

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

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<b>L.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-0811</b>
	)	<b>Issued: November 13, 2018</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Cleveland, OH Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 7, 2018 appellant, through counsel, filed a timely appeal from a February 8, 2018 nonmerit decision of the Office of Workers' Compensation Programs. As more than 180 days elapsed from the last merit decision dated July 1, 2015, to 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 the case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

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

## 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 May 18, 2015 appellant, then a 50-year-old supervisor, filed a traumatic injury claim (Form CA-1) alleging that she developed post-traumatic stress disorder (PTSD) on May 5, 2015 at 12:30 p.m. when she witnessed an attempted robbery. On the reverse of the form, appellant's supervisor indicated that appellant was injured in the performance of duty.

By development letter dated May 27, 2015, OWCP requested that appellant provide additional factual and medical evidence in support of her emotional condition claim. Appellant's manager completed a statement dated May 14, 2015 and described the events of May 5, 2015. She noted that a postal carrier alleged that a customer approached her postal vehicle and pulled out a gun. Appellant was present near this site, parked in a vehicle a short distance from the carrier. She provided a statement asserting that she observed an individual approaching the nearby carrier's vehicle, reached into his pants pocket, and pulled something out, but she did not indicate that she had seen a weapon. Appellant's manager noted that appellant provided both an oral and a written statement regarding the events of May 5, 2015, but did not stop work until May 18, 2015.

In notes dated May 19, 2015, Dr. Jameelad D. Strickland, an internist, diagnosed PTSD. She indicated that appellant should remain off work from May 18 through 29, 2015.

Appellant completed a narrative statement on June 4, 2015. She described conducting a supervisory inspection of a postal carrier on her route on May 5, 2015. Appellant noted that the carrier was parked at a convenience store on her route and appellant parked behind her. At 12:30 p.m. a male in his mid-thirties walked to the carrier's vehicle and as he approached pulled something out of his pocket. He then noticed appellant and began to walk backwards rapidly. The carrier then jumped from her vehicle and informed appellant that the man had pulled a gun on her. Appellant began to try to telephone the police, but the carrier returned to her vehicle and left the parking lot following the man. She noted, "I'm saying to myself, where is she going?" Appellant started her vehicle and "as I was pulling off I see a vision in my mind. I see us in a hail of bullets and got scared." She honked her horn and followed the carrier. The carrier reached the man and talked with him as he explored the contents of his pants pockets. She followed him for approximately 1000 feet and then got out of her vehicle and returned to appellant. The carrier informed appellant that she was going to contact a police officer on her route who had knowledge of the man's behavior.

Appellant contacted 911 and then realized that a police officer was directly behind her performing a traffic stop. She received his assistance following the stop. Appellant then telephoned her manager. The carrier alleged that the same person had drawn a gun the day before at a business on her route. She repeatedly opined that the man was hiding in bushes and was waiting for the police to leave. The carrier was unable to complete her route. Appellant and the carrier returned to the employing establishment and appellant felt overwhelmed. She informed the

postmaster that she was “shook up.” The carrier asked why this happened to her and appellant was unable to cope with the carrier’s distress.

Appellant telephoned the Employee Assistance Program after she arrived home. She described the events of the day and a prior, similar situation to the counselor. Appellant noted that, over a year ago, when she was the last employee left in the employing establishment, a man threatened to break all the windows when she refused to open the door after hours. This man went from door to door knocking and kicking at the glass. Appellant telephoned a coworker for help and called the police. Police dispatch informed appellant that officers had the man in custody, and asked appellant to step outside. Appellant opened the door and the man kicked the door so hard it shattered. She telephoned maintenance to repair the door. The counselor allegedly informed appellant that her current condition was due to both incidents.

Appellant stated that she was unable to cry following the May 5, 2015 incident even though she wanted to do so. She required extra sleep for the next three days and on May 7, 2015 noticed that she was angry.

Appellant submitted a copy of the police report regarding the May 5, 2015 incident. According to the report, while the carrier was delivering mail on St. Clair Avenue, a man approached the carrier and instructed her to give him rubber bands and displayed a handgun. The carrier knew the man as he was a postal customer on her route. Appellant approached and the man fled. She informed the police that she could not see what the man pulled from his pocket.

Appellant submitted a copy of the carrier’s statement noting that, while she and appellant were at lunch on St. Clair Avenue, a man she knew from her route walked towards her, reached in his pocket, and pulled out a gun. She alleged that when the man saw appellant parked behind her in another postal vehicle, he put the gun back in his pocket and backed away. The man asked if the carrier had any rubber bands. The carrier shouted, “No.” She then jumped out of her vehicle and ran to appellant who indicated that she would call the police. The carrier looked in the store and saw the man inside. When the man exited the store, she pulled along beside him in her vehicle and began asking why he threatened her. The carrier indicated that appellant remained behind her in her car honking the horn and instructing her to keep going as the man was armed. She stopped her vehicle and the man disappeared through the parking lot.

