

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

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**J.D., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chicago, IL, Employer**

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**Docket No. 15-1879  
Issued: February 10, 2016**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 14, 2015 appellant filed a timely appeal from an April 21, 2015 merit decision and a July 1, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish consequential T8-9, T9-10, and T10-11 disc herniations in the performance of duty; (2) whether an OWCP hearing representative properly denied appellant's request for a subpoena; and (3) whether OWCP properly denied reconsideration of the merits of appellant's claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## FACTUAL HISTORY

This matter has been previously before the Board. The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that on or before March 28, 2005 appellant, then a 48-year-old mail processing clerk, sustained a herniated C5-6 disc, lumbar strain, and a right rotator cuff tear due to repetitive lifting and bending while handling mail. It later expanded the claim to include a bilateral hip strain/sprain and an aggravation of osteoarthritis of both hips.<sup>2</sup> Appellant stopped work in May 2005 and did not return.

Appellant submitted medical reports dated from April 14, 2005 through July 14, 2008 from Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon. Dr. Chmell diagnosed lumbar disc derangement, lumbar degenerative disc disease, a bilateral traumatic hip strain, right-sided lumbar radiculopathy and sciatica, and a herniated lumbar disc.

On June 20, 2008 appellant claimed a schedule award. Dr. Chmell provided a November 19, 2009 report finding 57 percent impairment of each leg due to restricted motion and weakness, according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*) then in effect. An OWCP medical adviser reviewed Dr. Chmell's report and found 10 percent impairment of each lower extremity due to limited hip motion. By decision dated February 3, 2009, OWCP issued appellant a schedule award for 10 percent permanent impairment of each lower extremity.<sup>3</sup> Appellant appealed to the Board.

During the pendency of the prior appeal, appellant submitted an April 30, 2009 magnetic resonance imaging (MRI) scan of the thoracic spine showing a right paracentral disc herniation at T8-9, a minute central disc herniation at T9-10, and a small left paracentral herniation at T10-11 without mass effect of the spinal cord.<sup>4</sup>

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<sup>2</sup> OWCP accepted several of appellant's claims: OWCP File No. xxxxxx089 for bilateral knee and ankle injuries and conditions; OWCP File No. xxxxxx273 for contusions of the right shoulder and upper arm, face, scalp, neck, and head, and headaches; OWCP File No. xxxxxx861 and xxxxxx608 for three abdominal wall hernias and repairs; OWCP File Nos. xxxxxx055 and xxxxxx922 for bilateral carpal tunnel syndrome and right styloid tenosynovitis. In November 2009, OWCP combined appellant's claims under OWCP File Nos. xxxxxx055, xxxxxx273, and xxxxxx862 under OWCP File No. xxxxxx055.

<sup>3</sup> On March 3, 2010 OWCP obtained a second opinion from Dr. Rodrigo M. Ubilluz, a Board-certified neurologist, regarding whether appellant had any permanent impairment of the upper extremities due to the accepted injuries and conditions. Dr. Ubilluz found no ratable impairment of the upper extremities according to the sixth edition of the A.M.A., *Guides*.

<sup>4</sup> Appellant also submitted April 2009 imaging studies of her head, upper extremities, pelvis, hips, and lower extremities, a February 2, 2010 abdominal study, and February 2010 upper extremity electrodiagnostic studies. These tests did not address the thoracic spine.

By decision and order issued May 21, 2010,<sup>5</sup> the Board affirmed a February 3, 2009 OWCP decision granting a schedule award for 10 percent permanent impairment of each lower extremity.<sup>6</sup>

Dr. Chmell provided periodic reports from June 4, 2009 through April 29, 2010 diagnosing cervical and lumbar derangement, but did not address the thoracic spine. In a September 30, 2010 report, he newly diagnosed thoracic scoliosis. Dr. Chmell referred appellant for lumbar epidural injections to address right lower extremity sciatica and radiculopathy.

In a July 8, 2011 letter, Dr. Chmell asserted that appellant “did injure her thoracic spine and this continues to bother her.” He contended that unspecified medical records “documented an injury to the thoracic spine at work.” Dr. Chmell requested that OWCP accept a thoracic spine condition and authorize treatment. He submitted periodic reports through September 2011 diagnosing thoracic scoliosis.

In a September 27, 2011 letter received on October 3, 2011, appellant requested reconsideration of the schedule award decision.

By decision dated June 13, 2012, OWCP denied reconsideration as it was untimely filed within one year of the Board’s May 21, 2010 decision and order, and failed to present clear evidence of error.

