

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

_____)	
A.P., Appellant)	
)	
and)	Docket No. 20-0089
)	Issued: June 17, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Miami, FL, Employer)	
_____)	

Appearances:
Joanne Marie Wright, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 13, 2019 appellant, through her representative, filed a timely appeal from a July 24, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated July 10, 2018, 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 over the merits of this case.³

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.*

³ The Board notes that following the July 24, 2019 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 February 23, 2013 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 19, 2013 she sustained injuries to both arms, both legs, lower back, and right shoulder as a result of performing her work duties, specifically sorting, handling, and moving mail before and during her route, while in the performance of duty. She stopped work on February 20, 2013. OWCP accepted appellant's claim for aggravation of preexisting cervical disc syndrome, aggravation of preexisting lumbar disc syndrome, aggravation of preexisting bilateral derangement of the knees, and aggravation of preexisting bilateral derangement of the shoulders. It paid wage-loss compensation on the periodic rolls, effective May 5, 2013. Appellant subsequently retired on disability effective March 27, 2014.

On March 26, 2017 OWCP referred appellant, along with an updated statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Gilbert Beauperthuy, a Board-certified orthopedist, for a second-opinion evaluation regarding the status of her accepted February 19, 2013 employment-related conditions. In an April 25, 2014 report, Dr. Beauperthuy accurately described the February 19, 2013 employment injury and related appellant's current complaints for bilateral knee and low back pain. He provided examination findings and diagnosed degenerative arthropathy to the right and left knee that was not work related, chronic lumbar degenerative disc disease that was not work related, and bilateral rotator cuff disease that was not work related. Dr. Beauperthuy opined that appellant's accepted aggravation of her medical conditions had resolved and that her ongoing symptoms were due to her preexisting degenerative conditions and old age. He indicated that she did not have any disability due to her work-related injury.

In reports dated May 13, June 26, and July 22, 2014, Dr. Richard Blecha, a Board-certified orthopedic surgeon, noted his disagreement with the Dr. Beauperthuy's April 25, 2014 report. He provided examination findings and diagnosed lumbar spinal stenosis, multiple cervical disc herniations, internal derangement of the right and left knee joints, degenerative tear of the medial meniscus of the right knee, partial oblique tear within the posterior horn of the medial meniscus of the left knee, acromioclavicular arthritis and impingement syndrome of both shoulders, right shoulder impingement syndrome, and internal derangement of the right and left shoulders. Dr. Blecha reported that appellant had preexisting disease affecting all these areas, but she aggravated all of these areas on February 19, 2013 and continued to experience symptoms from the aggravation. He related that she remained disabled from work.

OWCP determined that a conflict in the medical evidence existed between Dr. Blecha, appellant's treating physician, and Dr. Beauperthuy, OWCP's second opinion physician, with respect to the status of her employment-related conditions and disability. It referred her, along with a SOAF and a copy of the record, to Dr. Richard S. Glosser, a Board-certified orthopedic surgeon, for an impartial medical evaluation in order to resolve the conflict.

In a December 3, 2014 report, Dr. Glosser related that he had reviewed the record, including the SOAF and medical reports, and noted that appellant's claim was accepted for

aggravation of preexisting cervical disc syndrome, aggravation of preexisting lumbar disc syndrome, aggravation of preexisting bilateral derangement of bilateral knees, and aggravation of preexisting bilateral derangement of the bilateral shoulders. Upon examination of appellant's cervical spine, he observed some cervical tenderness to palpation and noted range of motion findings. Examination of appellant's lumbar spine revealed some complaints of discomfort, but no spasm. Dr. Glosser indicated that range of motion of her right shoulder was flexion to about 160 degrees and abduction to about 150 degrees. Range of motion of appellant's left shoulder was full. Dr. Glosser reported that examination of her knees revealed pain about the medial joint line and crepitation with range of motion. He related that he agreed with Dr. Beauperthuy's opinion that appellant had no work-related conditions causing her objective symptoms and that her objective symptoms were a result of a significant, preexisting degenerative process. Dr. Glosser reported that she could not return to her date-of-injury position, but explained that her work restrictions were related to her preexisting conditions. He completed a work capacity evaluation form (OWCP-5c) with appellant's specific work restrictions.

On February 11, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because her February 19, 2013 work-related injury had resolved based on Dr. Glosser's December 3, 2014 medical report. It afforded her 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

Appellant submitted a February 5, 2015 duty status report by Dr. Samy Bishai, an orthopedic surgeon, who indicated that appellant was unable to work.

By decision dated March 23, 2015, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective March 23, 2015. It found that the special weight of the medical evidence rested with Dr. Glosser, OWCP's impartial medical examiner, who concluded in his December 3, 2014 medical report that she had no residuals or disability due to her accepted February 19, 2013 work-related conditions.

On April 16, 2015 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on December 8, 2015. In a February 19, 2016 decision, an OWCP hearing representative affirmed the March 23, 2015 termination decision.