When the police arrived the carrier identified the man with the gun based on a photograph. She noted that she had been his mail carrier for three or four years. The carrier asserted that a customer had informed her that the man had attempted a robbery at gunpoint the previous day. She indicated that the same man had harassed her on several occasions asking for money or if she wanted to shoot dice. The carrier alleged that she had reported this harassment to the employing establishment.

In a report dated June 22, 2015, Dr. Roopa K. Chavda, a psychiatrist, noted treating appellant since May 18, 2015. She described the incident of May 5, 2015 as appellant witnessing a man pull a gun on her colleague. Dr. Chavda noted that appellant felt threatened, was fearful for her life, and was worried that there would be a shootout. She also noted that appellant was experiencing flashbacks of a prior incident when she felt threatened by a drunken man who entered her workplace when she was alone. Dr. Chavda diagnosed PTSD. She opined, “In my opinion

[appellant] is suffering from symptoms of acute PTSD secondary to exposure to a traumatic incident at work. She is experiencing nightmares, increased physiological distress when subjected to events or instances that remind her of her past traumatic events, mood changes -- anxiety and irritability. [Appellant] is unable to tolerate situations that cause her to be hyper vigilant and anxious as these trigger panic attacks.” Dr. Chavda completed a form report on the same date and indicated that appellant could return to work on June 25, 2015.

By decision dated July 1, 2015, OWCP denied appellant’s traumatic emotional condition claim finding that she had not established that she was in the performance of duty at the time the alleged incident occurred. It found, “Although [appellant] your description is difficult to follow, it is clear that you and your coworker went outside the boundaries of being in the performance of duty upon pursuing the man with a handgun. You should have immediately contacted the police and your postal manager while in the parking lot of the convenience store instead of pursuing your coworker, who in turn was pursuing a man both you were conscious of possessing handgun.”<sup>3</sup>

On June 30, 2016 counsel requested reconsideration of the July 1, 2015 decision. In support of his request, he provided additional medical evidence as well as resubmitting Dr. Chavda’s June 22, 2015 report. Appellant submitted treatment notes from Eliot W. Gutow, a licensed social worker, beginning May 18, 2015 as well as notes from Siobhan D. Malave, a licensed social worker, beginning on July 16, 2015. Dr. Chavda examined appellant on May 28, and June 12, 2015. Dr. Shila J. Mathew, a Board-certified psychiatrist, examined appellant on July 21 and 22, 2015 for psychiatric consultation due to a traumatic event which occurred in May 2015. Appellant also provided treatment notes from Dr. Joshua H. Zarowitz, an osteopath, who examined her on August 27, November 16, and December 18, 2015, January 29 and March 16, 2016 due to PTSD, anxiety, and depression. Dr. Cheryl Wills, a Board-certified psychiatrist, completed reports on May 3 and 9, 2016 and diagnosed major depressive disorder as well as chronic PTSD triggered by workplace trauma.

By decision dated February 8, 2018, OWCP denied appellant’s request for reconsideration of the merits of her claim. It noted that her claim was denied as she was found not to be in the performance of duty at the time her injury occurred. OWCP found that appellant failed to submit factual evidence supporting her contention that she was in the performance of duty at the time her alleged injury occurred. It contended that she voluntarily deviated from her federal duties when she chose to leave the parking lot of the convenience store and pursue a man who potentially had a handgun.

### **LEGAL PRECEDENT**

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.<sup>4</sup> Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of

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<sup>3</sup> Appellant appealed this decision to the Board on December 8, 2015. On June 15, 2016 counsel requested that the Board dismiss the appeal. On August 17, 2016 the Board issued an *Order Dismissing Appeal*.

<sup>4</sup> 20 C.F.R. § 10.607(a).

compensation at any time based on its own motion or on application.<sup>5</sup> To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that 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 pertinent new evidence not previously considered by OWCP.<sup>6</sup> 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.<sup>7</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>8</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>9</sup> When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set for at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>10</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>11</sup>

### ANALYSIS

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

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

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<sup>5</sup> 5 U.S.C. § 8128(a); *A.D.*, Docket No. 18-0497 (issued July 25, 2018).

<sup>6</sup> 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>7</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>8</sup> *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

<sup>9</sup> *C.F.*, Docket No. 18-0360 (issued July 19, 2018); *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>10</sup> *C.F.*, *id.*; *Annette Louise*, 54 ECAB 783 (2003).

<sup>11</sup> *M.E.*, 58 ECAB 694 (2007).

The Board further finds that appellant has failed to submit relevant and pertinent new evidence in support of reconsideration. While appellant submitted additional medical evidence, this evidence is not relevant to the reasons for which OWCP denied her claim.<sup>12</sup> The issue in her claim was factual and legal, not medical, whether she was in the performance of duty at the time her injury occurred. As noted above, the submission of argument/evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>13</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered.

### **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).

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<sup>12</sup> Appellant also provided a series of treatment notes from Eliot W. Gutow and Siobhan D. Malave, licensed social workers. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists, and social workers are not considered "physician[s]" as defined under FECA. *R.B.*, Docket No. 17-0890 (issued October 18, 2017); *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); 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

<sup>13</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 8, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2018  
Washington, DC

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

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

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