

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

C.F., Appellant	)	
	)	
and	)	<b>Docket No. 18-0583</b>
	)	<b>Issued: October 16, 2018</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Bellmawr, NJ, Employer	)	
	)	

*Appearances:*  
Aaron B. Aumiller, 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  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On January 22, 2018 appellant, through counsel, filed a timely appeal from a July 26, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days have elapsed since the last merit decision, dated April 28, 2016, to the filing of this

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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> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from July 26, 2017, the date of OWCP's last decision was Monday, January 22, 2018. Since using January 25, 2018, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 22, 2018, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

appeal, pursuant to the Federal Employees' Compensation Act<sup>3</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>4</sup>

### **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 23, 2014 appellant, then a 40-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that, while working on May 19, 2014, she was sliding a package out of the back of her truck and, when she went to lift it, she felt a burn in her lower abdomen. She reported that it felt like a burning tear to her right side. Appellant stopped work and first received medical care on May 19, 2014. On the reverse side of the claim form, appellant's supervisor checked a box marked "yes" indicating that her knowledge about the injury agreed with the employee's statement.

By development letter dated June 2, 2014, OWCP notified appellant that her claim was initially administratively handled to allow medical payments, as it appeared to involve a minor injury resulting in minimal or no lost time from work. However, appellant's claim was reopened for consideration of the merits because she had not returned to work in a full-time capacity. OWCP informed her that the evidence of record was insufficient to establish her traumatic injury claim. It advised appellant of the type of factual and medical evidence necessary to establish her claim. OWCP afforded her 30 days to submit additional evidence.

In a May 20, 2014 report, Dr. Tanisha Taylor, Board-certified in internal medicine, reported that appellant was a letter carrier who sustained an injury while taking a package out of a truck on May 19, 2014. Appellant reported that, as she was pulling it down, she felt a stabbing pain in her lower abdomen. She complained of pain and burning in her back and lower abdomen. Dr. Taylor diagnosed over exertion from sudden strenuous movement, sprain/strain of lumbosacral spine, and other injury of abdomen.

In a May 22, 2014 report, Dr. Taylor reported that appellant presented for a follow-up sooner than scheduled, noting that it was unclear whether her employing establishment had authorized the visit. She reported that appellant was adamant that she did not want to perform modified-duty work which included sorting mail. Dr. Taylor noted that appellant drove to her appointment and initially stated that she was feeling better, but suddenly felt worse. Appellant threatened that, if she were to return to work, it would be the physician's liability if she fell. Due to her persistent complaints of pain in the abdomen and suspect abdominal wall, Dr. Taylor ordered an abdominal ultrasound. Appellant completed the ultrasound, but left without having her work disposition addressed. Dr. Taylor noted that the abdominal x-rays and ultrasound were unremarkable. She further reported that an x-ray of the lumbar spine revealed no acute trauma.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> 20 C.F.R. § 501.3(e).

Dr. Taylor diagnosed over exertion from sudden strenuous movement, sprain/strain of lumbosacral spine, and other injury of abdomen.

By decision dated July 14, 2014, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that her diagnosed condition was causally related to the accepted May 19, 2014 employment incident.

On October 31, 2014 appellant requested reconsideration of OWCP's decision. In support of her claim, she submitted medical and diagnostic reports dated May 19 to October 7, 2014.

In an August 21, 2014 diagnostic report, Dr. Duc T. Tran, a Board-certified radiologist, reported that a magnetic resonance imaging (MRI) scan of the lumbar spine revealed mild disc bulge on the left at L5-S1 with encroachment. In a September 26, 2014 diagnostic report, he reported that a cervical spine MRI scan revealed incidental disc herniations at C3-4 and C4-5.

In an October 7, 2014 medical report, Dr. Sripad Dhawlikar, a Board-certified orthopedic surgeon, reported that appellant sustained a cervical, thoracic, and lumbar spine injury on May 19, 2014 as a result of trauma she sustained at work. He explained that she worked as a postal carrier and was in the process of delivering mail and packages when a large, heavy package that was on the upper part of her truck she was trying to unload, happened to tilt toward one side. As appellant attempted to prevent it from falling, the package fell on appellant. She bent in an abnormal fashion, causing sudden onset of pain in the above-mentioned regions. Dr. Dhawlikar reported that the mechanism of injury was that the entire large, heavy box fell onto appellant and she was thrust in a backward fashion, twisting her spine. Also, as appellant tried to prevent the package from falling, her body twisted in a significant fashion in the thoracic and lumbar region to prevent the fall of the package. Dr. Dhawlikar reported that the above-mentioned incident could certainly cause the symptoms and spinal injuries she was experiencing. He noted that appellant was completely asymptomatic prior to this incident and did not have any preexisting conditions for which she had sought any kind of treatment for pertaining to the cervical, thoracic, or lumbar spine.

