United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 18-0353**
	)	**Issued: February 18, 2020**
U.S. POSTAL SERVICE, WASHINGTON TOWNSHIP POST OFFICE, Dayton, OH, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 2, 2017[1] appellant filed a timely appeal from a June 9, 2017 merit decision and a November 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from June 9, 2017, the date of OWCP's last merit decision, was December 6, 2017. Since using December 11, 2017, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 2, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

[3] 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 evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include additional lumbar spine conditions as causally related to the accepted August 2, 2011 employment injury; (2) whether OWCP abused its discretion by denying appellant authorization for an April 10, 2014 lumbar spine surgery; and (3) 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 August 2, 2011 appellant, then a 48-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his left knee and left ankle on that date when he moved quickly to avoid being bitten by a dog, causing his knee to pop when he shifted his weight and was hit by the dog, while in the performance of duty. Following his initial medical treatment, on September 20, 2011, OWCP accepted his claim for left knee and leg sprain, left ankle sprain, and sprain of left ankle other sites specified. It paid appellant wage-loss compensation on the supplemental rolls commencing September 24, 2011.

In a report dated October 24, 2011, Dr. Kevin J. Paley, a Board-certified orthopedic surgeon, noted that appellant was injured when a dog physically struck his left knee causing a twisting injury followed by a fall into a brick wall striking his knee a second time. He noted appellant's claim had been accepted for left ankle and knee sprains, but should also be accepted for the additional conditions of chondromalacia of the left knee and left ankle patellar tendinopathy. Dr. Paley reviewed a magnetic resonance imaging (MRI) scan and found that appellant also has a medial meniscus tear based on clinical criteria. He indicated that appellant was incapable of returning to work and had been refused work by the employing establishment due to his use of crutches.

OWCP referred appellant to Dr. Rudolf A. Hofmann, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of appellant's accepted employment-related conditions. In his November 17, 2011 report, Dr. Hofmann indicated that his objective residuals were mild left medial knee joint instability with tenderness along the medial joint space and clinical findings consistent with a tear of the posterior medial meniscus and a tender, painful nodule in the mid-portion of the left Achilles tendon with MRI scan findings of tendinosis (tendinitis) of the left Achilles tendon. He found no evidence of a work-related left ankle sprain. Dr. Hofmann diagnosed chondromalacia of the left patella based on his review of a September 9, 2011 MRI scan and noted that a physical examination in regards to possible chondromalacia of the left knee was not possible that day due to inability of appellant to fully extend his left knee. He further diagnosed patellar tendinitis/tendinosis supported by the September 9, 2011 MRI scan. Dr. Hofmann opined that appellant's left knee chondromalacia of the patella and the left knee patellar tendinitis conditions were causally related to his August 2, 2011 employment injury. He explained that the direct blow against the anterior aspect of the left knee was consistent with damage to the patellar articular cartilage and patellar ligament. Dr. Hofmann further opined that appellant's work-related conditions necessitated a left knee arthroscopic surgery.

By decision dated January 24, 2012, OWCP expanded the acceptance of appellant's claim to include left Achilles tendinitis, left chondromalacia patellae, and left patellar tendinitis.

Appellant underwent authorized left knee surgery on February 15, 2012.

In reports dated April 20, June 27, and July 12, 2012, Dr. Brandon W. Bishop, a podiatrist, diagnosed left tarsal syndrome and left Achilles tendinitis with associated left equinus deformity and opined that appellant had exhausted conservative care and, therefore, recommended a gastrocnemius recession of the left side, left Achilles tendon debridement, possible retro-calcaneal exostectomy, as well as left tarsal tunnel release. He opined that appellant's tarsal tunnel condition was "connected to his original injury on [August 2, 2011] where he was attacked by [a] dog and was noted that his foot was everted at the time and his ankle twisted inwards, and as he eternally rotated his foot and his knee, his knee buckled medially."

On August 30, 2012 Dr. Nabil F. Angley, a Board-certified orthopedic surgeon serving as a district medical adviser (DMA), indicated that Dr. Bishop's recommendation for surgery "may be unnecessary" and recommended referring appellant to a Board-certified orthopedic surgeon who specializes in foot and ankle surgery for an opinion and recommendation on the necessity of surgery.

