

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

S.V., Appellant)	
)	
and)	Docket No. 20-1309
)	Issued: December 22, 2020
)	
U.S. POSTAL SERVICE, BROOKLYN)	
PROCESSING & DISTRIBUTION CENTER,)	
Brooklyn, NY, Employer)	
)	

Appearances:
Tom McMenamy, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 24, 2020 appellant, through her representative, filed a timely appeal from a March 12, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from OWCP's last merit decision, dated December 5, 2019, to

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 Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, appellant's representative asserted that oral argument should be granted because the medical evidence of record was sufficient to establish an employment-related injury. The Board, in exercising its discretion, denies appellant's request for oral argument because the Board does not have jurisdiction over the merits of the claim the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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 September 20, 2018 appellant, then a 53-year-old automation clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 22, 2018 she experienced burning and stinging sensations and pain in her elbow, both hands, and shoulder while in the performance of duty. She stopped work on the date of injury. In a statement of even date, appellant related that she reported her claimed injury to her supervisor on the date of injury, she sought medical treatment for her condition and was placed off work by her physician, and she returned to work on September 10, 2018.

In support of her claim, appellant submitted chiropractic care certificates dated August 23 and September 5, 2018 by Dr. Avrum I. Musnik, a chiropractor. Dr. Musnik indicated that appellant was seen in his office from August 23 through September 8, 2018 for a spinal condition. Dr. Musnik noted that she should be excused from work due to an acute exacerbation of her spinal condition.

Appellant also submitted medical reports by Dr. Victor Katz, an attending Board-certified orthopedic surgeon. In a September 18, 2018 report, physical therapy letter, and patient instructions dated September 21, 2018, Dr. Katz noted a history that appellant sustained a work-related injury due to her repetitive work duties. He diagnosed cervical herniated disc, cervical radiculopathy on the right, lumbar radiculopathy on the left, lumbar herniated disc, right shoulder impingement and bursitis, right elbow medial and lateral epicondylitis, left elbow medial epicondylitis, cervicalgia, lumbago. Dr. Katz ordered physical therapy to appellant's conditions. He advised that she was temporarily totally disabled from her current work duties due to injuries sustained during the course of employment.

Thereafter, OWCP received additional medical evidence from Dr. Katz. In duty status reports (Form CA-17) dated October 18, November 27, and December 18, 2018, Dr. Katz reiterated appellant's history of injury and his prior diagnosis of right shoulder impingement due to injury. He again advised that she was not fit for duty. In a September 18, 2018 patient instructions, Dr. Katz noted that appellant was seen on that date due to injuries that occurred on the job over a period of time.

In a development letter dated January 15, 2019, OWCP indicated that when appellant's claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work and payment of a limited amount of medical expenses was administratively approved. It explained that it had reopened the claim for consideration because she had not returned to work

³ 5 U.S.C. § 8101 *et seq.*

in a full-time capacity. OWCP requested that appellant submit additional factual and medical evidence in support of her claim and provided a questionnaire for her completion.

OWCP subsequently received additional medical evidence from Dr. Katz. In narrative reports dated October 18, November 27, and December 18, 2018, January 22, 2019, Dr. Katz reiterated appellant's history of injury and his prior cervical, lumbar, right shoulder, and bilateral elbow diagnoses and opinion that she was temporarily totally disabled. In Form CA-17 reports dated January 22, 2019, he continued to advise that she was not fit for duty.

On February 2, 2019 appellant responded to OWCP's development letter. She described her work duties, the development of her claimed injuries, and history of her medical treatment. Appellant contended that her medical conditions were caused by her employment duties.

Appellant submitted narrative reports and Form CA-17 reports dated January 24, February 19, and March 19, 2019 in which Dr. Katz restated his prior cervical, lumbar, right shoulder, and bilateral elbow diagnoses and opinion that appellant was temporarily totally disabled and not fit for duty.

In a second development letter dated March 28, 2019, OWCP requested that the employing establishment provide additional information regarding appellant's claim. In a separate development letter of even date, it requested that Dr. Katz provide a rationalized opinion as to whether appellant's current condition was caused, aggravated, accelerated, or precipitated by her work activities.

On April 4, 2019 OWCP converted appellant's traumatic injury claim to an occupational disease claim because the claimed incidents and conditions at work occurred over the course of more than one workday or work shift.⁴

OWCP received a March 22, 2019 cervical spine magnetic resonance imaging (MRI) scan report by Dr. Michael Reichel, a Board-certified diagnostic radiologist, who provided an impression of mild multilevel degenerative cervical changes.

