

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

_____)	
D.G., Appellant)	
)	
and)	Docket No. 19-1348
)	Issued: December 2, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Kennebunk, ME, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 4, 2019 appellant filed a timely appeal from a December 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 20, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the December 14, 2018 decision, OWCP received additional evidence. 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*

FACTUAL HISTORY

On May 15, 2018 appellant, then a 52-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on May 11, 2018 she sustained strained back and neck muscles, bruising to the right side from the knee to the buttocks, and post-traumatic stress disorder (PTSD) due to a motor vehicle accident while in the performance of duty. On the reverse side of the claim form the employing establishment indicated that appellant stopped work on May 12, 2018, that the injury occurred in the performance of duty, and that appellant initially sought medical treatment on May 11, 2018.

Appellant submitted a May 11, 2018 employing establishment accident report concerning the May 11, 2018 motor vehicle accident and appellant's pay rate information.

On May 11, 2018 appellant underwent diagnostic testing. A chest x-ray examination showed no right rib fracture or pneumothorax. A lumbar spine x-ray revealed normal alignment and no evidence of acute fracture.

In a development letter dated May 23 2018, OWCP informed appellant of the evidence needed to support her traumatic injury claim. It afforded her 30 days to submit the requested information.

OWCP received a police accident information form dated May 11, 2018, a witness statement dated May 15, 2018, and a state workers' compensation medical form dated May 11, 2018 by a provider whose signature is illegible.

Appellant submitted emergency room hospital records dated May 11, 2018, which indicated that she was treated by Dr. Michael Schmitz, an osteopath specializing in emergency medicine, for complaints of back and right side pain after a motor vehicle accident. Dr. Schmitz provided examination findings, including diagnostic test results, and diagnosed acute neck strain and lumbar strain.

Appellant also received medical treatment from Dr. Marc G. Malon, a chiropractor. In a May 17, 2018 progress note, Dr. Malon recounted appellant's complaints of mid and lower back and neck pain following a May 11, 2018 motor vehicle accident. Upon examination of appellant's cervical, thoracic, and lumbosacral spine, he noted significant tenderness upon palpation to the mid-to-lower cervical and mid-thoracic spine. Dr. Malon reported an initial impression of traumatic cervical, thoracic, and lumbosacral sprain/strain with muscle spasm. In a May 21, 2018 treatment note, he authorized appellant to work with restrictions of no lifting over 20 pounds, limited bending, and no working above shoulder height. In a May 29, 2018 note, Dr. Malon indicated that appellant's "musculoligamentous injuries to neck and back" were improving.

In a May 29, 2018 treatment note and state workers' compensation medical form report, Dr. Nicholas Handanos, a Board-certified internist, related that he conducted a follow-up examination of appellant after a motor vehicle accident. He noted examination findings of worsening low back pain and improving neck pain. Straight leg raise testing was negative. Dr. Handanos diagnosed acute bilateral low back pain without sciatica, acute neck pain, and

anxiety disorder. He checked a box marked “yes” indicating that appellant’s problem was work related.

On June 7, 2018 appellant responded to OWCP’s May 23, 2018 development letter. She indicated that the initial effects of the injury were muscle strain and pain and noted that she did not have a new injury since the initial accident.

By decision dated June 28, 2018, OWCP accepted that appellant was involved in an employment-related motor vehicle accident on May 11, 2018 and was diagnosed with low back strain, neck strain, and anxiety disorder. However, it denied appellant’s claim, finding that the medical evidence was insufficient to establish causal relationship between the accepted employment incident and her diagnosed medical conditions.

On August 24, 2018 appellant requested reconsideration.

Appellant continued to receive treatment from Dr. Malon. In a work status note dated June 22, 2018, Dr. Malon authorized appellant to return to work, effective June 25, 2018. In chiropractic treatment notes dated May 21 to July 30, 2018, he provided examination findings for appellant’s neck and back and explained the therapy treatments that he provided. Dr. Malon diagnosed cervical strain and radiculopathy, thoracic spine strain, lumbar strain, sacroiliac joint strain, muscle spasm, cervical segmental dysfunction and somatic dysfunction, thoracic segmental dysfunction, lumbar posterior joint dysfunction, and sacral segment and somatic dysfunction.