On June 20, 2012 appellant claimed an additional schedule award for lower extremity impairment related to thoracic disc herniations. OWCP developed the claim as one for consequential injury. In support of her claim, appellant submitted August 6, 2012 lower extremity electromyography (EMG) and nerve conduction velocity (NCV) studies showing bilateral L5 radiculopathy and bilateral polyneuropathies. A May 4, 2013 lumbar MRI scan showed posterior facet degeneration from L1 to S1.

In a June 7, 2013 letter, appellant requested reconsideration of OWCP’s June 13, 2012 nonmerit decision. By letter dated June 19, 2013 OWCP forwarded that request to the Board. Appellant called OWCP on July 29, 2013 and disagreed that her claim should have been forwarded to the Board. OWCP responded by August 14, 2013 letter, noting that appellant’s only avenue of appeal was to the Board. Appellant thereafter filed an appeal with the Board on August 28, 2013, docketed as No. 13-1975.

In an August 16, 2013 letter, OWCP advised appellant of the additional evidence needed to establish her request for an increased schedule award claim, including a report from her attending physician finding that she had attained maximum medical improvement, and a complete description and assessment of any impairment utilizing the tables and grading schemes of the sixth edition of the A.M.A., *Guides*.

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<sup>5</sup> Docket No. 09-2007 (issued May 21, 2010).

<sup>6</sup> By order issued September 28, 2010, the Board denied appellant’s June 18, 2010 petition for reconsideration, finding that it did not establish any error of law or fact warranting further consideration.

On January 20, 2014 an OWCP medical adviser reviewed the medical record. He explained that, as there was no documented injury to the thoracic spine, it was likely that the thoracic disc herniations were due to the aging process.

On April 10, 2014 OWCP obtained a second opinion from Dr. Allan Brecher, a Board-certified orthopedic surgeon. Dr. Brecher reviewed the medical record and statement of accepted facts. He opined that appellant had not sustained consequential thoracic disc herniations as there was no clear work injury to the thoracic spine. Dr. Brecher explained that the thoracic disc herniations were “more likely than not related to an aging process and there is no compression.”

In a March 20, 2014 letter, Dr. Chmell opined that in addition to the accepted conditions, appellant sustained lumbar derangement, L5 radiculopathy, cervical derangement, thoracic derangement, bilateral ankle and foot derangement, and traumatic arthropathy of the lower legs. He opined that all of these conditions were “medically connected to work injury by direct cause.”<sup>7</sup>

By order issued April 7, 2014,<sup>8</sup> the Board dismissed appellant’s August 28, 2013 appeal as there was no final adverse OWCP decision within 180 days of August 28, 2013, the date appellant filed her appeal with the Board. The Board explained that the June 19, 2013 document was an informational letter and not a decision.

On June 12, 2014 Dr. Chmell found “muscle spasm and tenderness in the cervical, thoracic, and lumbosacral areas of the spine.” He diagnosed thoracic scoliosis.

OWCP found a conflict of medical opinion between Dr. Brecher, for the government, and Dr. Chmell, for appellant, regarding whether appellant sustained consequential thoracic disc herniations. To resolve the conflict, it selected Dr. Kevin M. Koutsky, a Board-certified orthopedic surgeon as the independent medical examiner. Dr. Koutsky submitted a July 24, 2014 report reviewing the medical record and statement of accepted facts. He noted that an April 30, 2009 MRI scan of the thoracic spine showed minimal degenerative changes “including right paracentral disc protrusion at T8-9, central disc protrusion noted at T9-10, small left paracentral disc protrusion noted at T10-11.” On examination, Dr. Koutsky noted tenderness to palpation of the parathoracic region without focal spasm, minimal limitation of thoracic spine motion, and some decreased sensation below both knees in a stocking distribution consistent with polyneuropathy. He also noted nonorganic signs indicative of somatization. Dr. Koutsky diagnosed age-related degenerative changes of the thoracic spine, unrelated to work factors. He explained that appellant had no permanent impairment related to a thoracic injury or condition.

By decision dated July 28, 2014, OWCP denied appellant’s claim for a consequential thoracic disc herniations at T8-9, T9-10, and T10-11 as the medical evidence did not support the causal relationship asserted. It accorded the weight of the medical evidence to Dr. Koutsky.

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<sup>7</sup> In a May 6, 2014 letter to OWCP, appellant requested a hearing regarding the Board’s April 7, 2014 order. By decision dated June 12, 2014, OWCP denied her request for hearing as the Branch of Hearings and Review does not have jurisdiction to review final decisions of the Board.

<sup>8</sup> Docket No. 13-1975 (issued April 7, 2014).

