

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

P.R., Appellant	)	
	)	
and	)	Docket No. 19-0439
	)	Issued: June 25, 2019
U.S. POSTAL SERVICE, POST OFFICE,	)	
Kokomo, IN, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 21, 2018 appellant filed a timely appeal from September 10 and November 20, 2018 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from the last merit decision, dated May 17, 2018,

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<sup>1</sup> After filing the current appeal, appellant also requested reconsideration from OWCP. By decision dated February 20, 2019, OWCP declined to reopen appellant's claim for consideration of the merits. The Board and OWCP may not exercise simultaneous jurisdiction over the same issue(s) in a case on appeal. 20 C.F.R. § 501.2(c)(3). Following the docketing of an appeal before the Board, OWCP does not retain jurisdiction to render a further decision regarding the issue(s) on appeal until after the Board relinquishes jurisdiction. *Id.* Thus, the February 20, 2019 OWCP decision denying appellant's request for reconsideration of the merits of the claim are null and void. *See id.*; *Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Douglas E. Billings*, 41 ECAB 880 (1990).

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.<sup>3</sup>

### **ISSUE**

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

### **FACTUAL HISTORY**

On April 6, 2017 appellant, then a 57-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, while in the performance of duty, she was walking on uneven ground in the rain and carrying a mailbag weighing 10 to 15 pounds, when she felt her back pop. She alleged that she sustained back and right leg pain.

On April 6, 2017 the employing establishment provided appellant with an authorization for examination and/or treatment (Form CA-16). A physician, whose signature is illegible, completed this part B of this form (attending physician's report) on March 31, 2017 and reported that appellant injured her back while delivering mail. He diagnosed intervertebral disc disorder. The physician checked a box marked "yes" indicating that he believed that appellant's diagnosed condition was related to her history of injury.

On May 4, 2017 appellant reported previous employment-related spine surgery in 2013.

In a development letter dated June 13, 2017, OWCP noted that when appellant's claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. It, therefore, authorized payment of a limited amount of medical expenses without formally considering the merits of the claim. OWCP advised appellant of the deficiencies of her claim and requested additional factual and medical evidence from appellant. It afforded her 30 days for a response.

In a report dated May 8, 2017, Dr. Nilda Durany, a family practitioner, examined appellant due to low back pain and radicular leg pain. She described appellant's history of injury on March 30, 2017 noting her 35-pound mail satchel shifted to the right and twisted her back causing it to "pop." Dr. Durany found spasm, tenderness, pain, and edema in the lumbosacral spine. She reported positive straight leg raising and nerve root compression. Dr. Durany diagnosed facet syndrome on the right at L5-S1, lumbosacral radiculopathy, degenerative disc disease of the lumbar spine, and lumbosacral osteoarthritis. She concluded that the injury on March 30, 2017 was the direct cause of appellant's diagnosed lumbar conditions.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence on appeal. 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.*

By decision dated July 24, 2017, OWCP denied appellant's traumatic injury claim finding that the medical evidence submitted did not provide medical rationale needed to establish causal relationship between her diagnosed lumbar conditions and her accepted employment incident of March 30, 2017. It concluded, therefore, that the requirements had not been met to establish an employment injury or condition.

On August 9, 2017 appellant requested reconsideration of the July 24, 2017 merit decision. On August 4, 2017 Dr. Durany added an addendum to her May 8, 2017 note and opined that the injury on March 30, 2017 was caused by appellant's 35-pound mail satchel shifting to the right which caused her back to twist and pop. She found that this injury aggravated appellant's L5-S1 facet arthropathy, lumbar degenerative disc disease, and lumbar osteoarthritis which were preexisting and causing lumbosacral radiculopathy. In an August 14, 2017 narrative statement, appellant asserted that on March 30, 2017 she was carrying a full mailbag weighing 30 pounds which caused her to walk unevenly due to the weight on her shoulders. She felt a pop or twist in her back. Appellant's right leg then periodically began to feel numb.

By decision dated November 8, 2017, OWCP denied modification of the July 24, 2017 decision.

On February 5, 2018 appellant requested reconsideration of the November 8, 2017 merit decision.

On January 29, 2018 Dr. Durany opined that appellant experienced a traumatic aggravation to her lower back on March 30, 2017 caused by her 35-pound mail satchel shifting to the right resulting in twisting and popping of appellant's lower back. She found that the shifting weight caused a twisting injury to appellant's lumbosacral spine, which permanently aggravated, accelerated, and exacerbated her preexisting lumbosacral degenerative disc disease and L5-S1 facet arthropathy causing lumbosacral radiculopathy. Dr. Durany concluded that this aggravation was a permanent change in appellant's back condition.

By decision dated May 17, 2018, OWCP denied modification of the November 8, 2017 merit decision.

