

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

On August 13, 2019 appellant, then a 37-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 10, 2019 she sustained a left shoulder strain when lifting a heavy sack while in the performance of duty. She did not stop work.

In an August 13, 2019 form report, Nicole O'Donnell, a nurse practitioner, noted appellant's August 10, 2019 injury date, diagnosed left shoulder strain, and indicated that appellant was capable of returning to very light work on August 13, 2019. In a report of even date, she detailed an injury history, again diagnosed left shoulder pain, and, on examination, reported that appellant had good left shoulder range of motion, some discomfort over the acromioclavicular joint, and generalized discomfort with palpation over entire anterior aspect. Ms. O'Donnell related that a left shoulder x-ray was negative for any acute process.

An August 13, 2019 x-ray of appellant's left shoulder revealed mild left shoulder acromioclavicular joint degenerative changes.

In an August 29, 2019 report, Dr. Jose A. Padilla, an orthopedic surgeon, noted the history of appellant's claimed August 10, 2019 incident, related her physical examination findings, and diagnosed traumatic left shoulder pain. He also noted that review of left shoulder x-rays showed mild acromioclavicular joint degenerative changes. In a work excuse of even date, Dr. Padilla advised that appellant was to continue with current work restrictions pending further testing.

A September 27, 2019 left shoulder magnetic resonance imaging (MRI) scan revealed nondisplaced superior labral tear and moderate acromioclavicular osteoarthritis.

In progress notes dated October 3, 2019, Dr. Padilla reviewed an MRI scan and diagnosed left shoulder rotator cuff tear with severe acromioclavicular osteoarthritis. He recommended that appellant undergo arthroscopic examination of the left shoulder.

On October 29, 2019 appellant underwent left shoulder arthroscopic subacromial decompression and distal clavicle resection surgery, which was performed by Dr. Padilla.

In a November 15, 2019 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to provide the necessary evidence.

In a December 3, 2019 response, appellant indicated that the sack she lifted on August 10, 2019 weighed approximately 85 pounds. She also indicated that she had not experienced any left shoulder symptoms prior to August 10, 2019.

By decision dated January 23, 2020, OWCP denied the claim, finding that the evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted August 10, 2019 employment incident.

Following the denial of her claim, appellant resubmitted a September 27, 2019 MRI scan, along with October 3, 2019 progress notes and an October 29, 2019 operative report from Dr. Padilla.

On January 21, 2021 appellant, through counsel, requested reconsideration. Counsel asserted that appellant's claim should be accepted for left rotator cuff tear, left anterior glenoid labral tear and exacerbation of left shoulder bursitis and left shoulder acromioclavicular joint arthritis based on Dr. Padilla's medical reports and MRI scan findings.

In progress notes dated November 4 and December 2, 2019 and January 9 and February 27, 2020, Dr. Padilla provided examination findings and diagnosed status post left shoulder arthroscopic surgery. In the December 2, 2019 progress notes, he related that appellant had been doing well following her left shoulder decompression and distal clavicle resection until she picked up her four-year old and experienced instant pain. Dr. Padilla related an assessment of exacerbation of left shoulder bursitis. In the January 9, 2020 progress notes, he referred appellant to another physician to address workers' compensation issues as appellant asserted that her injury was an employment injury under dispute and had not been officially filed.

OWCP also received a January 9, 2020 letter from Joe Cotton, a physician assistant, and progress notes dated November 23 and December 30, 2019 from Dr. Padilla's staff members.

