

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

C.F., Appellant)	
)	
and)	Docket No. 19-1495
)	Issued: March 3, 2020
U.S. POSTAL SERVICE, BROOMFIELD POST)	
OFFICE, Broomfield, CO, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 2, 2019 appellant, through counsel, filed a timely appeal from a May 30, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 The Board notes that following the May 30, 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.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board has jurisdiction to review this nonmerit decision.⁴

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 December 6, 2012 appellant, then a 41-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on December 4, 2012 she fell down concrete steps injuring both knees, her right wrist and hand, as well as her left arm, shoulder and neck while in the performance of duty. She stopped work on December 6, 2012. On December 26, 2012 OWCP accepted appellant's claim for sprain of the right knee, sprain of the bilateral shoulders and bilateral wrist sprain. On April 1, 2013 it expanded acceptance of her claim to include right anterior cruciate ligament tear, and tear of the posterior horn of the right medial meniscus. On June 13, 2013 OWCP expanded acceptance of appellant's claim to include bilateral trigger finger, bilateral radial styloid tenosynovitis, and left bucket handle tear of the medial meniscus.

Appellant's accepted surgical procedures include: a February 28, 2013 left shoulder arthroscopy, with repair of the labrum and subacromial bursectomy; a June 26, 2013 right trigger thumb release; a September 26, 2013 right shoulder arthroscopy with superior labrum anterior and posterior (SLAP) repair and subacromial decompression; a February 3, 2014 left trigger thumb release; an April 2, 2014 left knee arthroscopy with partial medial meniscectomy, partial lateral meniscectomy, and medial femoral chondroplasty; an August 12, 2015 right knee arthroscopy with partial lateral meniscectomy, removal of multiple cartilage loose bodies, and trochlear chondroplasty; a September 4, 2018 left middle finger surgery for osteomyelitis; and a September 19, 2018 left shoulder arthroscopic surgery to repair a SLAP tear.

On March 7, 2013 Dr. Robert R. Nystrom, an osteopath, examined appellant due to shoulder, knee, and neck injuries. In a note dated April 8, 2013, Dr. Michael Hewitt, a Board-certified orthopedic surgeon, noted appellant's history of fall on December 4, 2012 and reported that appellant denied a head or neck injury. On May 3, 2013 appellant underwent electrodiagnostic studies of the upper extremities which were normal. On June 9, 2014 Dr. Nystrom examined her due to neck pain as well as her accepted conditions. On July 11, 2014 appellant underwent electrodiagnostic studies which were negative for cervical radiculopathy. On January 22, 2016 she underwent a cervical spine magnetic resonance imaging (MRI) scan which demonstrated central C5-6 disc herniation indenting the anterior aspect of the thecal sac and bulging discs at C3-4 and C4-5. On April 29, 2016 appellant underwent electrodiagnostic studies including upper extremity nerve conduction velocity (NCV) and electromyogram (EMG) testing which was normal. On January 23, 2017 she underwent an additional EMG which demonstrated mild right

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that counsel did not appeal OWCP's March 6, 2019 merit decision denying cervical surgery. Therefore, the Board has not exercised jurisdiction over that decision. 20 C.F.R. § 501.3.

median neuropathy at the wrist. This study was negative for cervical radiculopathy or brachial plexopathy. On August 30, 2017 appellant underwent a cervical MRI scan which demonstrated cervical spondylosis.

On April 17, 2018 Dr. Timothy R. Kuklo, a Board-certified orthopedic surgeon, examined appellant due to right C6 radiculopathy. He performed a physical examination and diagnosed cervical radiculopathy, cervical herniated disc, and spinal stenosis of the lumbar region. Dr. Kuklo recommended an anterior cervical discectomy and fusion at C5-6. He requested authorization for this surgery from OWCP on April 20, 2018.

In a development letter dated April 24, 2018, OWCP denied appellant's request for cervical surgery and listed her accepted conditions including radiculopathy cervical region. It requested additional medical evidence supporting that her requested cervical spine surgery was causally related to her December 4, 2012 employment injury. OWCP afforded appellant 30 days for a response.

On September 13, 2017 Dr. Kuklo noted that appellant attributed her neck condition to her accepted December 4, 2012 employment injury. He noted that since December 4, 2012 she had experienced neck pain. Dr. Kuklo diagnosed cervical herniated disc and cervical radiculopathy.

