

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

F.M., Appellant)	
)	
and)	Docket No. 17-1945
)	Issued: October 17, 2018
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, West Sacramento, CA, Employer)	
)	

Appearances:
Edward Alcantar, for the appellant¹
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 September 18, 2017 appellant, through her representative, filed a timely appeal from a September 6, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated November 2, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

³ On appeal appellant's representative provided additional evidence that was not part of the record when OWCP issued its September 6, 2017 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

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 1, 2016 appellant, then a 39-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging "[p]ain in hand," which she attributed to performing repetitive work. She indicated that she first became aware of her condition on November 12, 2015, but it was not until July 28, 2016 that she first realized her condition was caused or aggravated by her federal employment. Appellant stopped work on May 31, 2016, and had not returned as of the date she filed her Form CA-2.

In a May 19, 2016 report, Dr. Laura A. Howard, a Board-certified family practitioner, noted that she had examined appellant for continuing left hand pain and referred her to an orthopedic specialist. She noted, "[t]his is not work-related." Dr. Howard advised that appellant should not lift anything more than 10 pounds. Additionally, she indicated that appellant was still able to push and pull objects, and that she had no other physical restrictions.

In a June 30, 2016 physical activity status report, Kristen Cheney, a certified physician assistant (PA-C), noted that appellant had left hand extensor tenosynovitis and required rest and occupational therapy to improve her symptoms. She further indicated that appellant should remain off work through July 30, 2016. In a July 28, 2016 physical activity status report, Ms. Cheney advised that she should continue to remain off work through August 28, 2016.

In an August 9, 2016 development letter, OWCP advised appellant of the need to submit additional factual and medical evidence in support of her claim for FECA benefits. It explained that nurse practitioners and physician assistants were not considered qualified physicians under FECA unless their report was countersigned by a physician. OWCP afforded appellant 30 days to submit the requested information.

OWCP subsequently received June 30 and July 28, 2016 progress notes from Ms. Cheney.⁴ Ms. Cheney noted that appellant worked as a mail handler and did a lot of lifting, pushing, and pulling with her hands. Appellant reported left hand pain over the prior six months and advised that her primary care physician had placed her on modified duty because of the pain. Ms. Cheney initially diagnosed left carpal tunnel syndrome, left thumb extensor pollicis longus tenosynovitis, and left middle finger flexor tenosynovitis. The July 28, 2016 follow-up progress notes omitted the previous diagnoses of left carpal tunnel syndrome and left middle finger flexor tenosynovitis, but included additional diagnoses of left index and small finger extensor tenosynovitis. In the latter report, Ms. Cheney characterized appellant's left hand condition as an overuse injury and recommended that she take off four weeks from work and undergo hand therapy.

⁴ The progress notes identified Dr. Michael S. Petersen, a Board-certified orthopedic surgeon, Dr. Andrew Opfell, a Board-certified orthopedic surgeon, and Dr. Scott Porter, an orthopedic surgeon, as supervising physicians. However, the reports do not bear either an electronic or original signature from any of the identified supervising physicians.

Ms. Cheney also provided a September 8, 2016 physical activity status report, advising that appellant should remain off work through October 20, 2016.

In a September 13, 2016 statement, appellant described her work-related activities as prepping, lifting, pushing, and pulling five days a week, eight hours per day. She also noted that her outside activities consisted of daily living activities at home.

By decision dated November 2, 2016, OWCP denied appellant's claim finding that the medical evidence submitted was insufficient to establish that the diagnosed medical conditions were causally related to the accepted employment exposure.

On June 9, 2017 appellant requested reconsideration. She argued that on May 23, 2017 her doctor of record answered all of the questions specified in the notice of decision. Appellant also referred to exhibits A-1 through A-5 and B-1 through B-2, and indicated that they were attached. She noted that her newly submitted exhibits contained her most recent medical documentation and limitations, however, these exhibits were not received into the record. Only the appeal request form and the prior decision with markings A-1 to A-5 were received. OWCP did not receive any new medical evidence in support of the request for reconsideration.

On September 6, 2017 OWCP denied appellant's request for reconsideration finding that she failed to submit new and relevant evidence or raise a substantive legal question, and thus was not entitled to a merit review of its prior decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸ When a timely application for reconsideration does not meet at least one

⁵ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). 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. 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 2.1602.4b.

⁸ 20 C.F.R. § 10.606(b)(3).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁹

ANALYSIS

On June 9, 2017 appellant timely requested reconsideration of OWCP's November 2, 2016 decision. The underlying issue on reconsideration is whether appellant met her burden of proof to establish causal relationship.

The Board finds that OWCP properly denied reopening appellant's case for further merit review. Appellant's June 9, 2017 request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law. She also did not advance a relevant legal argument not previously considered by OWCP. Lastly, although appellant claimed to have submitted new medical evidence with her June 9, 2017 request for reconsideration, prior to issuance of the September 6, 2017 decision there is no record of OWCP having received appellant's most recent medical documentation and limitations. The September 6, 2017 decision advised that the referenced medical exhibits and/or May 23, 2017 medical report had not been received. On appeal appellant indicated that she was "puzzled if not totally confused" about why OWCP had not received her exhibits. The record did not include any additional medical evidence received between November 2, 2016 and September 6, 2017. As appellant did not satisfy any of the criteria under 20 C.F.R. § 10.606(b)(3), OWCP properly denied further merit review.¹⁰

On appeal to the Board, appellant submitted a report dated May 23, 2017 and repeated her argument that her physician answered all pertinent questions about her occupational injury. However, the Board does not have jurisdiction over the merits of the case.

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).

⁹ *Id.* at § 10.608(a), (b).

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the September 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 17, 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