By decision dated March 9, 2021, OWCP denied appellant's request for reconsideration of the merits of the claim under 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.³

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.⁴

³ *Supra* note 2 at § 8128(a); *see also P.S.*, Docket No. 20-1090 (issued September 9, 2021); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *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.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

ANALYSIS

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

Appellant, through counsel, filed a timely request for reconsideration on January 21, 2021. In support of her request, counsel argued that the evidence of record was sufficient to establish that the claim should be accepted for left rotator cuff tear, left anterior glenoid labral tear and exacerbation of left shoulder bursitis and left shoulder acromioclavicular joint arthritis as a result of the accepted August 10, 2019 employment incident. The Board finds that this argument does not show that OWCP erroneously applied or interpreted a specific point of law, nor does it advance a relevant legal argument not previously considered by OWCP. Counsel's general disagreement with OWCP's denial of the claim is insufficient to meet one of these two criteria.⁸ Additionally, his lay opinion regarding causal relationship is not probative regarding the issue in this case, which, as noted, is medical in nature.⁹ Consequently, appellant is not entitled to further review of the merits of her claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁰

With her request for reconsideration, appellant resubmitted a September 27, 2019 MRI scan of her left shoulder, October 3, 2019 progress notes from Dr. Padilla, and an October 29, 2019 operative report. Submission of medical evidence that either duplicates or is substantially similar to evidence of record does not constitute a basis for reopening a case.¹¹

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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 2.1602.4(b).

⁶ *Id.* at § 10.608(a); *see also P.S.*, *supra* note 3; *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *E.V.*, Docket No. 16-0080 (issued June 21, 2016).

⁹ *Id.*; *see Gloria J. McPherson*, 51 ECAB 441, 448 (2000).

¹⁰ *Supra* note 4 at 10.606(b)(3); *see T.B.*, Docket No. 21-0045 (issued June 2, 2021); *J.V.*, Docket No. 19-0990 (issued August 26, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹¹ *See B.S.*, Docket No. 20-0927 (issued January 29, 2021); *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *A.A.*, Docket No. 18-0031 (issued April 5, 2018); *Eugene F. Butler*, 36 ECAB 393 (1984).

Appellant also submitted progress notes dated November 4, December 2 and 30, 2019, January 9, and February 27, 2020, from Dr. Padilla who provided physical examination findings and diagnosed status post left shoulder arthroscopic surgery and exacerbation of left shoulder bursitis. The underlying issue in this case is whether appellant's left shoulder conditions are causally related to the accepted employment incident. However, Dr. Padilla's reports did not address causal relationship and are, therefore, irrelevant to the underlying issue in this case.¹² The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹³

Appellant also submitted a January 9, 2020 letter from Mr. Cotton, a physician assistant, noting that appellant attributed her left shoulder pain to a work injury. Mr. Cotton's letter has no probative value, however, as physician assistants are not considered physicians as defined under FECA.¹⁴ OWCP also received progress notes dated November 23 and December 30, 2019 from Dr. Padilla's staff members. These progress notes do not constitute medical evidence under FECA as there is no indication that staff members are physicians.¹⁵ As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁶

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁷

¹² *T.B.*, *supra* note 10; *Y.L.*, Docket No. 20-1025 (issued November 25, 2020).

¹³ *See T.B., id.*; *T.T.*, Docket No. 19-0319 (issued October 26, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000).

¹⁴ Section 8101(2) of FECA provides that medical opinions can only be given by a qualified physician. This section defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *M.M.*, Docket No. 20-0019 (issued May 6, 2020); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *see also C.S.*, Docket No. 20-1354 (issued January 29, 2021); *C.P.*, Docket No. 19-1716 (issued March 11, 2020) (physician assistants are not considered physicians as defined under FECA); *S.L.*, Docket No. 19-0603 (issued January 28, 2020) (nurse practitioners are not considered physicians as defined under FECA).

¹⁵ *See S.D.*, Docket No. 21-0292 (issued June 29, 2021); *C.B.*, Docket No. 09-2027 (issued May 12, 2010) (a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2) and reports lacking proper identification do not constitute probative medical evidence); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

¹⁶ *See M.M.*, Docket No. 21-0227 (issued June 17, 2021); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

¹⁷ *See M.M., id.*; *J.B.*, Docket No. 20-0145 (issued September 8, 2020).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 27, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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