In a May 9, 2018 report, Dr. Kuklo diagnosed cervical radiculopathy and again recommended an anterior cervical discectomy and fusion. He found that appellant had failed conservative measures. On May 9, 2018 Abby E. Leishman, a physician assistant, performed a preoperative examination.

On June 4, 2018 OWCP referred appellant, an April 25, 2013 statement of accepted facts (SOAF), and a list of questions for a second opinion evaluation to Dr. Douglas Porter, an orthopedic surgeon. In his June 20, 2018 report, Dr. Porter reviewed the SOAF and appellant's medical treatment. He performed a physical examination and noted that during the interview she was able to move her neck more than what she had demonstrated with active range of motion testing. Dr. Porter found no evidence of cervical myelopathy and normal motor strength. He diagnosed preexisting multilevel cervical spondylosis with disc herniation at C5-6. Dr. Porter opined that there was no objective evidence of precipitation, acceleration, or aggravation of her cervical spine due to appellant's December 4, 2012 employment injury. He further found that she had significant nonemployment-related cervical spine conditions, and that while she might elect to proceed with cervical spine surgery, it was not a work-related injury. Dr. Porter noted that appellant's cervical spine MRI scan demonstrated findings most consistent with a degenerative process and not acute trauma.

In a letter dated June 28, 2018, OWCP informed appellant that her requested cervical spine surgery was not authorized. It requested additional medical evidence in support of her requested medical treatment. OWCP indicated that appellant's claim had been accepted for radiculopathy, cervical region.

On July 26, 2018 Dr. Nystrom disagreed with Dr. Porter and opined that appellant's cervical condition was related to her accepted employment injury. He found that it was very easy to see how an injury involving bilateral shoulder dislocations would cause some cervical injury as

well. Dr. Nystrom also noted that appellant's neck pain was not a new complaint, as she had reported this for several years.

In an August 1, 2018 report, Dr. Kuklo disagreed with Dr. Porter and noted that in his initial examination of appellant on September 13, 2017 that she reported neck pain occurring since the December 4, 2012 employment injury. He opined that her complaints of arm pain and radiculopathy were secondary to her fall.

On August 29, 2019 OWCP informed appellant of a conflict of medical opinion between Drs. Kuklo and Porter, and referred her, an August 15, 2018 SOAF, which included within the accepted condition of cervical radiculopathy, and a list of questions to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination.

In his September 28, 2018 report, Dr. Sabin noted that appellant reported that her neck condition with bilateral radiculopathy had been present since the December 4, 2012 employment injury. He reviewed the SOAF and her medical history. Dr. Sabin noted that appellant had four EMGs which did not demonstrate cervical radiculopathy, that she had a history of preexisting neck facet syndrome, and concluded that her neck condition was not related to her accepted employment injury. He questioned whether she had an active neck condition as a pain generator had not been identified. Dr. Sabin concluded that strong surgical indications were not present for these reasons.

By decision dated December 11, 2018, OWCP denied appellant's request for cervical fusion. On December 28, 2018 appellant requested reconsideration.

On November 26, 2018 Dr. Gregory Reichhardt, a Board-certified physiatrist, examined appellant due to neck and shoulder pain as well as numbness down both arms. He listed the mechanism of injury as the work-related fall on December 4, 2012 when she tripped and fell down five feet from a porch while working. Dr. Reichhardt noted that appellant's EMG's were normal and that the etiology of her pain was unclear.

In notes dated January 9, 2019, Deana Halat, a nurse practitioner, recommended that Dr. Kuklo's request for cervical surgery should be granted. On January 15, 2019 Ms. Leishman, diagnosed right C6 radiculopathy with complete numbness of the thumb and index finger.

On January 15, 2019 Dr. Kuklo opined that appellant had experienced cervical radiculopathy since her December 4, 2012 employment injury. He noted that Ms. Halat supported his request for cervical surgery.

By decision dated March 6, 2019, OWCP denied modification of the December 11, 2018 decision.⁵

On March 11, 2019 Dr. Reichhardt noted that appellant underwent a cervical fusion on February 4, 2019 and that she felt that her neck pain was improved. He further noted that she disagreed with the denial of her request for cervical surgery by OWCP. Dr. Reichhardt attributed

⁵ *Supra* note 4.

appellant's neck and bilateral upper extremity pain and numbness to her December 4, 2012 employment injury.

On April 15, 2019 appellant, through counsel, requested reconsideration of the March 6, 2019 decision denying her requested cervical surgery. He resubmitted Dr. Kuklo's May 9 and August 1, 2018 reports and his January 15, 2019 note.