OWCP subsequently referred appellant to Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant required surgery for his accepted conditions. In his October 26, 2012 report, Dr. Fisher found that the left knee sprain/strain, left ankle sprain/strain, and the patella tendinitis had all healed with no objective findings or residuals. He further found that the Achilles tendinitis and left knee chondromalacia of the patella remained active and present based on findings of patellofemoral crepitation, tenderness/discomfort over the patella on palpation and on flexion/ extension of the left knee, and tenderness on palpation over the medial side of the distal end of the Achilles tendon. Dr. Fisher opined that appellant's conditions were causally related to the accepted employment injury. He further opined that, while appellant had tarsal tunnel syndrome, there was no equinis deformity of the left ankle. Dr. Fisher did not detect bursitis over the left side of the calcaneus upon physical examination and there was no evidence, by way of examination or MRI scan, of an exostosis over the calcaneus. He, therefore, concluded that a tarsal tunnel release on the left side was the only appropriate surgical procedure for appellant and the remaining requested surgical procedures were not medically necessary and/or appropriate.

By decision dated March 18, 2013, OWCP expanded the acceptance of appellant's claim to include the additional condition of tear of the medial meniscus of the left knee and left tarsal tunnel syndrome.

Appellant underwent an OWCP-authorized left foot Achilles tendon repair and tarsal tunnel release surgery on April 29, 2013.

A functional capacity evaluation (FCE) dated January 29, 2014 demonstrated that appellant was capable of the functional capacities that were consistent with the medium physical demands category. Appellant was unable to tolerate the walking route demands of his previous position, but was able to tolerate a customer service position.

In a January 31, 2014 report, Dr. Paley noted that appellant had a herniated nucleus pulposus at C5-6, confirmed by MRI scan, and a positive electromyography (EMG) of the upper extremity which showed cervical radiculopathy at the same level.

On April 10, 2014 appellant underwent an anterior lumbar interbody fusion at L5-S1, which was performed by Dr. Nicolas Grisoni, a Board-certified orthopedic surgeon.

In a January 8, 2016 report, Dr. Grisoni indicated that appellant claimed that he had an L5-S1 disc protrusion and herniation caused by a work reconditioning program and that the disc herniation had been treated surgically in April 2014. He opined that the work reconditioning program aggravated a mild, essentially asymptomatic issue with appellant's low back. Dr. Grisoni explained that a singular act of bending over to pick up a cell phone cord on February 7, 2014 was not the sole cause of the disc herniation. He indicated that, based on his progressive, severe pain during the work reconditioning program that he most likely ruptured his disc at some point during the course of the work reconditioning program, and the February 7, 2014 nonwork-related incident simply caused the disc herniation to become more symptomatic as the disc protruded further and caused more neurocompressive pathology.

In reports dated November 30, 2015 through April 11, 2016, Dr. Paley opined that appellant continued to complain of pain and swelling in the left knee and needed surgical intervention in the form of a repeat arthroscopy of the knee.

In reports dated May 4 and 9, June 3 and 29, and July 25 and 28, 2016, Dr. Paley provided progress notes on appellant's left lower extremity conditions and diagnosed complex tear of medial meniscus, right knee. He further indicated that appellant's complaints of lumbar pain were related to a vocational rehabilitation accident he had while recovering from a prior knee surgery.

On August 16, 2016 appellant underwent an authorized left knee surgery performed by Dr. Paley.

