

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

_____)	
F.H., Appellant)	
)	
and)	Docket No. 20-0309
)	Issued: January 26, 2021
U.S. POSTAL SERVICE, SUMMERLIN POST OFFICE, Las Vegas, NV, Employer)	
_____)	

Appearances:
Alexia Quintero, Esq., 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 November 25, 2019 appellant, through counsel, filed a timely appeal from a June 11, 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 April 3, 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 June 11, 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 August 19, 2016 appellant, then a 52-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she experienced pain in the neck and shoulders, which radiated down to her arms, and developed multi-level cervical spondylosis due to factors of her federal employment, including reaching overhead, bending forward, and lifting heavy loads. She indicated that she first became aware of her condition on September 7, 2012 and first realized that it was caused or aggravated by factors of her federal employment on July 28, 2016. Appellant did not initially stop work. On November 1, 2016 OWCP accepted the claim for temporary aggravation of cervical disc displacement. It paid appellant intermittent wage-loss compensation on the supplemental rolls from October 15, 2016 through September 15, 2018, and on the periodic rolls commencing September 16, 2018.

On September 15, 2016 Dr. Mark Kabins, a Board-certified orthopedic surgeon, performed an anterior discectomy and interbody fusion/arthrodesis at the C3-4 level.

On January 17, 2017 appellant accepted an offer of a modified rural carrier assignment. The duties of the position included casing mail up to four hours a day, maintaining "Red books" up to two hours a day, and marking up to 10-pound parcels for delivery. The physical requirements included lifting up to 10 pounds and pulling and pushing up to two hours per day, and standing and walking up to four hours per day.

In a February 2, 2017 work excuse note, Dr. Steven Waltman, a specialist in family medicine, noted that appellant was unable to work until February 16, 2017. Appellant stopped work on February 2, 2017.

On February 6, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for intermittent disability from work during the period January 21 through February 3, 2017.

In a February 10, 2017 development letter, OWCP acknowledged receipt of appellant's claim for wage-loss compensation for "February 2, 2017 to February 3, 2017" because the employing establishment was unable to accommodate her work restrictions full time. It advised that additional evidence was needed to establish temporary total disability during the claimed period, requested additional factual and medical evidence, and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a February 16, 2017 duty status report (Form CA-17), Dr. John Reneau, a specialist in physical medicine, diagnosed neck pain, right shoulder pain, and headaches, and listed appellant's work restrictions.

On February 21, 2017 appellant filed a Form CA-7 for disability from work during the period February 4 through 17, 2017.

On February 24, 2017 OWCP forwarded appellant's medical record and a statement of accepted facts to its district medical adviser (DMA) and requested that he address whether an anterior discectomy and reconstruction at the C3-4 level was medically necessary and causally related to her accepted conditions.

In a February 28, 2017 development letter, OWCP acknowledged receipt of appellant's claim for wage-loss compensation for February 4 to 17, 2017 and advised that additional evidence was needed to establish temporary total disability during the claimed period. It requested additional factual and medical evidence as detailed in its February 10, 2017 development letter regarding the earlier claimed period of disability.

On March 8, 2017 appellant responded to OWCP's development questionnaire. She noted that her recurrence occurred after returning to work in a modified-duty position in which she performed repetitive motions that irritated her neck, shoulders, and arms and caused headaches. Appellant indicated that she worked eight hours on January 12 and 13, 2017, casing mail which involved standing for long periods of time, lifting mail weighing up to 10 pounds, and rotating her neck. She alleged that her injury was progressing because her modified assignment did not allow her to recover completely.

In a March 8, 2017 report, Dr. Waltman noted that appellant had a history of previous neck injury and was seen due to increasing neck pain which necessitated that she be off work from February 2 to 16, 2017. He found that her physical examination revealed decreased range of motion of the cervical spine and obvious muscle stiffness and spasms. Dr. Waltman diagnosed recurrent cervical disc disorder and opined that, due to appellant's neck pain and muscle spasms, she was unable to return to work during the noted time frame.

In a March 27, 2017 report, Dr. Nizar Souayah, a Board-certified specialist in neuromuscular medicine, acting as OWCP's DMA, noted appellant's history of injury and medical treatment. He found that she developed chronic neck pain after a work-related injury and indicated that physical examination showed cervical tenderness in the neck and limited range of motion. Dr. Souayah reviewed diagnostic testing which revealed chronic C2, C3, and C4 radiculopathy and a disc protrusion at C3-4. He noted that appellant failed all conservative therapies including cervical injections, pain medications, and physical therapy and as such, the request for anterior discectomy and reconstruction at the C3-4 level was medically necessary.

By decision dated March 31, 2017, OWCP denied appellant's claim for disability for the period February 2 to 17, 2017, finding that the medical evidence of record was insufficient to establish disability for the claimed period.

On March 31, 2017 OWCP authorized the cervical surgical procedures that appellant underwent on September 15, 2016.

On March 29, 2018 appellant, through counsel, requested reconsideration. Counsel enclosed medical evidence and argued that the acceptance of appellant's claim should be expanded to include cervical radiculopathy and that appellant suffered a material worsening of her condition leading to disability starting on or around February 2, 2017. He further argued that OWCP incorrectly evaluated a March 8, 2017 report from Dr. Waltman which established that appellant was disabled from work during the claimed period of disability.

OWCP subsequently received additional medical evidence. Electromyography and nerve conduction velocity studies dated November 14, 2012 revealed moderate bilateral carpal tunnel syndrome and very mild C4 and C5 radiculopathy.