On February 4, 2019 appellant underwent C5-6 anterior cervical discectomy and bilateral foraminotomy, as well as anterior cervical fusion. On March 22, 2019 Dr. Kuklo disagreed with Dr. Sabin's September 18, 2018 report and referenced his January 15, 2019 note. On February 21, March 22, and April 12, 2019 Ms. Halat noted that appellant had undergone a cervical anterior fusion.⁶

By decision dated May 30, 2019, OWCP denied appellant's request for reconsideration relative to the denial of her request for cervical surgery. It reviewed the medical evidence submitted and found it was cumulative and substantially similar to evidence previously considered on the issue of whether surgery was medically necessary due to her accepted employment injury of December 4, 2012.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.⁷

A claimant seeking reconsideration of a final decision must present arguments or provide evidence 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.⁸ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁹ 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.¹⁰

⁶ By decision dated May 1, 2019, OWCP rescinded its acceptance of cervical radiculopathy. The rescission issue is currently on appeal under Docket No. 20-0479.

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(3); *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ *Id.* at § 10.608(a); *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

¹⁰ *Id.* at § 10.608(b); *L.S.*, Docket No. 18-0858 (issued November 19, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

To be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹¹ Timeliness is determined by the document "received date" as recorded in the Integrated Federal Employees' Compensation System (IFECS).¹² If the last day of the one-year time period is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.¹³

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁴ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵

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 filed a timely request for reconsideration on April 15, 2019,¹⁶ but she did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that she is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).¹⁷

In support of her request for reconsideration, appellant submitted Dr. Reichhardt's March 11, 2019 note which reported that she underwent a cervical fusion on February 4, 2019 and that she felt that her neck pain was improved. He further noted that she disagreed with the denial of her request for cervical surgery by OWCP. Dr. Reichhardt attributed appellant's neck and bilateral upper extremity pain and numbness to her December 4, 2012 fall. This report is not relevant to the central issue in this case, whether cervical surgery was causally related to appellant's accepted employment injury and medically warranted.¹⁸ While Dr. Reichhardt

¹¹ 20 C.F.R. § 10.607(a).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹³ *Id.*; *M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹⁴ *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁵ *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁶ *Supra* note 13; *J.F.*, Docket No. 16-1233 (issued November 23, 2016).

¹⁷ *Supra* note 10.

¹⁸ 5 U.S.C. § 8103. OWCP shall furnish the services which it considers likely to cure, give relief, or reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation. However, the employee has the burden of proof to establish that the expenditure is incurred for treatment of the effects of an employment-related injury or condition. The employee must also establish that the procedure is medically warranted. *T.A.*, Docket No. 19-1030 (issued November 22, 2019); *D.K.*, 59 ECAB 141 (2007); *R.C.*, 58 ECAB 238 (2006).

addressed appellant's opinions regarding her cervical surgery,¹⁹ he did not offer his own medical opinion on the necessity of this operation.

Appellant provided her February 4, 2019 operative report. This report does not offer any medical opinion evidence and is not relevant to the issue of whether the surgery was medically warranted and causally related to her accepted December 4, 2012 employment injury.²⁰ Appellant also provided a series of notes from Ms. Halat, a nurse practitioner. However, the Board has held that treatment notes signed by a nurse practitioner are not considered medical evidence as a nurse practitioner is not a physician under FECA.²¹ The nurse practitioner's opinion therefore is not relevant evidence and does not constitute a basis for reopening the case on the merits of the claim²² as it is of no probative value in establishing medical necessity of a requested procedure.²³

On March 22, 2019 Dr. Kuklo noted his disagreement with Dr. Sabin's September 18, 2018 report. He referenced his January 15, 2019 note previously considered by OWCP. Appellant also provided Dr. Kuklo's May 9 and August 1, 2018 reports and his January 15, 2019 note which had also previously been submitted and considered by OWCP. The submission of this evidence does not require reopening of appellant's case for review of the merits as the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.²⁴

Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).²⁵

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). OWCP properly denied merit review.²⁶

¹⁹ The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation. *C.H.*, Docket No. 19-0409 (issued August 5, 2019); *Lourdes Harris*, 45 ECAB 545, 547 (1994).

²⁰ *Supra* note 18.

²¹ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician's 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).

²² *Supra* note 16.

²³ *T.A.*, *supra* note 18.

²⁴ *S.W.*, Docket No. 19-1498 (issued January 9, 2020).

²⁵ *Id.*

²⁶ *Supra* notes 9 through 11.

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 May 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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