

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

M.S., Appellant)	
)	
and)	Docket No. 19-0291
)	Issued: June 21, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Bellevue, NE, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 20, 2018 appellant, through counsel, filed a timely appeal from a September 25, 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 August 10, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 21, 2016 appellant, then a 42-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained "arthritis in thumb joints, tend[i]nitis in wrists, and carpal tunnel in both wrists" due to repetitive hand, wrist, and thumb movements, while in the performance of duty. He noted that he first became aware of his claimed conditions on November 1, 2015, and their relationship to his federal employment duties on August 25, 2016. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on October 4, 2016, and first reported his condition to his supervisor on November 16, 2016.

In a narrative statement, appellant explained that he started feeling pain in his thumbs and wrists in November 2015. He noted that his upper extremities would ache when casing, pulling down, and delivering mail, and the pain would worsen as the workday progressed. Appellant indicated that he believed his conditions were caused by repetitive wrist and grasping movements. He related that he grasped, placed, lifted mail, and opened and shut mailboxes in repetitive motions as part of his federal employment duties.

In a report dated August 25, 2016, Dr. Robert D. Cunard, a family medicine physician, indicated that appellant complained of sore and painful hands and wrists. He diagnosed bilateral thumb pain and de Quervain's syndrome, and noted that appellant was to remain off work.

In a report dated September 6, 2016, Dr. Cunard diagnosed arthralgia, and myalgia. He continued to advise appellant to remain off work.

In a report dated September 13, 2016, Dr. Jay G. Kenik, a Board-certified rheumatologist, diagnosed de Quervain's tendinitis, bilateral carpal tunnel syndrome, and wrist tendinitis.

In a report dated September 20, 2016, Dr. Cunard noted that appellant had been off of work for four weeks due to his hand and wrist conditions. He diagnosed tendinitis of both wrists, and indicated that appellant could return to work on September 21, 2016. In a letter of even date, Dr. Cunard indicated that appellant could return to work without restrictions.

In reports dated October 4, 12, and November 1, 2016, Dr. Caliste Hsu, a Board-certified hand surgeon, reviewed appellant's x-rays and diagnosed bilateral mild first carpometacarpal (CMC) joint primary osteoarthritis, bilateral mild-to-moderate scaphotrapeziotrapezoid (STT) joint primary osteoarthritis, bilateral carpal tunnel syndrome, and bilateral dorsal wrist extensor tendinitis. In her October 4, 2016 report, she indicated that appellant had received a cortisone injection to his wrists one month prior. In her October 12, 2016 report, Dr. Hsu noted that she believed appellant's work conditions including gripping and lifting of packages, had contributed to his symptoms. In her November 1, 2016 report, she referred appellant for an electromyogram and nerve conduction velocity (EMG/NCV) study, and indicated that appellant could return to work with restrictions including no lifting, pushing, or pulling more than five pounds.

In a development letter dated December 6, 2016, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It requested that he submit a comprehensive narrative medical report with a physician's opinion supported by medical explanation as to how his federal employment activities caused, contributed to, or aggravated his diagnosed medical conditions. OWCP afforded appellant 30 days to submit the requested evidence.

In response, appellant resubmitted Dr. Kenik's September 13, 2016 report.

Appellant also submitted a work status note dated December 15, 2016 from Dr. Hsu, who noted that appellant was not to return to work until after surgery.

In an undated statement, appellant reiterated the description of his repetitive employment duties.

By decision dated February 17, 2017, OWCP denied appellant's claim, finding that he had not established that his diagnosed medical conditions were causally related to the accepted factors of his federal employment.

On March 6, 2017 OWCP's Branch of Hearings and Review received appellant's request for a review of the written record and additional medical evidence.

In a report dated December 14, 2016, received by OWCP on March 14, 2017, Dr. Hsu reviewed appellant's EMG/NCV study findings and added the diagnosed of left cubital tunnel syndrome in addition to his previously mentioned diagnoses. She opined that appellant's employment duties contributed to the symptoms of bilateral thumb pain, wrist pain, and carpal tunnel syndrome because he had to perform fine manipulation, simple grasping, and pushing and pulling activities for more than two hours per day. Dr. Hsu further opined that such repetitive duties can aggravate arthritis in the hand and thumb in addition to contributing to the development of carpal tunnel and cubital tunnel symptoms. She recommended that appellant receive endoscopic carpal tunnel and cubital tunnel releases.