Dr. Dhawlikar provided physical examination findings and a review of diagnostic testing. He diagnosed cervical herniated disc at C3-4 and C5-6 with thoracic strain, thoracic facet cyst at T10-11, and lumbar facet syndrome at L4-5 and L5-S1. Dr. Dhawlikar reported that these diagnoses were responsible for appellant's symptoms and were a consequence of the work-related injury that she sustained as described in his report. He explained that she sustained a hyperextension of the lumbar spine, thoracic spine, twisting V, and a lateral flexion at the same time in these regions, along with cervical hyperextension and lateral flexion, which caused abnormal stresses on the spine and disc and facet joints which led to the above-mentioned symptoms and findings on MRI scan. Dr. Dhawlikar further noted that appellant had no preexisting conditions and was completely asymptomatic, performing her job for several years without any problems.

By decision dated January 30, 2015, OWCP modified the July 14, 2014 decision to find that the evidence of record was insufficient to establish that the May 19, 2014 employment incident occurred, as alleged. It explained that fact of injury was not established because of inconsistencies pertaining to how the injury occurred, noting that appellant's account on her Form CA-1 differed from that provided by Dr. Dhawlikar in his October 7, 2014 report.

On January 29, 2016 appellant, through counsel, requested reconsideration. Counsel noted submission of Dr. Dhawlikar's September 16, 2014 report, which provided a rationalized medical opinion and explained how the mechanism of injury caused appellant's injury. He further noted submission of appellant's statement which would provide additional clarification pertaining to the incident which corresponded with the mechanism of injury alleged.

In a September 16, 2014 medical report, Dr. Dhawlikar reported that appellant had a significant onset of lumbar spinal pain and had been unresponsive to conservative treatment thus far. He noted a work-related injury to her lumbar spine in the past. Dr. Dhawlikar reported that appellant was trying to pull a heavy load off of a vehicle and tended to slip to the ground, and she tried to hold it to prevent it from falling down when she had a sudden onset of back pain. He reported that this injury can certainly occur from the above-mentioned mechanism. Dr. Dhawlikar explained that the paraspinal muscles go all the way from the cervical spine down to the lumbosacral region and the latissimus dorsi and other paraspinal abdominal muscles, as well as spinal stabilizers, which can be strained in this kind of an injury. He opined that appellant's work-related injury was responsible for her lumbar symptoms of pain, as well as disc bulging and the facet joint changes that have occurred since.

An April 2, 2015 duty status report (Form CA-17) was also submitted which provided a diagnosis of muscular strain and indicated that appellant could resume work on April 6, 2015 in a full-time capacity, with restrictions.

In a January 29, 2016 narrative statement, appellant reported that, on the morning of May 19, 2014, she was delivering her route when she was removing a large, heavy box from the back of her truck. When she attempted to lift the package, the contents shifted heavily and quickly onto her. When appellant tried to stop the package and herself from falling, she had immediate pain throughout her neck and back, along with burning sensations. She reported immediately calling her supervisor to inform him of what had happened and was instructed to continue delivering mail. Appellant stated that after an hour and a half passed she called the employing establishment and informed them that she was in too much pain and could not continue. Upon her return, management angrily stopped her from writing her statement and forced her to go out to her truck to break up the remainder of her route for the other carriers to finish. When appellant finished, she was provided the paperwork for her physician.

By decision dated April 28, 2016, OWCP denied modification of its January 30, 2015 decision, finding that the evidence of record failed to establish that the May 19, 2014 employment incident occurred, as alleged. It found that the circumstances and facts surrounding appellant's claim remained speculative, unfounded, and cast serious doubt as to the factual validity of how the alleged work event occurred.

On April 28, 2017 appellant, through counsel, requested reconsideration. Counsel submitted a brief citing new legal arguments to support merit review of appellant's claim.