In an August 2, 2018 letter, Dr. Handanos opined that appellant was in a motor vehicle accident that caused her back, neck, and shoulder pain and anxiety, which should all be covered under workers’ compensation. He noted that he treated appellant on May 29, 2018 and provided a detailed description of his findings. Dr. Handanos indicated that his diagnosis, clinical course of treatment, and opinion supported by medical explanation was outlined in the office visit note.

By decision dated September 20, 2018, OWCP denied modification of the June 28, 2018 decision.

On October 25, 2018 appellant requested reconsideration.

Appellant submitted a September 28, 2018 letter by Dr. Handanos. Dr. Handanos recounted that appellant was involved in a work-related motor vehicle accident on May 11, 2018 and sustained strains to her neck, back, and shoulder. He indicated that, as a result of her strains, she experienced increased pain and anxiety and sought treatment from Dr. Malon for her pain and from Rudolph Skowronski, a licensed clinical social worker. Dr. Malon noted that, although appellant was previously diagnosed with anxiety, it was well controlled prior to her accident. Dr. Handanos opined that appellant’s increased anxiety and pain were directly related to the strains that she sustained during her accident.

OWCP received additional chiropractic treatment notes by Dr. Malon dated August 13 to October 16, 2018. Dr. Malon recounted appellant’s complaints of discomfort in her neck, upper back, and right hip. He provided examination findings and reported diagnoses of cervical strain and radiculopathy, thoracic spine strain, lumbar strain, sacroiliac joint strain, muscle spasm, cervical segmental dysfunction and somatic dysfunction, thoracic segmental dysfunction, lumbar

posterior joint dysfunction, and sacral segment and somatic dysfunction. Dr. Malon noted an overall assessment of daily improvement as appellant reported less discomfort and showed improved function.

By decision dated December 14, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.⁴

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

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).

Appellant did not submit any statement along with her October 25, 2018 reconsideration request explaining why she disagreed with the September 20, 2018 merit decision. She has not shown that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered. Thus, the Board finds that appellant is not

³ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 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).

⁵ 20 C.F.R. § 10.607(a). Timeliness is determined by the document "received date" as recorded in the Integrated Federal Employees' Compensation System (iFECS). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁶ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

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

entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered.

In support of her reconsideration request, appellant submitted a September 28, 2018 letter by Dr. Handanos, who opined that appellant sustained strains to her neck, back, and shoulder as a result of a May 11, 2018 motor vehicle accident. Dr. Handanos further explained that because of her strains, appellant experienced increased pain and anxiety. He noted that, although appellant was previously diagnosed with anxiety, it was well controlled prior to her accident. Dr. Handanos opined that appellant's increased anxiety and pain were directly related to the strains that she sustained during her accident. The Board finds, however, that this letter is substantially similar to his August 2, 2018 letter, which was previously reviewed and considered by OWCP. Dr. Handanos did not provide any pertinent new or relevant evidence explaining the mechanism of injury regarding how the May 11, 2018 employment incident caused or contributed to appellant's medical conditions. The Board has held that the submission of evidence which duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.⁸

In treatment notes dated May 21 to July 30, 2018, Dr. Malon, a chiropractor, noted appellant's diagnosed conditions of cervical strain and radiculopathy, thoracic spine strain, lumbar strain, sacroiliac joint strain, muscle spasm, cervical segmental dysfunction and somatic dysfunction, thoracic segmental dysfunction, lumbar posterior joint dysfunction, and sacral segment and somatic dysfunction. He provided examination findings and indicated that appellant showed improved function. The Board finds that, because Dr. Malon has not provided a diagnosis of spinal subluxation based on x-ray examinations, he is not considered a physician under FECA.⁹ Accordingly, appellant is not entitled to a review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

As appellant's request for reconsideration did not meet any of the three requirements enumerated under 20 C.F.R. § 10.606(b)(3), the Board finds that OWCP properly denied merit review pursuant to 20 C.F.R. § 10.608.¹⁰

⁸ *S.W.*, Docket No. 18-1261 (issued February 22, 2019); *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

⁹ The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2).

¹⁰ *See F.P.*, Docket No. 19-0177 (issued June 19, 2019); *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *Susan A. Filkins*, 57 ECAB 630 (2006).

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).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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