In an August 20, 2014 letter, appellant requested an oral hearing before an OWCP hearing representative. She contended that OWCP had not properly developed her claim. Appellant argued that as OWCP had accepted cervical and lumbar injuries, expanding the claim to include thoracic disc degeneration was fair and reasonable. At the hearing, held on February 11, 2015, she alleged that Dr. Koutsky failed to consider the April 2009 thoracic spine MRI scan. Appellant argued that the employing establishment and OWCP had engaged in a pattern of obstruction and retaliation against her for reporting alleged sexual harassment at the employing establishment in 1980. Following the hearing, she submitted her February 28, 2015 statement contending that Dr. Brecher's report was not well rationalized and, therefore, did not create a conflict with Dr. Chmell's opinion. Appellant provided copies of medical evidence previously of record. She also requested that OWCP subpoena x-rays taken by Dr. Koutsky on July 9, 2014, asserting that OWCP was seeking to "hide" the x-rays.

In a March 27, 2015 letter, appellant also requested reconsideration from OWCP regarding the Board's April 7, 2014 order dismissing a prior appeal. She generally contended that OWCP had improperly developed her schedule award claim, improperly denied her a hearing, had engaged in fraud, and did not provide her with all relevant documents. Appellant also argued that as a schedule award for bilateral knee impairment under File No. xxxxxx089 proved that OWCP had fully or properly considered the evidence in the present claim. She submitted copies of medical reports previously of record.

By decision dated April 21, 2015, the OWCP hearing representative affirmed OWCP's July 28, 2014 decision, finding that the medical evidence had failed to establish a consequential thoracic spine condition. He also denied appellant's request for a subpoena finding that the x-rays were not necessary for resolving the issue.

By decision dated July 1, 2015, OWCP also denied appellant's March 27, 2015 request for reconsideration as it did not raise substantive legal questions or include new, relevant evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.<sup>9</sup> In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, then a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.<sup>10</sup>

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<sup>9</sup> *Albert F. Ranieri*, 55 ECAB 598, 602 (2004); *A Larson, The Law of Workers' Compensation* § 10.01 (2000).

<sup>10</sup> *Charles W. Downey*, 54 ECAB 421, 422-23 (2003).

A claimant bears the burden of proof to establish his claim for a consequential injury. As part of this burden a claimant must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.<sup>11</sup>

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>12</sup> The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that appellant sustained a herniated C5-6 disc, lumbar strain, right rotator cuff tear, bilateral hip sprain/strain, and an aggravation of bilateral hip osteoarthritis. Appellant underwent an April 30, 2009 MRI scan showing disc herniations at T8-9, T9-10, and T10-11 without neural effacement. On that basis, she filed a June 20, 2012 claim for consequential injury.

In support of her claim, appellant submitted reports from Dr. Chmell, an attending Board-certified orthopedic surgeon. Dr. Chmell diagnosed thoracic scoliosis on September 30, 2010 but did not indicate a cause. He contended in his July 8, 2011 letter that appellant “did injure her thoracic spine” but did not indicate the date or mechanism of injury. On March 20, 2014 Dr. Chmell again opined that appellant sustained thoracic derangement “medically connected to work injury by direct cause.” In contrast, on January 20, 2014, an OWCP medical adviser opined that the thoracic disc herniations were due to aging. Dr. Brecher, a Board-certified orthopedic surgeon and second opinion physician, also opined that the T8-10 herniations were due to aging, as there was no history of thoracic injury, and no other apparent cause by history or examination. Thus, OWCP found a medical conflict between Dr. Brecher and Dr. Chmell.<sup>14</sup>

Dr. Koutsky, a Board-certified orthopedic surgeon and impartial medical specialist, explained on July 24, 2014 that the thoracic disc herniations demonstrated by the April 2009 MRI scan were age-related degenerative changes. He noted that the medical record and statement of accepted facts did not document any occupational injury to the thoracic spine. Based on Dr. Koutsky’s opinion, OWCP denied the claim for consequential thoracic disc herniations by decision dated July 28, 2014, which was affirmed by a hearing representative on April 21, 2015. Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a

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<sup>11</sup> *Id.*

<sup>12</sup> *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

<sup>13</sup> *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

<sup>14</sup> Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a).

proper factual and medical background, must be given special weight.<sup>15</sup> The Board finds that Dr. Koutsky's opinion was sufficiently well rationalized to represent the special weight of the medical evidence.

The Board notes that in an August 20, 2014 letter, appellant offered a mechanism of causation, asserting that the thoracic disc herniations were related by proximity to accepted cervical and lumbar injuries. She contended that it was therefore reasonable for OWCP to expand the claim. However, appellant's lay opinion is of no probative value as she is not a physician under FECA.<sup>16</sup>

As appellant did not submit additional medical evidence supporting that the accepted injuries caused thoracic disc herniations, she did not meet her burden of proof for expansion of the claim. The Board finds that OWCP's April 21, 2015 hearing representative decision is proper under the law and facts of this case.