In a letter dated March 1, 2017, Dr. Hsu noted that she evaluated appellant for hand and wrist pain, and diagnosed bilateral first CMC joint primary osteoarthritis as well as bilateral mild-to-moderate STT joint primary osteoarthritis. She opined that osteoarthritis was a condition of overuse and was not necessarily caused by appellant's work duties, but rather the gripping and lifting of packages aggravated the symptoms of his conditions. Dr. Hsu further opined that the repetitive wrist and elbow use from opening and closing sliding doors, turning the ignition on and off, turning a key to lock and unlock central box units, and simple grasping and fine manipulation could lead to the development of bilateral carpal tunnel syndrome, left cubital tunnel syndrome, and bilateral dorsal extensor tendinitis of the wrist.

In an attending physician's report (Form CA-20) of even date, Dr. Hsu diagnosed first CMC joint osteoarthritis, mild-to-moderate STT osteoarthritis, carpal tunnel syndrome, wrist tendinitis, and left cubital tunnel syndrome. She checked a box marked "yes" when asked whether she believed appellant's conditions were caused or aggravated by an employment activity, and noted that the repetitive grasping, gripping, lifting, pushing, and pulling contributed to his

diagnoses. Dr. Hsu related that appellant's period of partial disability was from October 4, 2016 and continuing.

By decision dated August 10, 2017, OWCP's hearing representative affirmed the February 17, 2017 decision, finding that appellant had not submitted sufficient rationalized medical evidence that explained the medical process of how his specific employment duties caused his diagnosed conditions.

On June 4, 2018 appellant, through counsel, requested reconsideration of OWCP's hearing representative's August 10, 2017 decision. Additional medical evidence was submitted along with his reconsideration request.

In a letter dated May 15, 2018, Dr. Hsu noted the aforementioned diagnoses, and opined that appellant's osteoarthritis was a condition of overuse and was not necessarily caused by appellant's employment activities. She further opined that the repetitive gripping and lifting of packages could aggravate the osteoarthritis symptoms, and the constant wrist and elbow use during employment activities could lead to the development of bilateral carpal tunnel syndrome, left cubital tunnel syndrome, and bilateral dorsal extensor tendinitis of the wrist. This letter was largely repetitive of appellant's previous letter dated March 1, 2017.

By decision dated September 25, 2018, OWCP denied appellant's reconsideration request, finding that the evidence presented was insufficient to warrant review of OWCP's hearing representative's August 10, 2017 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.³ 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.⁴

To require OWCP to reopen a case for merit review upon timely application under section 8128(a) of FECA,⁵ OWCP's 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.⁶ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's request for

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. 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.

⁵ *Id.*

⁶ 20 C.F.R. § 10.606(b)(3).

reconsideration must be received within one year of the date of that decision.⁷ When a claimant fails to meet one of the above standards, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

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.⁹ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹⁰ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at 20 C.F.R. § 10.606(b)(3) to the claimant's request for reconsideration and any evidence submitted in support thereof.¹¹

ANALYSIS

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

Appellant's June 4, 2018 timely request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. The Board thus finds that appellant has neither shown that OWCP erroneously applied or interpreted a specific point of law nor advanced a relevant legal argument not previously considered by OWCP.¹² Consequently, appellant is not entitled to further review of the merits of his claim based on the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹³

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. In support of his request for reconsideration he submitted an additional report from Dr. Hsu. Dr. Hsu's May 15, 2018 report was however substantially similar to her March 1, 2017 report. The Board finds that submission of this report did not require reopening appellant's case for merit review. As OWCP had denied his claim based on a lack of supportive medical evidence establishing causal relationship and because Dr. Hsu's May 15, 2018 report merely repeated evidence already in the case record, it was cumulative and failed to constitute relevant and pertinent new evidence.¹⁴ Therefore, this evidence is insufficient to require OWCP

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ *S.D.*, Docket No. 18-1734 (issued March 12, 2019); *see Mark H. Dever*, 53 ECAB 710 (2002).

¹¹ *P.L.*, *supra* note 9; *Annette Louise*, 54 ECAB 783 (2003).

¹² *Supra* note 6 at § 10.606(b)(3)(i) and (ii).

¹³ *Id.*

¹⁴ *R.B.*, Docket No. 18-0945 (issued April 3, 2019).

to reopen appellant's claim for consideration of the merits pursuant to the third criteria under 20 C.F.R. § 10.606(b)(3).¹⁵

The Board finds that appellant has not met any of the three regulatory requirements under 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁶

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 21, 2019
Washington, DC

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

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

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

¹⁵ *Supra* note 6 at § 10.606(b)(3)(iii).

¹⁶ *See R.B.*, *supra* note 14; *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).