

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

A.S., Appellant	)	
	)	
and	)	Docket No. 18-1089
	)	Issued: December 28, 2018
U.S. POSTAL SERVICE, POST OFFICE,	)	
Pasco, WA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On May 4, 2018 appellant filed a timely appeal from an April 4, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated December 4, 2017, which became final after 30 days of issuance and is not subject to further review.<sup>1</sup> As there was no merit decision by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>3</sup>

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<sup>1</sup> 20 C.F.R. § 501.6(d); *see A.F.*, Docket No. 18-0645 (issued October 26, 2018).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted evidence on appeal. 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.*

## 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.<sup>4</sup> 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 February 11, 2014 appellant, then a 55-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained a neck and back injury as a result of a slip and fall on snow and ice in the employing establishment parking lot. He stopped work on February 11, 2014. OWCP accepted the claim for sprain of neck and sprain of back, lumbar region.

Appellant came under the care of Dr. Janmeet Sahota, a Board-certified osteopath specializing in orthopedic surgery. Beginning in June 2015, Dr. Sahota requested authorization for cervical spine surgery. On February 25, 2016 OWCP referred appellant to Dr. S. Daniel Seltzer, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a March 26, 2016 report, Dr. Seltzer advised that the February 11, 2014 employment injury caused sprains of the neck and lumbar region, which had resolved. As to the requested surgery, Dr. Seltzer indicated that, although appellant was a candidate for surgery, this was due to his underlying preexisting condition and not to the employment injury.

On February 15, 2017 OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Seltzer and Dr. Sahota regarding whether the requested cervical surgery should be authorized. It referred appellant to Dr. Lowell Anderson, a Board-certified orthopedic surgeon, for an impartial evaluation. In a March 20, 2017 report, Dr. Anderson diagnosed preexisting cervical spondylosis. He opined that appellant's present condition was a natural progression of the preexisting condition and that the February 11, 2014 work injury did not cause a disc protrusion at C6-7 or accelerate the natural progression of appellant's preexisting degenerative condition. Dr. Anderson concluded that no employment-related condition remained, and no surgical procedure was indicated due to the accepted conditions.

By decision dated April 10, 2017, OWCP found that the weight of the medical evidence rested with the impartial evaluation of Dr. Anderson and denied authorization for cervical spine surgery. By decision dated December 4, 2017, the Board affirmed the April 10, 2017 OWCP decision. The Board found the weight of the medical evidence rested with the opinion of Dr. Anderson, the impartial examiner.

OWCP subsequently received a May 18, 2017 report in which Dr. Sahota noted seeing appellant in follow up for a history of neck pain. Dr. Sahota diagnosed cervical disc stenosis at

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<sup>4</sup> Docket No. 17-1088 (issued December 4, 2017).

C4-7 and occipital neuralgia and recommended magnetic resonance imaging scan testing. Additional reports submitted included a December 14, 2017 treatment note from Matthew Corey Woolf, a physician assistant, and reports dated January 30 and March 1, 2018 from Nadean Pulfer, also a physician assistant.<sup>5</sup>

On March 27, 2018 appellant requested reconsideration. He referenced a January 18, 2017 injury, which had been accepted by OWCP under File No. xxxxxx455.

By decision dated April 4, 2018, OWCP denied appellant's March 27, 2018 request for reconsideration of the merits of his claim. It found the evidence submitted was irrelevant or immaterial and of no bearing on the issue of whether the requested surgery should be authorized.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>6</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which either: (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.<sup>7</sup>

Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.606(b), will be denied by OWCP without review of the merits of the claim.<sup>8</sup>

### **ANALYSIS**

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

In his March 27, 2018 request for reconsideration, appellant referenced an additional OWCP claim. The instant appeal is however limited to the April 4, 2018 OWCP decision, adjudicated under File No. xxxxxx702. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law nor did he advance a new and relevant legal argument not

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<sup>5</sup> The record also contains additional monthly reports from physician assistants. Dr. Kenneth Breeden, an osteopath and associate of Dr. Sahota, followed appellant for pain and medication management. He did not comment on any recommended cervical spine surgery. The record also contains a December 21, 2017 operative report for left knee total arthroplasty.

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.608(b).

previously considered in the present claim. Thus, he is not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>9</sup>

The Board also finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request. The underlying issue in this case is whether OWCP abused its discretion by denying appellant's authorization for cervical spine surgery. As the issue is medical in nature, it can only be resolved through the submission of medical evidence.<sup>10</sup>

Appellant submitted reports dated December 14, 2017, and January 30 and March 1, 2018 from Mr. Woolf and Ms. Pulfer, physician assistants. Physician assistants, however, are not considered physicians as defined by section 8101(2) of FECA.<sup>11</sup> Consequently, these reports have no probative value.

In his May 18, 2017 report, Dr. Sahota did not address the request for cervical spine surgery. As this evidence is not relevant to the underlying issue of this case, its submission did not require reopening appellant's claim for review on the merits.<sup>12</sup>

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied his reconsideration request.<sup>13</sup>

### **CONCLUSION**

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

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<sup>9</sup> *Id.* at § 10.606(b)(3); *see L.S.*, Docket No. 18-0811 (issued November 13, 2018).

<sup>10</sup> *M.A.*, Docket No. 18-0395 (issued July 17, 2018).

<sup>11</sup> 5 U.S.C. § 8101(2); *see J.L.*, Docket No. 18-0698 (issued November 5, 2018).

<sup>12</sup> *See R.R.*, Docket No. 18-1044 (issued October 24, 2018).

<sup>13</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 28, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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