On June 18, 2018 appellant requested reconsideration of the May 17, 2018 merit decision. She provided a report dated June 6, 2018 from Dr. Durany relating her history of injury on March 30, 2017. Dr. Durany diagnosed mild active facet arthropathy on the right at L5-S1 and explained that this condition was a currently progressive disease or abnormality of the facet joints. She also explained that lateral recess stenosis was a narrowing of the space within the rear side of the spinal canal. Dr. Durany further explained that on March 30, 2017 appellant's 35-pound mail satchel slipped on her shoulder and shifted to the right causing appellant's back to twist. She noted that as appellant's lower back twisted with the added 35 pounds of force from the mailbag, it caused the "vertebrae at L4-5 and L5-S1 to twist and rotate past its physiological limit, releasing nitrogen gas, which caused the 'pop' and as the vertebrae twisted, the facet joint at L5-S1 separated momentarily past its physiological limit and accelerated and permanently aggravated the preexisting facet arthropathy osteoarthritis." Dr. Durany further found that the rotational injury also caused the L4-5 joint to rotate past its physiological limit permanently aggravating preexisting stenosis at L4-5 and impinging the left L5 descending nerve.

By decision dated September 10, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim.

Appellant again requested reconsideration on September 20, 2018 and submitted a May 8, 2017 progress report by Dr. Durany who concluded that appellant's diagnosed lumbar conditions were the "direct result of her required work duties for the [employing establishment] on March 30, 2017." She resubmitted a portion of Dr. Durany's May 8, 2017 narrative report discussing causal relationship between the mechanism of the March 20, 2017 employment incident and the diagnosed back conditions. To this report Dr. Durany added that the "injury aggravated [appellant's] L5-S1 facet arthropathy, lumbar degenerative disc disease and lumbar osteoarthritis which was preexisting and is causing the lumbosacral radiculopathy."

Appellant also resubmitted January 29 and June 6, 2018 medical reports by Dr. Durany, who reiterated her opinion contained in the previously discussed addendum to her May 8, 2017 narrative report.

### **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.<sup>4</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>5</sup>

To require OWCP to reopen a timely application for merit review under section 8128(a) of FECA,<sup>6</sup> 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.<sup>7</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>8</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>9</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 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>6</sup> *Supra* note 4.

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

<sup>8</sup> *Id.* at § 10.607(a).

<sup>9</sup> *A.G.*, Docket No. 18-1720 (issued May 7, 2019); *C.F.*, Docket No. 18-0583 (issued October 16, 2018).

When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>10</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).

The underlying issue on appeal was whether appellant submitted sufficient rationalized medical opinion evidence to establish a back condition causally related to her accepted March 30, 2017 employment incident. With her reconsideration requests, appellant did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>11</sup>

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted new medical evidence from Dr. Durany, which addressed the relevant issue of causal relationship. Her May 8, 2017 progress note and narrative both addressed causal relationship between the diagnosed back conditions and the accepted March 30, 2017 employment incident. In the May 8, 2017 narrative report, Dr. Durany opined that the March 30, 2017 "injury aggravated her L5-S1 facet arthropathy, lumbar degenerative disc disease and lumbar osteoarthritis which was preexisting and is causing the lumbosacral radiculopathy." In her June 6, 2018 report, she offered a medical explanation of the physiological processes by which appellant's March 30, 2017 employment incident aggravated her preexisting conditions of facet arthropathy osteoarthritis and stenosis at L4-5 resulting in impingement of the left L5 descending nerve.

The Board finds that the opinions and reasoning expressed in Dr. Durany's May 8, 2017 addendum and her June 8, 2018 report, constitute relevant and pertinent new evidence not previously considered by OWCP. Dr. Durany's opinions directly addressed the basis upon which OWCP denied appellant's claim as it addressed the issue of causal relationship between her accepted employment incident and her diagnosed aggravations of preexisting lumbar conditions.<sup>12</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>13</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>14</sup> The Board thus finds that

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<sup>10</sup> 20 C.F.R. § 10.608(b).

<sup>11</sup> *T.G.*, Docket No. 18-1064 (issued April 26, 2019).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

<sup>14</sup> *T.G.*, *supra* note 11.

appellant's request for reconsideration met one of the standards for obtaining a merit review of her case. Accordingly, she is entitled to a merit review.<sup>15</sup>

The Board will, therefore, set aside OWCP's September 10, and November 20, 2018 decisions. Following such further development of the evidence as might be necessary, OWCP shall issue an appropriate decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 20 and September 10, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: June 25, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>15</sup> The Board notes that where an employing establishment properly executes a Form CA-16 authorizing medical treatment related to a claim for a work injury, the form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. *See Tracy P. Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c)