



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.

### **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**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case as set forth in the prior decision is incorporated herein by reference. The relevant facts are as follows.

On January 21, 2014 appellant, then a 54-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on January 13, 2014 she vomited twice, lacked focus, became confused, and experienced headache and dizziness due to her exposure to toxic fumes from a malfunctioning heating unit at work. She claimed that toxic exhaust fumes were emitted into her office, examination rooms, and nearby areas of a clinic.

By decision dated February 17, 2015, OWCP denied the claim, finding that the evidence of record was insufficient to establish that the January 13, 2014 incident occurred at work, as alleged. It noted that the employing establishment submitted evidence to establish that appellant was not exposed to carbon monoxide or toxic gas. Further, that Dr. Gerald B. Levine, a Board-certified internist specializing in pulmonary diseases and OWCP referral physician, found no factual or objective confirmation of a diagnosis of carbon monoxide poisoning. Appellant, through counsel, subsequently requested reconsideration, however, by decisions dated September 11, 2015 and May 4, 2016, OWCP denied modification of its prior decision.

Appellant, through counsel, appealed to the Board on October 17, 2016. By decision dated March 21, 2017, the Board affirmed the May 4, 2016 merit decision, finding that appellant had failed to provide evidence sufficient to establish that the January 13, 2014 incident occurred at work, as alleged. The Board noted that, although appellant's statement that she sustained a traumatic injury on January 13, 2014 was entitled to great weight, it was contradicted by the employing establishment's evidence and the medical evidence of record.

On March 20, 2018 appellant, through counsel, requested reconsideration, contending that the additional factual and medical evidence submitted were sufficient to establish that appellant sustained an injury due to her exposure to toxic fumes from a malfunctioning heating unit at work on January 13, 2014.

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

<sup>4</sup> Docket No. 17-0056 (issued March 21, 2017).

A heating, ventilation, and air conditioning (HVAC) service order invoice dated January 28, 2013 from Wilkins Enterprises indicated, among other things, that a heat exchange had been replaced at the employing establishment.

An undated and unsigned employing establishment incident report noted that appellant noticed “a bad odor” when she arrived at the clinic on the morning of January 13, 2014. She reported the odor to a supervisor who immediately shut off the HVAC units and opened all of the windows in the clinic. Appellant was assigned to a room furthest away from the odor and was permitted to go outside to get fresh air. A propane company was called to determine whether there were any leaks in the heating system. No leaks were found and it was determined that the odor was from a soot buildup in a heating unit. The odor completely cleared from the clinic around noon.

In a June 9, 2016 transcript of his deposition, John Sunderson, a certified physician assistant, addressed his January 24, 2014 notes in which he diagnosed toxic effect of carbon monoxide and advised that he did not specifically find a causal correlation between the alleged January 13, 2014 incident and appellant’s current symptoms.

Discharge summaries dated January 21, 2017 from Dr. Archana Pasupleti, a Board-certified neurologist, and Dr. Robert C. Knowlton, a neurologist, noted a history that appellant experienced a strong odor of car exhaust at her workplace on January 13, 2014. Both physicians provided an assessment of nonepileptic spells and headache.

In progress notes dated June 7 and 6, 2017, Dr. David C. Perry, a Board-certified neurologist, indicated that appellant presented for a follow-up of her cognitive symptoms, headache, gait, and movement changes. He provided an impression that she had multiple systemic and neurologic symptoms following self-reported workplace exposure on January 13, 2014. Largely, appellant reported these symptoms as unchanged. Dr. Perry noted that her cognitive symptoms largely reflected attention and concentration difficulty and her observable speech and movement findings had improved.

In a medical report dated November 20, 2017, Dr. James Craner, Board-certified in occupational medicine, noted a history that appellant noted a noxious “nasty” exhaust odor as she walked into her office building on January 13, 2014. He diagnosed occupational acute carbon monoxide toxicity with delayed-onset encephalopathy. Dr. Craner opined that this poisoning and its sequelae were directly caused by a malfunctioning and/or improperly designed or installed propane-fired heating system.

