

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

L.S., Appellant	)	
	)	
and	)	<b>Docket No. 18-0367</b>
	)	<b>Issued: September 23, 2019</b>
U.S. POSTAL SERVICE, POST OFFICE, Fowler, OH, Employer	)	
	)	
	)	

*Appearances:*  
Alan J. Shapiro, 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 December 12, 2017 appellant, through counsel, filed a timely appeal from a November 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 7, 2016, 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>

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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.*

<sup>3</sup> The Board notes that following the November 27, 2017 decision, OWCP received additional evidence. 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.*

## **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 July 25, 2012 appellant, then a 46-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 23, 2012 she tripped and fell while in the performance of duty, injuring her neck, right wrist/hand, back, and left leg. She stopped work on July 24, 2012. In December 2012, OWCP initially accepted the claim for sprain of the right wrist and hand.<sup>4</sup> It subsequently expanded the acceptance of appellant's claim to include cervical, thoracic, and lumbar sprains; and a herniated disc at C4-5.

By decision dated September 30, 2015, OWCP terminated appellant's medical benefits with respect to her previously accepted right wrist, thoracic, and lumbar sprains. Appellant remained eligible for conservative medical treatment with respect to her accepted cervical condition, as well as continuing compensation benefits related to her July 23, 2012 employment injury. OWCP based its determination on the February 24, 2014 opinion of Dr. Victoria M. Langa, a Board-certified orthopedic surgeon and impartial medical examiner.<sup>5</sup>

Appellant, through counsel, timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 5, 2016. During the hearing counsel argued that appellant's lumbar condition had not resolved, and the claim should have been expanded to include L4-5 radiculitis.<sup>6</sup> By decision dated September 7, 2016, OWCP's hearing representative affirmed the September 30, 2015 decision finding that the impartial medical examiner's opinion represented the special weight of the medical evidence.

On August 30, 2017 appellant, through counsel, requested reconsideration of OWCP's September 7, 2016 decision. In support of the request appellant submitted an August 21, 2017 report from her treating physician, Dr. Donich, regarding her ongoing cervical complaints and the need for surgery at C6-7.

By decision dated November 21, 2017, OWCP expanded acceptance of the claim to include aggravation of cervical spinal stenosis. It also retroactively authorized a February 5, 2017 cervical spine surgical procedure.<sup>7</sup>

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<sup>4</sup> OWCP paid wage-loss compensation for temporary total disability beginning September 8, 2012, and placed appellant on the periodic compensation rolls effective January 13, 2013.

<sup>5</sup> OWCP declared a conflict in medical opinion between appellant's physician, Dr. Dane J. Donich, a Board-certified neurosurgeon, and Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon and second opinion examiner.

<sup>6</sup> The impartial medical examiner's diagnoses included status post thoracolumbar sprain/strain and underlying age-related degenerative disc/joint disease.

<sup>7</sup> OWCP based its determination on the November 15, 2017 opinion of Dr. Timothy J. Nice, a Board-certified orthopedic surgeon and impartial medical examiner, who agreed with appellant's physician, Dr. Donich, regarding the need for cervical surgery.

By decision dated November 27, 2017, OWCP denied appellant's August 30, 2017 request for reconsideration finding that Dr. Donich's August 21, 2017 opinion regarding appellant's cervical spine was not relevant to the September 30, 2015 and September 7, 2016 decisions, which terminated benefits with respect to appellant's right wrist sprain, thoracic sprain, and lumbar sprain. Consequently, OWCP found that the evidence presented was insufficient to warrant merit review of the September 7, 2016 decision.

### **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.<sup>8</sup>

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.<sup>9</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>10</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>11</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>12</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).

The August 30, 2017 request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Accordingly, appellant has not established a basis for further merit review under the first and second above-noted requirements of 20 C.F.R. § 10.606(b)(3).

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<sup>8</sup> 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).

<sup>9</sup> 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).

<sup>10</sup> *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. Chapter 2.1602.4b.

<sup>11</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>12</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

The underlying issue on reconsideration was whether OWCP properly terminated benefits with respect to appellant's accepted right wrist, thoracic, and lumbar sprains. Counsel did not submit evidence or argument with respect to the termination of benefits regarding the above-noted conditions. Although Dr. Donich's August 21, 2017 report was not part of the record when OWCP last addressed the termination issue on September 7, 2016, this evidence is not "relevant and pertinent" to the issue on reconsideration. His opinion concerned the need for additional cervical surgery, and did not specifically address appellant's right wrist, thoracic, and lumbar sprains. As such, Dr. Donich's August 21, 2017 report is insufficient to warrant further merit review based on the third requirement under section 10.606(b)(3).

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.

On appeal counsel argues that there was an unresolved conflict in medical evidence, and therefore, OWCP had not met its burden of proof to terminate benefits. As previously noted, the Board does not have jurisdiction over the September 7, 2016 merit decision.

### **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 November 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 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