In a September 9, 2016 report, Dr. Paley indicated that appellant presented with complaints of pain in the cervical region and diagnosed sprain of ligaments of the cervical spine. He indicated that appellant had previously sustained an injury at work and his claim had been accepted by OWCP for cervical disc displacement.[4]

On October 5, 2016 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon serving as a DMA, reviewed the medical evidence of record and found that appellant had extensive preexisting degenerative disease at L5-S1 and MRl scan reports showed gradual progressive bulging and ultimately a herniation of the L5-S1 disc space. He opined that appellant's spinal condition was a progressive protrusion not related to the August 2, 2011 employment injury. The DMA further indicated that the injury was not consequential to his discogenic abnormality because MRl scan studies of the lumbar spine dated January 5, 2012 revealed mildly degenerative disease with slight retrolisthesis, but no compressive disc herniation. He noted that there was dehydration at L5-S1 which indicated long-standing degenerative disease with desiccation as demonstrated. The DMA also noted that there was no compressive disc herniation or stenosis from L2 through S1 and therefore, no evidence of disc herniation at L5-S1. He concluded that appellant's April 10, 2014 surgery had been an "elective reconstructive procedure fusion" of L5-S1 and was not "reasonable and necessary" due to his accepted August 2, 2011 employment injury. The DMA further concluded that bulging discs at L2-3, L3-4, and L4-5 with stenosis and retrolisthesis at

[4] Appellant has an additional claim for a December 17, 2008 injury that has been accepted for numerous conditions, including cervical spine disc displacement, under OWCP File No. xxxxxx623. Appellant's claims have not been administratively combined.

L3-4 and L4-5 with nerve root stenosis should not be accepted conditions in this claim. He opined, however, that appellant had sustained an additional injury superimposed upon his left Achilles tendinitis and recommended that the claim be expanded to include the additional condition of aggravation of left Achilles tendinitis and left ankle surgery.

In an addendum report dated January 17, 2017, the DMA explained that the work conditioning/hardening program appellant underwent in late 2013/early 2014 for his left foot and ankle conditions was "not competent to produce or ultimately contribute to" his lumbar spine conditions and/or the April 10, 2014 lumbar spine surgery. He opined that none of appellant's lumbar conditions represented an acute injury, as no single event or multiple events of this type of word hardening could have caused his multiple level disc abnormalities. The DMA concluded that appellant's lumbar conditions all represented chronic long-standing, preexisting conditions had not been caused by the work-hardening program. He also concluded that the medical record also failed to establish that appellant's lumbar conditions were aggravated by the work-hardening program and concluded that they were preexisting and degenerative in nature.

On March 1, 2017 OWCP found a conflict in the medical opinion evidence and referred appellant to Dr. Theodore Toan Le, a Board-certified orthopedic surgeon serving as an impartial medical examiner (IME), to resolve the conflict as to whether there was a causal relationship between the claimed lumbar spine conditions and the work-hardening program and also the necessity and appropriateness of the April 10, 2014 lumbar spine surgery.

In a March 29, 2017 report, the IME, Dr. Le, submitted his findings upon examination following a review of a statement of accepted facts (SOAF) and the medical evidence of record. He opined that appellant's lumbar spine conditions were not related to the accepted August 2, 2011 employment injury. The IME reported that he had 42 visits for his work-hardening program and there had been only four complaints during those visits of stiffness or soreness to his lumbar spine. The duration of the visits were noted to be anywhere from three to four hours and appellant had been able to tolerate the program well. The IME reviewed the diagnostic testing of record and opined that he had a preexistent condition at the L5-S1 level and that over the course of two-plus years, he developed worsening of the condition and an acute episode of increased pain in February 2014. He concluded that the work-hardening program, over a period of two-and-a-half months, was insufficient to have contributed to the disc herniation. The IME concurred with Dr. Berman that appellant's progressive right L5-S1 para-median disc protrusion was progressive in nature, not acute in terms of herniation.

On March 29, 2017 appellant underwent an authorized left Achilles tendon repair surgery, which was performed by Dr. James P. Martens, a Board-certified orthopedic surgeon.

By decision dated June 9, 2017, OWCP denied the expansion of the acceptance of appellant's claim to include additional lumbar spine conditions finding that the medical evidence of record failed to establish that his diagnosed lumbar conditions were causally related to the accepted August 2, 2011 employment injury. It further denied authorization for the April 10, 2014 lumbar spine surgery.