In a February 2, 2017 report, Dr. Waltman noted that appellant presented with incapacitating neck pain. He examined her and diagnosed other cervical disc disorder. Dr. Waltman administered a pain injection to appellant's right elbow. He indicated that she was given a work excuse note to be off work until February 16, 2017.

In a November 16, 2017 report, Dr. Jason Garber, a Board-certified neurosurgeon, noted that appellant presented with exacerbation of her cervical spine condition. He reviewed x-ray views of her spine and diagnosed acute neck pain and a bulge of the cervical disc without myelopathy. Dr. Garber indicated that a magnetic resonance imaging (MRI) scan of appellant's spine from 2016 revealed a disc herniation at C3-4 with ventral impression on the spinal cord.

By decision dated April 3, 2018, OWCP denied modification of its March 31, 2017 decision.

On April 2, 2019 appellant, through counsel, requested reconsideration. Counsel repeated arguments made in her March 29, 2018 request for reconsideration that OWCP mischaracterized or misinterpreted the medical evidence of record. He asserted that the evidence of record was insufficiently developed regarding appellant's diagnosed cervical radiculopathy condition, leading to the April 3, 2018 decision being rendered in error. In addition, counsel specifically addressed a new report from Dr. Matthew Otten, an osteopathic physician specializing in neuromusculoskeletal medicine, dated February 10, 2018 and argued that this report, along with Dr. Waltman's reports established that her diagnosis of cervical radiculopathy was causally related to the accepted employment injury and caused her alleged disability.

OWCP continued to receive medical evidence. In an October 31, 2017 report, Dr. Randall Yee, an osteopathic surgeon, noted appellant's complaints of sharp pain in the right shoulder. Dr. Yee reviewed an MRI scan of her right shoulder and diagnosed cervical radiculopathy, lateral epicondylitis of the right elbow, and right shoulder rotator cuff tear. In a November 8, 2017 report, he reviewed MRI scans of cervical spine and right shoulder and diagnosed cervical radiculopathy and right shoulder rotator cuff tear. In a December 6, 2017 report, Dr. Yee noted that appellant still experienced pain following a cortisone injection. He examined her and diagnosed cervical radiculopathy and right shoulder rotator cuff tear.

In a December 12, 2017 report, Dr. Brian Le, a Board-certified osteopathic physician specializing in pain medicine, noted that appellant had neck pain with associated headaches and pain radiating into the shoulder and hands. He examined her and reviewed x-rays and MRI scans of her right shoulder and spine. Dr. Le diagnosed cervical radiculopathy, but did not specify when it first presented. OWCP thereafter continued to receive progress reports from him dated May 25, July 19, and August 14, 2018 and February 6 and 14, and April 11, 2019 wherein he diagnosed cervical radiculopathy, as well as failed neck syndrome, cervical facet syndrome, cervical radiculopathy, and lumbar facet syndrome.

In a February 10, 2018 report, Dr. Otten indicated that appellant's comorbidities included cervical degenerative disc disease with upper right extremity radiculopathy and right shoulder pain with mild rotator cuff pathology. He noted that she could perform light-duty work, restricted to

no more than two hours a day of repetitive motion, and two hours a day of lifting no more than 10 pounds.

Appellant also submitted progress reports, notes, evaluations, diagnostic tests, and physical therapy treatment notes which did not address her cervical radiculopathy or the specific period of disability claimed.

By decision dated June 11, 2019, 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 or her own motion or on application.⁴

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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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.⁸

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).

In support of appellant's April 2, 2019 request for reconsideration, counsel argued that OWCP mischaracterized or misinterpreted the medical evidence of record and failed to sufficiently develop the evidence of record as to whether the diagnosed cervical radiculopathy should be accepted as causally related to the August 2016 employment injury, leading to OWCP's April 3,

⁴ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.606(b)(3); *see C.C.*, Docket No. 19-1622 (issued May 28, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the originally 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.

⁷ *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *see C.C.*, *supra* note 5; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

2018 decision to be rendered in error. Counsel argued that OWCP failed to address appellant's argument that radiculopathy manifested as pain, muscle weakness, and numbness and that complaints of these conditions paired with objective evidence in the form of progressive worsening of diagnosed cervical radiculopathy constituted rationalized medical evidence. However, these arguments were duplicative of arguments previously of record and therefore do not constitute a basis for reopening the case.⁹ OWCP explained in its April 3, 2018 decision that appellant failed to provide medical rationale explaining how an increase in her symptoms would prevent her from working in any capacity. The Board finds, therefore, that she did not show that OWCP erroneously applied or interpreted a specific point of law, and 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 the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁰

Along with her reconsideration request, appellant submitted numerous progress reports, notes, evaluations, diagnostic tests, and physical therapy treatment notes, which did not address the specific period of disability claimed. She submitted reports from Dr. Yee, dated October 31 through December 6, 2017, and reports and progress notes from Dr. Le, dated December 12, 2017 through April 11, 2019. OWCP also received a February 10, 2018 report from Dr. Otten which indicated that appellant's comorbidities included cervical degenerative disc disease with upper right extremity radiculopathy and right shoulder pain with mild rotator cuff pathology and which necessitated work restrictions. The Board finds that the evidence submitted is irrelevant as to whether she has established disability due to her accepted conditions. The evidence does not address the claimed period of disability or offer an opinion on causal relationship. The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ As such, appellant is not entitled to further review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹²

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

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).

⁹ See *C.M.*, Docket No. 19-1610 (issued October 27, 2020).

¹⁰ *Supra* note 5 at § 10.606(b)(3).

¹¹ See *T.T.*, Docket No. 19-0319 (issued October 26, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000).

¹² *Supra* note 10.

¹³ *C.M.*, *supra* note 9; *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2021
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