

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

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<b>R.L., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-0175</b>
	)	<b>Issued: September 5, 2018</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Paterson, NJ, Employer</b>	)	
_____	)	

*Appearances:*  
*James D. Muirhead, 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 October 30, 2017 appellant, through counsel, filed a timely appeal from a May 23, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated October 3, 2016, 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 claim.

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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 June 9, 2015 appellant, then a 61-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on February 12, 2015, while in the performance of duty, she injured her chin, left knee, and right hand when she fell onto her left knee and hit her chin on a guard rail, while grasping the guard rail with her right hand to try to stop the fall. She did not stop work. A supervisor checked a box stating that appellant was not injured in the performance of duty, commenting "employee was in the building when she fell."

In an undated statement, appellant explained that at about 6:05 a.m., she was coming through the back door and fell, hitting her chin on a guard rail on the left side. She fell on her left knee and hurt her right shoulder.

In an undated witness statement, a coworker reported that on February 12, 2015 she was dealing with mail when she heard another coworker call her. She went to see what was wrong, and when she approached, she saw her coworker helping appellant off the floor at 6:05 a.m.

In a medical report dated February 16, 2015, Dr. Brian Rapp, Board-certified in emergency medicine, noted that appellant had a sprain, "which is a stretched or torn ligament." He noted that the injured area should remain immobilized and that an orthopedic evaluation was necessary. Dr. Rapp instructed appellant on the use of tramadol and the treatment of sprains.

In a diagnostic report dated March 23, 2015, Dr. Steven Festa, a Board-certified diagnostic radiologist, examined the results of an x-ray of appellant's right shoulder. He noted no displaced fracture or dislocation, with an intact acromioclavicular joint and no abnormal calcification.

In a report dated July 28, 2015, Dr. Vincent McInerney examined appellant and diagnosed impingement syndrome of the right shoulder. He performed an injection to her right shoulder.

On September 8, 2015 Dr. McInerney examined appellant and diagnosed a right shoulder rotator cuff tear and adhesive capsulitis. He referred appellant for a magnetic resonance imaging (MRI) scan.

By development letter dated September 29, 2015, OWCP informed appellant of the evidence necessary to establish her claim and requested that she submit additional factual and medical evidence. It noted that she had not established that she was within the performance of duty at the time of the claimed injury and that she had not submitted a physician's opinion on the causal relationship between her diagnosed conditions and the incident of February 12, 2015. OWCP afforded appellant 30 days to submit additional evidence and to respond to its inquiries.

In a report dated September 22, 2015, Dr. McInerney reported that appellant's MRI scan revealed tendinitis of the bicep and a large distal rim tear of the supraspinatus which he noted was due to a fall in February at the employing establishment. He recommended that due to the level of pain that appellant proceed with an arthroscopy.

On October 21, 2015 appellant responded to OWCP's inquiries. She stated that on the date of injury she entered the first door to her building safely, but when she entered the second door, her foot got tangled in a rug. Appellant began to stumble and attempted to prevent her fall by grabbing a guard rail with her right hand. Her chin hit the guard rail and she fell on her left knee. Appellant laid there calling for help until two coworkers assisted her with getting to her feet. She remained in pain and continued working. Appellant reported no symptoms or injuries before the incident occurred. She noted that she was on premises about to report to work at her start time of 6:15 a.m., and that the fall occurred at 6:05a.m. Appellant stated that she had no history of fainting, heart conditions, or seizures.

In a witness statement dated October 17, 2015, a coworker noted that on the date of injury he helped appellant off the floor where she had fallen.

By decision dated November 6, 2015, OWCP denied appellant's claim, finding that she had not submitted sufficient medical evidence to establish a causal relationship between her diagnosed conditions and the accepted employment incident of February 12, 2015. It noted that she had not submitted a medical report from a physician containing a well-reasoned opinion on causal relationship.

In a diagnostic report dated September 18, 2015, Dr. Rajendra Achaibar, a Board-certified diagnostic radiologist, examined the results of a right shoulder MRI scan. He observed a fairly large rim-vent tear of the distal anterior aspect of the supraspinatus tendon, a large high-grade partial thickness articular surface tear of the supraspinatus and conjoint tendon, acromiale along with osteophytes at the acromioclavicular junction indenting the distal supraspinatus muscle, and tendinosis of the long head of the biceps tendon.

On July 6, 2016 appellant, through counsel, requested reconsideration of OWCP's November 6, 2015 decision.

On reconsideration appellant submitted an emergency department report, dated February 16, 2015, in which Dr. Rapp diagnosed shoulder strain and a knee contusion. Dr. Rapp noted that appellant told him that she was injured four days prior when she tripped on her lunch box and fell on her left knee. He noted that appellant believed that she strained her right shoulder when she went to break her fall by holding onto a guard railing.

In a diagnostic report dated February 17, 2015, Dr. Ralph Wheeler, a Board-certified diagnostic radiologist, examined an x-ray of appellant's right shoulder. He observed no bone pathology. In another diagnostic report of the same date, Dr. Wheeler examined an x-ray of appellant's left knee. He observed a questionable small joint effusion, moderately advanced changes of degenerative arthritis, severe narrowing of the medial joint space, and degenerative osteophyte formation.

By decision dated October 3, 2016, OWCP reviewed the merits of appellant's claim and declined to modify its prior decision. It noted that appellant had not yet submitted a medical report from a physician containing a well-reasoned opinion on causal relationship.

By letter dated March 1, 2017, counsel noted that this case was pending reconsideration with OWCP and submitted medical records to the case file.<sup>3</sup>

Appellant, through counsel, resubmitted the diagnostic reports of Dr. Wheeler dated February 17, 2015 and the report of Dr. Rapp dated February 16, 2015 and his treatment instructions of the same date.

By decision dated May 23, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim. It noted that the evidence submitted on reconsideration was repetitious of evidence previously submitted or irrelevant to the underlying issue in this case.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>4</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### **ANALYSIS**

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).

In his March 1, 2017 correspondence, counsel submitted various hospital records in support of reconsideration of the case. He did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered

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<sup>3</sup> The record of evidence before the Board does not evince that counsel filed a request for reconsideration following the October 3, 2016 OWCP decision.

<sup>4</sup> 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/her] own motion or on application.” 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> *Id.* § 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 the OWCP decision for which review is sought. 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.

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

<sup>8</sup> *Id.* § 10.608(a), (b).

by OWCP. Thus, appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).<sup>9</sup>

Counsel also failed to submit any relevant and pertinent new evidence in support of appellant's request for reconsideration. On reconsideration he resubmitted treatment instructions dated February 16, 2015 from Dr. Rapp and the diagnostic reports of Dr. Wheeler dated February 17, 2015. This medical evidence was already before OWCP at the time of its October 3, 2016 merit decision. Providing additional evidence that either repeats or duplicates information already in the record does not constitute a basis for reopening a claim.<sup>10</sup> Because counsel did not provide relevant and pertinent new evidence, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).<sup>11</sup> Accordingly, OWCP properly declined to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

### **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>9</sup> *Id.* § 10.606(b)(3)(i) and (ii).

<sup>10</sup> *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

<sup>11</sup> 20 C.F.R. § 10.606(b)(3)(iii).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 5, 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