In an April 4, 2019 statement, the employing establishment responded to OWCP's development letter. It primarily agreed with appellant's statement of injury. The employing establishment was unaware of what task, frequency and duration she performed which resulted in her exposure or contact. In order to minimize appellant's effects of exposure, it moved her to a lighter machine that had less volume and she was also given extra help. The employing establishment indicated that it was unaware of her bilateral hand, shoulder, and elbow symptoms. Appellant's last day at work was September 19, 2018. The employing establishment provided an official copy of appellant's position description.

Dr. Aaron S. Greenberg, a Board-certified internist, noted in an August 20, 2018 certificate to return to work, that appellant had been out from August 16 to 17, 2018. He indicated that she could return to work on August 20, 2018.

⁴ See 20 C.F.R. § 10.5(q), (ee).

In a March 26, 2019 right shoulder MRI scan report, Dr. Christian P. Annese, a Board-certified diagnostic radiologist, provided impressions of tendinosis with a full-thickness, partial width tear of the anterior and mid insertional footprint of the supraspinatus tendon; tendinosis with interstitial delamination tear and fluid at the myotendinous junction of the infraspinatus; tendinosis of the subscapularis with low-grade interstitial partial tear; tendinosis and partial tear of the intra-articular biceps and biceps labral complex; degenerative type tear of the superior labrum; and small effusion with subacromial subdeltoid bursitis.

In response to OWCP's March 28, 2019 development letter, Dr. Katz submitted an April 16, 2019 report in which he reiterated his prior diagnoses and opinion on appellant's disability from work. Additionally, he opined that she had sustained a work-related injury that occurred over time due to her automation clerk work duties.

OWCP, by decision dated May 20, 2019, denied appellant's occupational disease claim finding that she had not submitted a rationalized medical opinion explaining how her diagnosed conditions were causally related to the accepted factors of her federal employment. Consequently, it found that the requirements had not been met to establish an injury or medical condition causally related to the accepted employment factors.

In a March 22, 2019 lumbar spine MRI scan report, Dr. Reichel provided: impressions of mild multi-level degenerative lumbar changes; kidney history consistent with normal anatomic variation; and diverticulosis.

On August 8, 2019 appellant requested reconsideration of the May 20, 2019 decision. She submitted a July 16, 2019 letter by Dr. Katz. Dr. Katz noted appellant's repetitive work duties, reviewed diagnostic test results, and discussed findings on physical examination of the right shoulder. He believed that her right shoulder injury was causally related to her repetitive work duties. Dr. Katz advised that appellant sustained a right shoulder full-thickness tear as a direct result of her federal employment. He requested authorization for her to restart physical therapy and recommended arthroscopic rotator cuff repair to treat her right shoulder condition.

In a November 6, 2019 decision, OWCP denied modification of the May 20, 2019 decision finding that appellant had not submitted sufficient medical evidence to establish a medical condition causally related to the accepted work factors, as her physician did not provide a rationalized opinion on causal relationship.

On November 26, 2019 appellant requested reconsideration of the November 6, 2019 decision. She submitted a November 12, 2019 letter by Dr. Katz who reiterated his opinions and treatment plan as set forth in his prior letter of July 16, 2019.

OWCP, by decision dated December 5, 2019, denied modification of its prior decisions, again finding that Dr. Katz failed to provide a rationalized medical opinion on causal relationship.

Appellant, on February 19, 2020, requested reconsideration. She submitted an additional January 9, 2020 letter by Dr. Katz who continued to opine that appellant's right shoulder full-thickness tear was directly caused by her repetitive work duties, request authorization for her to restart physical therapy, and recommend right shoulder arthroscopic rotator cuff repair.

In a March 12, 2020 decision, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

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.⁵

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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

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).

Appellant's timely February 19, 2020 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that she did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of her claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

⁵ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁶ 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).

⁷ *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 (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her reconsideration request under 20 C.F.R. § 10.606(b)(3). OWCP previously denied her claim because the medical evidence of record did not contain a rationalized opinion that her diagnosed conditions were causally related to the accepted employment factors. In support of her reconsideration request, appellant submitted a new report dated January 9, 2020 in which Dr. Katz related appellant's repetitive work duties, diagnosed right shoulder full-thickness tear, opined that the diagnosed condition was directly caused by her work duties, and addressed her treatment plan. This evidence, however, essentially reiterated Dr. Katz's diagnosis and opinion set forth in his prior July 16 and November 12, 2019 reports of record. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁰ As appellant failed to provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that appellant did not meet 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.¹¹

On appeal appellant's representative contends that the evidence submitted is sufficient to establish an employment-related injury. However, as explained above, the Board lacks jurisdiction to review the merits of the claim.

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).

¹⁰ *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *A.A.*, Docket No. 18-0031 (issued April 5, 2018).

¹¹ *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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