

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

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| L.G., Appellant                   | ) |                              |
|                                   | ) |                              |
| and                               | ) | <b>Docket No. 19-0094</b>    |
|                                   | ) | <b>Issued: June 14, 2019</b> |
| U.S. POSTAL SERVICE, POST OFFICE, | ) |                              |
| South Easton, MA, Employer        | ) |                              |
|                                   | ) |                              |

*Appearances:*  
Jacqueline Shanahan, 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  
JANICE B. ASKIN, Judge

**JURISDICTION**

On October 15, 2018 appellant, through counsel, filed a timely appeal from a May 21, 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 July 7, 2017, 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 over the merits of this case.

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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 December 30, 2015 appellant, then a 45-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 26, 2015 she struck the back of her right hand against a cluster mailbox while in the performance of duty. She experienced pain and swelling in her right hand and fingers. On January 28, 2016 OWCP accepted appellant's claim for contusion of the right hand.

On January 21, 2016 Dr. Nurhan G. Kasparyan, a Board-certified orthopedic and hand surgeon, diagnosed right second metacarpal head fracture. On January 22, 2016 appellant underwent a right hand magnetic resonance imaging (MRI) scan, which demonstrated a suspected occult nondisplaced subchondral fracture of the second metacarpal head with superimposed second metacarpophalangeal (MCP) joint osteoarthritis. Dr. Kasparyan examined her again on February 12, 2016 and diagnosed second metacarpal hand fracture. He treated appellant with protective splinting and found that she was totally disabled.

On April 5, 2016 appellant accepted a modified rural carrier position. She returned to full-time modified duty on April 11, 2016. In a duty status report (Form CA-17) dated April 14, 2016, Dr. Kasparyan found that appellant could perform light-duty lifting up to 20 pounds and performing limited pushing and pulling. In a letter dated April 18, 2016, OWCP noted that appellant had returned to work with no loss of wages and ended her wage-loss compensation effective April 11, 2016.<sup>3</sup>

In a note dated March 8, 2017, Dr. Kasparyan reported appellant's continued right hand pain. He viewed x-rays and diagnosed post-traumatic arthritis of the hand secondary to second metacarpal head fracture. Dr. Kasparyan recommended joint surgery.

In a letter dated April 3, 2017, OWCP denied appellant's request for surgery as her claim was accepted for contusion of the right hand. It informed her that additional rationalized medical opinion evidence was required to support her request for surgery.

On May 4, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that she experienced a recurrence of disability on April 27, 2017 due to her December 26, 2015 employment injury. She provided a narrative statement asserting that she worked with

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<sup>3</sup> On May 19, 2016 Dr. Kasparyan indicated that appellant was totally disabled due to extreme right hand pain, and limited motion. Appellant filed claims for wage-loss compensation (Form CA-7) and alleged that she was disabled for the period from May 19 through August 5, 2016. On August 10, 2016 Dr. Kasparyan discharged her from his care. Appellant returned to full-time regular-duty work on August 11, 2016. By decision dated October 12, 2016, OWCP denied her claims for wage-loss compensation. On October 28, 2016 appellant requested an oral hearing before an OWCP hearing representative. By decision dated April 21, 2017, OWCP's hearing representative affirmed the October 12, 2016 decision denying wage-loss compensation for the period from May 19 through August 5, 2016.

excruciating pain. Appellant noted that working worsened her injury and that she was losing mobility in her index finger.

In a note dated May 4, 2017, Dr. Kasparyan found that appellant was totally disabled as a result of pain and swelling in her MCP joint. He noted that she was scheduled for surgery on June 15, 2017.

In a development letter dated May 18, 2017, OWCP noted that appellant's claim had been accepted for contusion of the right hand. It requested that she provide additional factual and medical evidence. OWCP afforded appellant 30 days to respond.

On June 28, 2017 Dr. Kasparyan opined that appellant was totally disabled from work for three months.

By decision dated July 7, 2017, OWCP denied appellant's claim for a recurrence of disability, finding that there was no medical evidence of record addressing causal relationship between her current right hand condition and resulting disability as well as to her accepted right hand contusion of December 26, 2015.

