

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

I.S., Appellant)	
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)	
and)	Docket No. 19-0808
)	Issued: October 3, 2019
DEPARTMENT OF VETERANS AFFAIRS, ORLANDO VETERANS AFFAIRS MEDICAL CENTER, Orlando, FL, Employer)	
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Appearances:

Wayne Johnson, Esq., for the appellant¹
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 March 5, 2019 appellant, though counsel, filed a timely appeal from a September 6, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 28, 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 to consider 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 her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 4, 2017 appellant, then a 58-year-old medical supply technician, filed a traumatic injury claim (Form CA-1) alleging that on March 22, 2017 she injured her left shoulder, upper and lower back, left hip, and left leg due to a work-related fall. On the reverse side of the claim form, the employing establishment acknowledged that she was injured in the performance of duty.

In March 24, 2017 medical records, Dr. Yong Chen, an occupational medicine specialist, related that as appellant exited the employing establishment's soiled utility room and walked into a hallway, she slipped and fell on her left side. He conducted a physical examination and diagnosed appellant with left shoulder contusion/sprain, wrist contusion, a left knee contusion, lumbar strain, and left hip contusion. Dr. Chen noted that appellant should not return to work on that day.

A June 23, 2017 duty status report (Form CA-17) Dr. Robert Reppy, a preventive medicine specialist, indicated that appellant was injured on March 22, 2017, and his clinical findings included neck and low back pain. The diagnosis was illegible, and the form indicated that appellant could not return to work.

In a June 23, 2017 medical report, Dr. Reppy indicated that appellant presented with lower back pain radiating through her legs, pain in both of her shoulders, and neck pain extending into her upper extremities, disproportionately affecting her left side. He related that appellant had slipped on something wet while at work on March 22, 2017, causing her to fall backwards, hitting the floor first with her upper back and then with her head. She instantly experienced pain and had to stop work until the subsequent week, when she was able to return to work full time. Dr. Reppy noted that appellant stated she had no medical history of neck or back injuries. He diagnosed lumbar and cervical sprains/strains, but noted that these diagnoses were subject to change once more information was gathered.

A June 26, 2017 physical capacity evaluation of appellant, a July 5, 2017 upper extremity nerve conduction study, a July 5, 2017 study of appellant's somatosensory evoked responses of her upper extremities, and a thoracic outlet syndrome evaluation were received by OWCP.

In a July 24, 2017 development letter, OWCP informed appellant that additional factual and medical evidence was required in support of her claim. It advised her of the factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested factual and medical evidence.

By decision dated August 28, 2017, OWCP denied appellant's traumatic injury claim, finding that she had not established the factual component of fact of injury. It explained that there was "no clear explanation of the details surrounding how the injury occurred." OWCP

concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received additional medical evidence, including an August 25, 2017 narrative report from Dr. Reppy who diagnosed partial T12 fracture, cervical stenosis, a right fibula closed fracture, lumbar spine facet arthropathy, and disc displacement of the cervical spine. Dr. Reppy noted that appellant's two locations of facet arthropathy represented preexisting degenerative conditions that were not directly caused by appellant's workplace fall.

OWCP also received a September 8, 2017 diagnostic report, a September 18, 2017 magnetic resonance imaging (MRI) scan of appellant's left shoulder revealing a large full-thickness supraspinatus tendon tear, and a June 8, 2018 physical capacity evaluation.

On August 28, 2018 appellant, through counsel, requested reconsideration.

By decision dated September 6, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim.

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 which: (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 be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it 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

³ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

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

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).

The underlying issue in this case was whether appellant has established the factual component of fact of injury. On August 28, 2018 counsel submitted the appeal request form that accompanied OWCP's August 28, 2017 decision. Although the request was timely and noted appellant was seeking reconsideration, counsel did not otherwise elaborate on the basis of the request for reconsideration. The Board finds that the August 28, 2018 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, counsel did not advance a relevant legal argument not previously considered by OWCP. Accordingly, appellant is not entitled to a review of the merits based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁸

The Board further finds that appellant did not fulfill the third requirement under 20 C.F.R. § 10.606(b)(3) because she did not submit relevant and pertinent new evidence not previously considered by OWCP. While OWCP received additional medical evidence following its August 28, 2017 merit decision, as noted, the issue on reconsideration was whether appellant established that the March 22, 2017 incident occurred as alleged. Appellant's April 4, 2017 Form CA-1 merely noted a fall at work. She has yet to provide a statement in response to OWCP's July 24, 2017 development letter requesting specific details of the alleged March 22, 2017 employment-related fall. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹ As such, appellant is not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹⁰

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).

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

⁸ 20 C.F.R. § 10.606(b)(3)(i) and (ii).

⁹ *C.B.*, Docket No. 19-0419 (issued July 22, 2019).

¹⁰ 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the September 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 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