On July 28, 2017 appellant requested reconsideration. In support of his request, he submitted progress reports regarding his bilateral knee conditions dated June 19, July 28, August 28, and October 2 and 23, 2017, and duty status reports (Form CA-17) regarding his

accepted left knee/ankle conditions dated June 29, July 28, August 28, October 23, and November 17, 2017 from Dr. Paley.

In reports dated July 17 and September 25, 2017, Dr. Martens prescribed physical therapy for appellant's status post left Achilles tendon debridement and provided progress notes relating to his postsurgical condition.

In a July 19, 2017 report, a physical therapist indicated that appellant had attended a work-hardening program and confirmed that appellant had remarked about "some on-going lower back irritation and pain as well as some right leg radiating pain as well." The therapist noted that these complaints were "overshadowed by the left ankle and knee issues."

Appellant resubmitted MRI scan reports of the lumbar spine dated January 5, 2012, February 17 and July 7, 2014, and February 16, 2015.

By decision dated November 27, 2017, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[5]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[6] A physician's opinion on whether there is causal relationship between the diagnosed condition and an accepted injury must be based on a complete factual and medical background.[7] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale which, explains the nature of the relationship between the diagnosed condition and the accepted employment injury.[8]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include additional lumbar spine conditions as causally related to the accepted August 2, 2011 employment injury.

OWCP found a conflict in the medical opinion evidence between appellant's treating physicians, Drs. Grisoni and Paley, who opined that his L5-S1 spinal condition was caused and/or aggravated by a work-hardening program for his accepted left lower extremity conditions, and its

[5] *M.B.*, Docket No. 19-0485 (issued August 22, 2019); *R.J.*, Docket No. 17-1365 (issued May 8, 2019); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[6] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[7] *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[8] *Id.*

DMA, Dr. Berman, who opined that appellant's lumbar conditions were chronic long-standing, preexisting conditions and could not have been caused by the work-hardening program. It properly referred appellant to Dr. Le, serving as the IME, to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

In his March 29, 2017 report, the IME found that appellant's lumbar spine conditions were not causally related to the accepted August 2, 2011 employment injury. He reported that appellant had 42 visits for his work conditioning program, but on only four occasions had he complained of stiffness or soreness to his lumbar spine. The IME reviewed the diagnostic testing of record and opined that he had a preexistent condition at the L5-S1 level which, over the course of two-plus years, had progressed and resulted in an acute episode of increased pain in February 2014. He concluded that the work-conditioning program had not contributed to the disc herniation, concurring with Dr. Berman that appellant's progressive right L5-S1 para-median disc protrusion was progressive in nature, not acute in terms of herniation.

The Board finds that Dr. Le's impartial medical examination report represents the special weight of the medical evidence as he had full knowledge of the relevant facts and evaluated the course of appellant's condition. The IME is a specialist in the appropriate field, his opinion is based on a proper factual and medical history, and his report contained a detailed summary of this history. He addressed the medical records to make his own examination findings to reach a reasoned conclusion regarding appellant's employment-related conditions.[9] Following physical examination, the IME found no basis on which to attribute causal relationship between the additional spinal conditions and the accepted August 2, 2011 employment injury. His opinion, as set forth in his March 29, 2017 report, is found to be probative evidence and reliable. The Board therefore finds that the IME's opinion constitutes the special weight of the medical evidence.

As Drs. Grisoni and Paley were on one side of the conflict, their subsequent reports are insufficient to create a new conflict in medical opinion or to overcome the special weight properly accorded to the IME.[10] Therefore, OWCP properly determined that these additional reports were insufficient to expand the acceptance of appellant's claim to include additional lumbar spine conditions as causally related to the accepted August 2, 2011 employment injury.