On April 13, 2018 appellant, through counsel, requested reconsideration of the July 7, 2017 decision. She contended that OWCP should expand acceptance of her claim to include right second metacarpal head fracture. Counsel contended that, in clear cut traumatic injury claims, such as this one, a physician's affirmative statement on causal relationship was sufficient and no rationalized medical opinion evidence was required.<sup>4</sup> She further contended that appellant was entitled to wage-loss compensation for periods of total disability due to her diagnosed right second metacarpal head fracture.

Appellant resubmitted Dr. Kasparyan's June 30, 2016 note. In a June 15, 2017 note, Dr. Kasparyan documented that he had performed a right index MCP joint silicone total joint arthroplasty. He found end-stage post-traumatic arthritis with gross deformity and pain.

On September 19, 2017 Dr. Jennifer B. Green, a Board-certified orthopedic and hand surgeon, reported that appellant underwent a repeat surgery on July 3, 2017 during which the replacement joint was removed due to swelling and infection. It was also noted that appellant also returned to the operating room for repeat irrigation and debridement due to persistent infection on August 28, 2017.

In a report dated March 20, 2018, Dr. Kasparyan noted appellant's history of injury on December 26, 2015 and her initial diagnosis of contusion based on negative x-rays. He noted that her January 22, 2016 MRI scan demonstrated right second metacarpal head fracture and bony contusion. Dr. Kasparyan reviewed his treatment notes and found appellant's continued complaints of pain and swelling in her right hand. He listed his treatment including cortisone injection on April 27, 2017, right total joint arthroplasty on June 15, 2017, removal of the joint due to infection on June 30, 2017, and repeated irrigation and debridements on July 28, August 27, and October 10, 2017. Dr. Kasparyan performed a revision total joint arthroplasty on

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(d)(1) (January 2013).

December 1, 2017. He diagnosed post-traumatic osteoarthritis of the right hand, acute osteomyelitis of the right metacarpal bone, infection, and osteoarthritis of the finger. Dr. Kasparyan found, “Based on a reasonable degree of medical certainty, [appellant] sustained a fracture of the second metacarpal head and bony contusion when she closed a mailbox.”

By decision dated May 21, 2018, OWCP declined to reopen appellant’s claim for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **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 evidence not previously considered by OWCP.<sup>5</sup>

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.<sup>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</sup> 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.<sup>8</sup>

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>9</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>10</sup> When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set for at section 10.606(b)(3) to the claimant’s application for reconsideration and any evidence submitted in support thereof.<sup>11</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).

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<sup>5</sup> 20 C.F.R. § 10.606(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(a); *see also H.H.*, *supra* note 5; *M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *see also H.H.*, *id.*; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>9</sup> *S.M.*, Docket No. 18-1158 (issued January 16, 2019); *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

<sup>10</sup> *See supra* note 5; *Mark H. Dever*, 53 ECAB 710 (2002).

<sup>11</sup> *S.M.*, *supra* note 9; *Annette Louise*, 54 ECAB 783 (2003).

In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Accordingly, she is not entitled to a review of the merits of her claim based on the first requirement under 20 C.F.R. § 10.606(b)(3).

With respect to the second above-noted requirement under 20 C.F.R. § 10.606(b)(3), counsel contended fact of injury had been established and that it was clearly competent to have caused the condition described without the need for fully-rationalized medical evidence. The Board finds that this is a new and relevant legal argument not previously considered by OWCP. Accordingly, appellant is entitled to a review of the merits of her claim.

Additionally, the Board further finds that Dr. Kasparyan's March 20, 2018 report constitutes relevant and pertinent new evidence not previously considered by OWCP. In that report, Dr. Kasparyan opined that appellant's right fracture of the second metacarpal head was causally related to the December 26, 2015 employment incident when she closed a mailbox. This report directly addresses the basis upon which OWCP denied her recurrence claim, as it offers an opinion on causal relationship between her current condition and her accepted employment injury.<sup>12</sup> Appellant's request for reconsideration met more than one of the requirements for obtaining merit review of her case.<sup>13</sup>

The Board will, therefore, set aside OWCP's May 21, 2018 decision. After such further development of the evidence deemed necessary, OWCP shall issue an appropriate merit decision.

### **CONCLUSION**

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).

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<sup>12</sup> The Board has held that, in support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof. He or she needs only to submit relevant and pertinent evidence not previously considered by OWCP. *See M.C.*, Docket No. 17-1983 (issued August 17, 2018); *S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>13</sup> *M.C.*, *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 21, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: June 14, 2019  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board