OWCP subsequently received a June 16, 2016 report by Dr. Bishai who recounted appellant's complaints of continuing pain in both knees, both shoulders, neck, and back. Dr. Bishai provided examination findings and diagnosed lumbar, cervical, bilateral knee, and bilateral shoulder conditions.

On February 14, 2017 appellant, through her representative, requested reconsideration. In a February 12, 2017 letter, she asserted that Dr. Glosser did not sufficiently explain how appellant sustained only a temporary aggravation of her preexisting conditions on February 19, 2013. Appellant's representative noted that both Dr. Beauperthuy and Dr. Glosser had reported that appellant could not return to her date-of-injury position.

Appellant submitted reports dated June 22, 2016 to February 3, 2017 by Dr. Jeremy Johnson, who specializes in family medicine. Dr. Johnson indicated that appellant was seen for complaints of left knee pain. He conducted an examination and diagnosed left knee osteoarthritis. In the February 3, 2017 report, Dr. Johnson related that appellant was seen for follow-up of partial medial meniscectomy of the left knee, which occurred on December 14, 2016.

By decision dated April 6, 2017, OWCP denied modification of the February 19, 2016 decision.

On April 4, 2018 appellant, through her representative, requested reconsideration. She alleged that Dr. Glosser failed to address whether appellant's previously accepted neck sprain and myalgia conditions had resolved. Appellant's representative also pointed out that both Dr. Beauperthuy and Dr. Glosser agreed that appellant continued to be disabled and was unable to return to her city letter carrier position.

Appellant submitted physical therapy treatment notes dated January 11 to September 20, 2017 regarding her treatment for neck pain, cervicalgia, neck stiffness, and neck weakness.

In a July 10, 2018 decision, OWCP denied modification of the April 6, 2017 decision.

On July 9, 2019 appellant, through her representative, requested reconsideration. She argued that Dr. Glosser did not provide a well-rationalized medical opinion that appellant's aggravation of her preexisting injuries on February 19, 2013 was temporary, not permanent. The representative asserted that Dr. Beauperthuy and Dr. Glosser failed to provide sufficient rationale explaining why appellant's continuing residuals from her accepted conditions had ceased even though she could not return to her date of injury job as a letter carrier.

Appellant submitted physical therapy treatment notes dated September 17 and October 16, 2018 co-signed by Dr. Jeffrey Knapp, a Board-certified orthopedic surgeon. Dr. Knapp noted physical examination findings of moderate tenderness in the lumbosacral area and provided range of motion findings. He diagnosed lumbar spondylolisthesis, low back pain, weakness of trunk musculature and both lower extremities, and difficulty walking.

By decision dated July 24, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ 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

⁴ *Supra* note 2.

⁵ 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).

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).

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 disagreed with the July 10, 2018 decision and timely requested reconsideration on July 9, 2019. The underlying issue in this case is whether OWCP properly terminated her compensation benefits as she no longer had continuing residuals or disability causally related to her February 19, 2013 employment injury. This is a medical question. Thus, the Board must determine if appellant presented sufficient evidence or argument regarding appellant's continuing disability or need for treatment to warrant a merit review pursuant to 5 U.S.C. § 8128(a).¹⁰

In her July 9, 2019 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. In her statement, appellant's representative argued that Dr. Glosser did not provide a well-rationalized medical opinion establishing that appellant sustained a temporary aggravation of her preexisting injuries. However, the Board notes that appellant's representative had previously made a similar argument in her February 14, 2017 reconsideration request. As appellant's representative did not provide a new and relevant legal argument and did not show legal error by OWCP, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under section 10.606(b)(3).¹¹

With her July 9, 2019 reconsideration request, appellant also submitted physical therapy treatment notes dated September 17 and October 16, 2018 co-signed by Dr. Knapp. He provided examination findings and diagnosed lumbar spondylolisthesis, low back pain, weakness of trunk musculature and both lower extremities, and difficulty walking. The Board finds that Dr. Knapp's reports did not include any discussion regarding whether appellant was disabled from work or continued to require medical treatment due to her February 19, 2013 employment injury. The Board notes that the submission of evidence that does not address the particular issue involved

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). 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).

¹⁰ *L.B.*, Docket No. 19-1380 (issued February 11, 2020).

¹¹ *Supra* note 8; *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

does not constitute a basis for reopening a case.¹² Accordingly, appellant was not entitled to a review of the merits based on the third above-noted requirement under section 10.606(b)(3).¹³

On appeal appellant's representative asserted that OWCP erroneously relied on the impartial medical report of Dr. Glosser as he failed to provide sufficient rationale to explain why appellant's current bilateral knee, bilateral shoulder, lumbar, and cervical spine problems were due only to her preexisting degenerative disease. As noted above, however, OWCP has previously considered this argument by appellant's representative. Appellant has not advanced a relevant legal argument not previously considered by OWCP.

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for reconsideration without reopening the case for review on the merits.¹⁴

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 July 24, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹² *D.C.*, Docket No. 19-0873 (issued January 27, 2020).

¹³ *Supra* note 8.

¹⁴ *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).