Appellant resubmitted a January 20, 2014 statement by her coworker, M.F., indicating that he developed carbon monoxide poisoning due to his exposure to exhaust fumes at work on January 13, 2014; a HVAC service order invoice dated January 13, 2014 from Wilkins Enterprises indicating that, an air conditioner was plugged with soot, a heat exchange was replaced, and burner operation was checked; Mr. Sunderson’s January 24, 2014 notes; and Dr. Levine’s January 25, 2015 second opinion report.

OWCP, by decision dated June 14, 2018, denied appellant's March 20, 2018 request for reconsideration of the merits of her claim, finding that the evidence submitted was insufficient to warrant merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>5</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>6</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>7</sup>

Upon receipt of a timely application, OWCP exercises its discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which either: (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.<sup>8</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>9</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).

Initially, the Board notes that findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. The Board will therefore not review the evidence addressed in the prior appeal.<sup>10</sup>

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<sup>5</sup> This section provides in pertinent part: the 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).

<sup>6</sup> 20 C.F.R. § 10.607.

<sup>7</sup> C.C., Docket No. 18-0316 (issued March 14, 2019); *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. 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. *Id.* at Chapter 2.1602.4b.

<sup>8</sup> *Id.* at § 10.606(b)(3).

<sup>9</sup> *Id.* at § 10.608(b).

<sup>10</sup> *See C.B.*, Docket No. 19-0175 (issued May 8, 2019); *M.M.*, Docket No. 18-1366 (issued February 27, 2019).

Appellant's timely 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, she 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).

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether appellant submitted sufficient factual evidence to establish that an employment incident occurred on January 13, 2014, as alleged. In support of her reconsideration request, she submitted an employing establishment incident report. However, this incident report, while new, is not relevant because it does not indicate that appellant was exposed to toxic fumes from a malfunctioning heating unit. The report noted that a propane company had inspected the heating system and determined that the odor reported by her was from soot buildup in the heating system. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>11</sup> Thus, the Board finds that this report is insufficient to require OWCP to reopen the case for merit review.<sup>12</sup>

The reports of Drs. Pasupleti, Knowlton, Perry, and Craner, while new, contained a history of injury as communicated by appellant, however, the physicians failed to provide factual corroboration of appellant's exposure to toxic fumes at work on January 13, 2014. This is particularly important in this case as OWCP found, and the Board previously affirmed, that she failed to establish that the January 13, 2014 incident at work, as alleged. The Board finds, therefore, that these reports are insufficient to require OWCP to reopen the case for merit review.

The remaining evidence of record, while new, is not relevant. The January 28, 2013 HVAC service order invoice from Wilkins Enterprises predates the alleged January 13, 2014 employment incident. Mr. Sunderson, in a June 9, 2016 deposition, failed to provide a factual history of appellant's injury.<sup>13</sup> For these reasons, the Board finds that this evidence is insufficient to reopen the case for merit review.

Appellant resubmitted M.F.'s January 20, 2014 statement, a January 13, 2014 HVAC service order invoice from Wilkins Enterprises, Mr. Sunderson's January 24, 2014 notes, and Dr. Levine's January 25, 2015 second opinion report. The Board finds that the submission of this evidence did not require reopening her case for merit review because it was previously of record and considered by OWCP in its February 17, 2015 decision and the Board in its March 21, 2017 decision.<sup>14</sup>

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<sup>11</sup> See *S.C.*, Docket No. 18-0814 (issued January 18, 2019); *David J. McDonald*, 50 ECAB 185 (1998).

<sup>12</sup> See *A.J.*, Docket No. 10-1537 (issued February 9, 2011).

<sup>13</sup> *Supra* note 11.

<sup>14</sup> See *G.M.*, Docket No. 17-0345 (issued May 1, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>15</sup>

**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 June 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2019  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>15</sup> See *supra* note 8 at § 10.608; see also *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).