

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

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R.A., Appellant	)	
	)	
and	)	<b>Docket No. 19-1523</b>
	)	<b>Issued: February 7, 2020</b>
DEPARTMENT OF THE AIR FORCE,	)	
902 <sup>nd</sup> CIVIL ENGINEER SQUADRON,	)	
RANDOLPH AIR FORCE BASE, TX, Employer	)	

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*Appearances:* *Case Submitted on the Record*  
Brett E. Blumstein, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 9, 2019 appellant, through counsel, filed a timely appeal from an April 4, 2019 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). As more than 180 days elapsed from OWCP’s last merit decision, dated July 24, 2017, 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.

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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.*

## ISSUE

The issue is 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

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 27, 2012 appellant then a 43-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1), alleging that on November 13, 2012, when in the process of moving his belongings to another department, he injured his neck, upper and lower back, and both legs while in the performance of duty.<sup>4</sup> He stopped work on November 16, 2012.

Contemporaneous medical reports and diagnostic studies revealed multilevel disc disease, most significant at L3-4, and evidence of a prior fusion at L5-S1. There was also evidence of severe cervical spondylosis and disc protrusions/herniations at C3 through C7. Appellant's diagnoses included lumbar disc displacement, lumbar sprain/strain, and neck sprain/strain.

By decision dated January 17, 2013, OWCP denied his traumatic injury claim finding that appellant failed to establish that the November 13, 2012 incident occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant subsequently requested reconsideration, and submitted additional factual and medical evidence regarding his claimed cervical and lumbar injuries.

By decision dated June 19, 2013, OWCP modified the prior decision to find that appellant established that the November 13, 2012 incident occurred as alleged. However, the claim remained denied because the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted employment incident.

Appellant subsequently submitted multiple requests for reconsideration. By merit decisions dated November 1, 2013, February 21 and July 16, 2014, and August 31, 2015, OWCP denied modification. Appellant, through counsel, appealed to the Board on November 25, 2015. By decision dated April 14, 2016, the Board affirmed OWCP's August 31, 2015 decision.<sup>5</sup>

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<sup>3</sup> Docket No. 16-0248 (issued April 14, 2016).

<sup>4</sup> In a November 26, 2012 statement, appellant indicated that on November 13, 2012 he was gathering and moving his belongings to another department and as he bent over to pick up a box, the box slipped. He jerked to keep the box from falling and felt a sharp, throbbing pain in his lower back and down his leg, as well as pain in his neck. Appellant indicated that he put the box down and waited a couple minutes for the pain to subside and then continued to move his belongings to the other department. The employing establishment confirmed that appellant had been informed to report to his newly assigned work area on November 13, 2012.

<sup>5</sup> *Supra* note 3.

On January 26, 2017 appellant, through counsel, requested reconsideration and submitted a January 4, 2017 lumbar computerized tomography (CT) scan. Also submitted was a report from Dr. Helo Chen, an osteopath and family practitioner, dated December 20, 2016, who noted a history of injury on November 13, 2012. He opined that appellant suffers from a sprain of ligaments of cervical spine, strain of the muscle tendon at the lower leg level and right leg, sprain of the ligaments of the lumbar spine, and intervertebral disc disorders with radiculopathy due to an on-the-job injury.

By decision dated April 26, 2017, OWCP denied modification.

On July 7, 2017 appellant, through counsel, requested reconsideration and submitted an undated report from Dr. Chen. Dr. Chen opined that the force of appellant's head hitting the bottom of the desk while his cervical and lumbar spine were in a flexed position caused the injury to his cervical spine, lumbar spine, and bilateral legs. He advised that the diagnosis was confirmed by examination, diagnostic studies, and an accident report review.

By decision dated July 24, 2017, OWCP denied modification of the April 26, 2017 decision.

On July 23, 2018 appellant requested reconsideration. In a narrative statement dated June 28, 2018, he indicated that on November 13, 2012 he was moving his belongings to another department, and when he bent over to pick up a box, it slipped, and he jerked to keep the box from falling, and he felt pain in his low back and neck. Appellant noted that the pain radiated into his ankle. He reported that after completing his move his back pain became worse. Appellant was treated by Dr. Chen on December 20, 2016 and June 16, 2017 and reported that he could not remember the exact date of his injury or provide an accurate restatement of events because it had been four to five years since the injury.

In a July 23, 2018 statement, appellant, through counsel, requested reconsideration of the July 24, 2017 OWCP decision. Counsel indicated that his June 28, 2018 statement explained the discrepancy between Dr. Chen's medical report and appellant's prior statements regarding the history of injury. Appellant asserted that he has provided medical evidence with medical rationale, history, findings, and diagnosis and his claim should be accepted.

By decision dated April 4, 2019, OWCP denied appellant's request for reconsideration.

### **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>6</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

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<sup>6</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).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</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>8</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>9</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>10</sup>

### ANALYSIS

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 disagreed with OWCP's July 24, 2017 merit decision, and timely requested reconsideration on July 23, 2018. The underlying issue is whether appellant has met his burden of proof to establish a causal relationship between his cervical and lumbar conditions and the accepted November 13, 2012 employment incident. As this is a medical question, the Board must determine if appellant presented sufficient evidence or argument regarding causal relationship to warrant a merit review pursuant to 5 U.S.C. § 8128(a).<sup>11</sup>

In his July 23, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered. Consequently, he was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>12</sup>

Along with his reconsideration request, appellant submitted a June 28, 2018 statement regarding the November 13, 2012 incident, which was consistent with his previous statement dated November 26, 2012.<sup>13</sup> However, he added that when he saw Dr. Chen in 2016-2017, he told him that he could not recall the dates and the accuracy of all of the specific events that caused his injury because it had been four to five years since his injury. Appellant reportedly told Dr. Chen to refer to the file for the correct information.

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<sup>7</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>8</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

<sup>9</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>10</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>11</sup> *S.W.*, Docket No. 18-1261 (issued February 22, 2019); *S.V.*, Docket No. 17-2012 (issued October 18, 2018).

<sup>12</sup> 20 C.F.R. § 10.606(b)(3)(i), (ii); *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

<sup>13</sup> *See supra* note 4.

As noted, the issue on reconsideration is causal relationship, which is a medical question that requires competent medical evidence to resolve. Appellant's explanation as to why Dr. Chen mistakenly believed he "hit his head hard against the bottom end of his desk" is not a proper substitute for competent medical evidence on the issue of causal relationship. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>14</sup> As appellant did not submit relevant and pertinent new medical evidence not previously considered by OWCP, he is not entitled to further merit review under the third requirement of 20 C.F.R. § 10.606(b)(3).

On appeal counsel argues that appellant's June 28, 2018 statement is sufficient to warrant further merit review. However, as explained above the underlying merit issue on reconsideration requires medical evidence to resolve.

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 OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>14</sup> *S.W.*, Docket No. 19-1498 (issued January 9, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2020  
Washington, DC

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

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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