On appeal, appellant asserts that the medical record supports that she sustained either a traumatic or consequential thoracic spine injury or condition. She emphasizes that OWCP acknowledged a thoracic spine condition because it granted a schedule award for bilateral hip impairment. As set forth above, the medical evidence does not support that appellant sustained a thoracic injury or condition causally related to the accepted injuries or other work factors. Appellant also alleges a pattern of deception, misconduct, and malfeasance by OWCP in the adjudication of her claim. The Board notes that she has provided no evidence to support these general accusations.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8126 of FECA provides that the Secretary of Labor, on any matter within his jurisdiction under this subchapter, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles.<sup>17</sup> The implementing regulations provide that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers, or other relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means and for witnesses only where oral testimony is the best way to ascertain the facts.<sup>18</sup> In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence

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<sup>15</sup> *B.P.*, Docket No. 08-1457 (issued February 2, 2009).

<sup>16</sup> See *James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988).

<sup>17</sup> 5 U.S.C. § 8126(1).

<sup>18</sup> 20 C.F.R. § 10.619; *Gregorio E. Conde*, 52 ECAB 410 (2001).

because there is no other means by which the testimony could have been obtained.<sup>19</sup> Section 10.619(a) of the implementing regulations provide that a claimant may request a subpoena only as a part of the hearings process and no subpoena will be issued under any other part of the claims process.

To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.<sup>20</sup> The hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion.<sup>21</sup> Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deduction from established facts.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

In the present case, appellant requested that the OWCP hearing representative issue a subpoena to obtain July 9, 2014 thoracic spine x-rays obtained by Dr. Koutsky. The hearing representative denied the request, finding the x-rays were irrelevant to establishing the critical issue of causal relationship.

As noted above, the hearing representative has discretion with respect to the issuance of subpoenas. Appellant argued that the x-rays were crucial to establishing causal relationship, without providing any valid explanation as to why they were necessary. The hearing representative reasonably determined that the evidence was irrelevant. There was no evidence presented to support that subpoenas were necessary with respect to the development of the relevant evidence in this case. The Board finds no abuse of discretion related to the denial of a subpoena request.<sup>23</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

To require the office to reopen a case for merit review under section 8128(a) of FECA,<sup>24</sup> section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and

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<sup>19</sup> *Id.*

<sup>20</sup> 20 C.F.R. § 10.619(a)(1).

<sup>21</sup> See *Gregorio E. Conde*, *supra* note 18.

<sup>22</sup> *Claudio Vazquez*, 52 ECAB 496 (2001).

<sup>23</sup> *D.O.*, Docket No. 15-1368 (issued October 22, 2015).

<sup>24</sup> 5 U.S.C. § 8128(a).



pertinent new evidence not previously considered by OWCP.<sup>25</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>26</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>27</sup> Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>28</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>29</sup>

### **ANALYSIS -- ISSUE 3**

Appellant requested reconsideration from OWCP by March 27, 2015 letter of the Board's April 7, 2014 order dismissing her appeal. She submitted evidence and argument regarding bilateral knee impairments. OWCP denied reconsideration by July 1, 2015 decision, finding that appellant's letter and accompanying medical records did not contain new, relevant evidence or argument.

The Board initially notes that an order of the Board is final as to the subject matter appealed, and such decisions and orders are not subject to review except by the Board.<sup>30</sup> The Board's decisions and orders are final upon the expiration of 30 days following issuance of that decision.<sup>31</sup> Thus, appellant has no right to seek OWCP's review of a Board decision or order. The Board further finds that OWCP appropriately denied reconsideration to the extent that she sought review of prior OWCP decisions. Appellant's March 27, 2015 argument is not relevant to underlying medical issue. She also submitted evidence previously of record. However, evidence or argument that repeats or duplicates evidence of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>32</sup> Therefore, they do not comprise a basis for reopening the case.<sup>33</sup>

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<sup>25</sup> 20 C.F.R. § 10.606(b)(3).

<sup>26</sup> *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

<sup>27</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>28</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>29</sup> *Annette Louise*, 54 ECAB 783 (2003).

<sup>30</sup> 20 C.F.R. § 501.6(d).

<sup>31</sup> *Id.*

<sup>32</sup> *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>33</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence or argument. Appellant did not do so in this case. She also did not show that OWCP erroneously applied or interpreted a point of law. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish consequential T8-9, T9-10, and T10-11 disc herniations in the performance of duty. The Board further finds that the OWCP hearing representative properly denied appellant's request for subpoena. The Board further finds that OWCP properly denied reconsideration of the merits of appellant's claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 1 and April 21, 2015 are affirmed.

Issued: February 10, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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