWCP accepted the claim for left shoulder sprain. Appellant returned to limited-duty work from December 11, 2019 through January 6, 2020, and stopped work on January 7, 2020. OWCP paid him wage-loss compensation on the supplemental rolls commencing January 7, 2020, and on the periodic rolls commencing April 26, 2020. On April 21, 2020 it expanded the acceptance of the claim to include cervical strain.

By decision dated April 26, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 27, 2021. It found that the weight of the medical evidence rested with the January 12, 2021 report of Dr. Martin H. Wagner, a Board-certified neurologist serving as a second opinion physician.

By decision dated August 13, 2021, OWCP's hearing representative affirmed the April 26, 2021 decision.⁶

On December 23, 2021 appellant, through then-counsel, appealed to the Board. By decision dated April 10, 2023, the Board affirmed the August 13, 2021 decision, finding that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that OWCP received additional evidence following the October 13, 2023 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

⁵ Docket No. 22-0300 (issued April 10, 2023).

⁶ On January 14, 2022 OWCP granted appellant a schedule award for 26 percent permanent impairment of the left upper extremity (left arm).

benefits, effective April 27, 2021, and that appellant had not met his burden of proof to establish continuing disability or residuals on or after April 27, 2021, causally related to his accepted November 1, 2019 employment injury.⁷

While the appeal was pending, OWCP received additional evidence, including December 1, 2020 treatment notes, October 27, 2021 and July 12, 2022 operative reports from Dr. Joseph Blythe, an osteopathic Board-certified orthopedic surgeon. Dr. Blythe performed a cervical discectomy at C4-6 on October 27, 2021, and cervical fusion from C5-7 on July 12, 2022.

OWCP also received a November 15, 2022 report from Dr. John W. Ellis, a Board-certified family practitioner, who requested that appellant's claim be expanded to include additional medical conditions to include cervical radiculopathy; cervical disc disorder; spinal stenosis, cervical region; and post-concussion syndrome. He opined that these conditions were directly related to the accepted work injury. OWCP also received January 27, 2023 work restrictions from Dr. Ellis.

On October 11, 2023 appellant requested reconsideration and resubmitted the November 15, 2022 report of Dr. Ellis.

By decision dated October 13, 2023, OWCP denied appellant's October 11, 2023 request for reconsideration, pursuant to 5 U.S.C. § 8128(a), finding that the evidence submitted on reconsideration consisted of the November 15, 2022 report from Dr. Ellis that was previously reviewed and considered.

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 or her own motion or on application.⁸

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.⁹

⁷ Docket No. 22-0300 (issued April 10, 2023).

⁸ 5 U.S.C. § 8128(a); *see L.J.*, Docket No. 22-0348 (issued April 28, 2023); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁹ 20 C.F.R. § 10.606(b)(3); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *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).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration.¹²

ANALYSIS

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

The underlying issue on reconsideration is medical in nature; whether appellant met his burden of proof to establish continuing disability or residuals on or after April 27, 2021, causally related to his accepted November 1, 2019 employment injury.

With his October 11, 2023 reconsideration request, appellant submitted the November 15, 2022 report from Dr. Ellis. While OWCP denied the reconsideration request on the grounds that this report was previously considered in OWCP's August 13, 2021 decision, the Board notes that the November 15, 2022 report from Dr. Ellis post-dates the August 13, 2021 decision and, therefore, was not previously considered by OWCP. The Board therefore finds that the November 15, 2022 report from Dr. Ellis constitutes relevant and pertinent new evidence. The Board also notes that other medical evidence as noted above was received after the August 13, 2021 decision and was not reviewed by OWCP in that decision.

Therefore, the submission of this evidence requires the reopening of appellant's claim for a merit review, pursuant to the third above-noted requirement of 20 C.F.R. § 10.606(b)(3).¹³

The Board shall, therefore, reverse OWCP's October 13, 2023 decision and remand the case for an appropriate merit decision.

¹⁰ *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.

¹¹ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

¹² *Id.* at § 10.608(b); *S.K.*, Docket No. 22-0248 (issued June 27, 2022); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹³ *See T.A.*, Docket No. 23-0928 (issued June 10, 2024); *B.D.*, Docket No. 23-0240 (issued December 13, 2023); *R.L.*, Docket No. 21-0220 (issued October 19, 2021); *L.M.*, Docket No. 20-1185 (issued January 13, 2021); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the October 13, 2023 nonmerit decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 10, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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