Counsel contended that, in OWCP's merit review of the claim, it cited discrepancies between appellant's statement and the medical reports of her treating physician. However, he argued that the treating physician's medical opinion need not satisfy a beyond any reasonable doubt standard. Counsel reported that, while there were some minor discrepancies between the

history of injury, related by appellant and her physician, these were not material to the determination. He offered an argument that the Federal (FECA) Procedure Manual discussed the issue of adequate factual and medical background, specifically reading in part, “The record should show whether the history obtained by the physician is substantially in accord with the facts of the accident or accepted employment conditions.”<sup>5</sup> Counsel asserted that the word “substantially” was different than “precisely” or “exactly.” He further asserted that the physician’s understanding must only be mostly in accord with the facts of the accident or accepted employment conditions. The actual incident that appellant described was consistent with the mechanism indicated by her treating physicians. Counsel argued that only a hyper-meticulous reading and an impossibly stringent standard of review, could conclude that the inconsistency between the mechanism of injury offered by appellant’s physicians, with appellant’s version of the incident, was material enough to render her description of the alleged incident of diminished probative value. He found that, in accordance with Federal (FECA) Procedure Manual, appellant had consistently described an employment incident.

Also on reconsideration, counsel asserted that OWCP erred in the development of this case by failing to administratively combine this claim, File No. xxxxxx446, with appellant’s March 30, 2015 claim under File No. xxxxxx575.<sup>6</sup> He argued that OWCP had notice of the filing of her second claim, yet continued to develop both claims independently despite involvement of the same body part (the lumbar spine), as well as the same treating physicians. As such, OWCP failed to properly develop causal relationship and medical analysis because the two claims were developed separately. Counsel concluded that the incident should be accepted and the referenced cases doubled.

By decision dated July 26, 2017, OWCP denied appellant’s request for reconsideration, finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review. It found that counsel’s arguments regarding consolidation of claims and causal relationship were insufficient to warrant merit review.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP 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

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<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence, Content of a Medical Report*, Chapter 2.810.5(a) (September 2010).

<sup>6</sup> On April 7, 2015 appellant filed a Form CA-1 alleging a March 30, 2015 injury when she was driving her vehicle for 12 hours to deliver mail and was constantly forced to twist and turn her neck and body, causing pain in her back radiating down to her legs, File No. xxxxxx575. By decisions dated May 20, 2015 and April 29, 2016, OWCP denied her claim finding that the evidence of record failed to establish that her diagnosed conditions were causally related to the accepted March 30, 2015 employment incident. By decision dated June 9, 2017, it denied appellant’s request for reconsideration, finding that she neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review.

evidence not previously considered by OWCP.<sup>7</sup> Section 10.608(b) of OWCP regulations provide that when an application for reconsideration 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>8</sup>

### **ANALYSIS**

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

The underlying issue on appeal was whether the incident occurred at the time, place, and in the manner alleged within the performance of duty. OWCP initially denied appellant's claim in its July 14, 2014 decision, finding that the claimed incident occurred as alleged, but that the evidence of record was insufficient to establish causal relationship. Its January 30, 2015 decision modified the prior decision, finding that the evidence of record was insufficient to establish fact of injury, noting that her account of the May 19, 2014 incident differed from that of Dr. Dhawlikar. Following the denial of her claim for fact of injury, appellant submitted a January 29, 2016 narrative statement which provided additional details pertaining to the May 19, 2014 incident. OWCP's April 28, 2016 decision denied modification of the January 20, 2015 decision.

On reconsideration, counsel argued that the medical reports of record did not contradict appellant's statements and were substantially in accord with the facts surrounding the incident. He cited to the Federal (FECA) Procedure Manual in support of his argument that minor discrepancies between her description of the incident and the history of injury provided by her physician did not create an inconsistent account of the incident.<sup>9</sup> On reconsideration, as counsel provided new legal arguments in support of appellant's claim to establish fact of injury which were not previously considered by OWCP, the Board finds that the refusal of OWCP to reopen her case for further consideration of the merits of her claim constituted an abuse of discretion.<sup>10</sup>

For these reasons, the Board will set aside OWCP's July 26, 2017 decision and remand the case for merit review of appellant's claim.<sup>11</sup> After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>7</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>8</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>9</sup> *B.C.*, Docket No. 07-1305 (issued September 26, 2007).

<sup>10</sup> *L.N.*, Docket No. 12-1326 (issued November 21, 2012).

<sup>11</sup> *H.C.*, Docket No. 10-2119 (issued August 24, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 26, 2017 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: October 16, 2018  
Washington, DC

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

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

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