The diagnostic testing reports and the FCE lack probative value on this issue of causal relationship and are thus insufficient to establish the claim as such evidence does not specifically address whether appellant's diagnosed conditions are causally related to the August 2, 2011 work injury.[11]

[9] *K.V.*, Docket No. 18-0947 (issued March 4, 2019); *M.E.*, Docket No. 18-1135 (issued January 4, 2019); *Michael S. Mina*, 57 ECAB 379 (2006); *Kathryn Haggerty*, 45 ECAB 383, 388 (1994) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

[10] *Id.*

[11] *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

The Board therefore finds that appellant has not submitted sufficient rationalized medical evidence to establish that the acceptance of appellant's claim should be expanded to include additional lumbar spine conditions.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree, or the period of disability, or aid in lessening the amount of the monthly compensation.[12] In interpreting this section of FECA, the Board has recognized that OWCP has broad discretion in approving services provided under FECA.[13]

OWCP has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on OWCP's authority is that of reasonableness.[14] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[15] It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[16]

ANALYSIS -- ISSUE 2

The Board finds that OWCP has not abused its discretion by denying appellant authorization for an April 10, 2014 lumbar spine surgery.

OWCP found a conflict in the medical opinion evidence relating to whether appellant's claim should be expanded to include lumbar spine conditions. Following an impartial medical examination and March 29, 2017 report by the IME Dr. Le, it properly determined that the acceptance of appellant's claim should not be expanded to include lumbar conditions causally related to his accepted employment injury and that lumbar spine surgery was not necessary or appropriate to treat his accepted work-related conditions. Thus, the Board finds that OWCP has not abused its discretion by denying appellant authorization for the April 10, 2014 lumbar spine surgery.

[12] 5 U.S.C. § 8103.

[13] *See J.B.*, Docket No. 11-1301 (issued March 22, 2012).

[14] *Id.*

[15] *Id.*

[16] *See Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

The Board further finds that the January 29, 2014 FCE and subsequent diagnostic reports of record do not constitute competent medical evidence because they do not provide an opinion from a physician regarding appellant's need for the April 10, 2014 lumbar spine surgery.[17] As such, appellant did not meet his burden of proof with these submissions.

LEGAL PRECEDENT -- ISSUE 3

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[18] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[19] 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.[20]

A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.[21] When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[22]

ANALYSIS -- ISSUE 3

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 July 28, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of his reconsideration request, appellant submitted reports dated June 19 through November 17, 2017 from Dr. Paley and July 17 and September 25, 2017 from Dr. Martens. He also resubmitted MRI scan reports of the lumbar spine dated January 5, 2012 to February 16, 2015.

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[17] *Supra* note 16.

[18] This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[19] 20 C.F.R. § 10.607.

[20] *Id*. 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 (iFECS). *Id.* at Chapter 2.1602.4b.

[21] 20 C.F.R. § 10.606(b)(3).

[22] *Id*. at § 10.608(a), (b).

The Board finds that submission of this evidence did not require reopening of appellant's case for a merit review. As OWCP denied his claim based on the lack of supportive medical evidence to overcome the special weight of the report of the IME Dr. Le, and because these reports repeat evidence already in the case record, they are cumulative and do not constitute relevant and pertinent new evidence. Therefore, the Board finds that they are insufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also submitted a July 19, 2017 report from a physical therapist who indicated that she complained of some on-going lower back irritation and pain as well as some right leg radiating pain. The Board finds that submission of this report did not require reopening appellant's case for merit review because it has no probative value on the underlying issues on reconsideration. This report does not constitute competent medical evidence because a physical therapist is not considered a "physician" as defined under FECA.[23] Therefore, this document is not relevant and is insufficient to require a merit review.

As appellant has not provided relevant and pertinent new evidence, he is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board therefore 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.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that the acceptance of his claim should be expanded to include additional lumbar spine conditions as causally related to the accepted August 2, 2011 employment injury. The Board further finds that OWCP has not abused its discretion by denying appellant authorization for an April 10, 2014 lumbar spine surgery. The Board also finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

[23] *M.G.*, Docket No. 19-1199 (issued December 19, 2019); *L.T.*, Docket No. 19-0145 (issued June 3, 2019); *T.H.*, Docket No. 18-1736 (issued March 13, 2019); *see David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *See also M.O.*, Docket No. 18-0229 (issued September 23, 2019) (physical therapists are not considered physicians under FECA).

ORDER

IT IS HEREBY ORDERED THAT the November 27 and June 9, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 18, 2020
Washington, DC

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

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

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