

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

D.P., Appellant)

and)

**DEPARTMENT OF DEFENSE, DEFENSE
COMMISSARY AGENCY, ROCK ISLAND
ARSENAL COMMISSARY, Rock Island, IL,
Employer**)

**Docket No. 20-1225
Issued: January 8, 2021**

Appearances:
Appellant, pro se
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 May 28, 2020 appellant filed a timely appeal from an April 16, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 22, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 22, 2019 decision, OWCP received additional evidence on appeal. 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 January 6, 2017 appellant, then a 40-year-old store associate, filed an occupational disease claim (Form CA-2) alleging that she injured her wrist due to factors of her federal employment. She noted that she first became aware of her condition and first realized it was caused or aggravated by her federal employment on May 16, 2008. Appellant explained that she experienced pain in her wrist after it popped. She noted that the repetitive motions involved with working in the store caused her wrist to hurt. On the reverse side of the claim form, T.H., appellant's supervisor, indicated that he had no record of the claimed 2008 incident and that he only had medical documentation from 2013 to present. He advised that the employing establishment was challenging appellant's claim, reasoning that it had been more than three years since her original injury and that her accompanying medical evidence did not indicate that her wrist injury was work related. Appellant did not stop work.

In an August 3, 2016 employment questionnaire, Dr. Thomas Von Gillern, a Board-certified orthopedic surgeon, diagnosed a right wrist sprain. He indicated that appellant underwent a right wrist arthroscopy, a debridement, a synovectomy, a chondroplasty, a partial triangular fibrocartilage excision, an exterior carpi ulnaris extensor tenolysis, a right elbow extensor origin release repair with partial lateral epicondylectomy, a radiocapitellar synovectomy and neurectomy of the posterior aspect of the posterior elbow on July 14, 2016 that would require approximately six to eight weeks for recovery. Dr. Von Gillern recommended light-duty work restrictions for her related impairment.

In a January 11, 2017 development letter, OWCP advised appellant of the factual and medical deficiencies of her claim. It requested that she complete a questionnaire to provide further details regarding the circumstances of her claimed injury and requested a narrative medical report from her treating physician, which contained a detailed description of findings and diagnoses, explaining how her work activities caused, contributed to, or aggravated her medical conditions. OWCP afforded appellant 30 days to respond.

In a November 19, 2013 medical note, Mary Jo Poremba, a physician assistant, indicated that appellant was able to return to work with restrictions.

In an August 5, 2016 memorandum, the employing establishment informed appellant that it denied her request for reasonable accommodations, but advised that she may be entitled to time off under the Family and Medical Leave Act (FMLA) and to other temporary duties.

In a February 7, 2017 letter, appellant noted that it was impossible for her to pinpoint any exact incident or exact time that initiated her work injury, but attested that the employing establishment was aware of her injuries.

In a February 8, 2017 letter, the employing establishment controverted appellant's claim, arguing that she did not begin her employment until November 12, 2008, as such, she could not have been performing her employment duties on May 16, 2008. It also argued that the medical evidence she submitted was insufficient to establish her claim. In a separate March 27, 2017 letter, the employing establishment again controverted appellant's claim, stating that her claim was untimely, she did not establish fact of injury and her medical evidence was insufficient.

By decision dated April 6, 2017, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish that the events occurred as described as she claimed her injury began on May 16, 2008, but she did not start working at the employing establishment until November 12, 2008. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 8, 2018 appellant requested reconsideration of OWCP's April 6, 2017 decision.

Appellant attached medical reports dated from September 26 to December 12, 2013 in which Ms. Poremba evaluated her for pain radiating from her right wrist to her elbow that began two weeks prior. She informed Ms. Poremba that she was taking her dog for a walk and it jerked at her arm. Appellant also noted that she performed twisting and lifting activities at work as a cashier which aggravated her symptoms. Upon review of x-rays Ms. Poremba diagnosed right wrist and hand extensor tenosynovitis, right wrist pain, questionable early carpal tunnel. She placed appellant's right arm in a splint, referred her to occupational therapy and recommended work restrictions. In her December 10, 2013 medical report, Ms. Poremba noted that appellant underwent an electromyography (EMG) test on December 2, 2013 which was negative. In a December 12, 2013 medical report, Dr. Von Gillern reviewed Ms. Poremba's medical findings and diagnosed possible early right carpal tunnel syndrome and possible early right Guyon's tunnel syndrome.

In a January 9, 2014 medical report, Jennifer Scardino, a physician assistant, evaluated appellant's continued right wrist pain and noted that she was beginning to experience symptoms in her left wrist as well. She diagnosed bilateral wrist pain.

In medical reports dated from February 18 to May 1, 2014, Dr. Von Gillern indicated that appellant was wearing bilateral splints and diagnosed bilateral wrist pain, and possible early bilateral carpal tunnel syndrome, possible early bilateral Guyon's tunnel syndrome and possible early bilateral cubital tunnel syndrome. In an April 22, 2014 diagnostic report, Dr. Robert Chesser, Board-certified in physical medicine and rehabilitation, conducted an EMG test and noted normal findings in both the median and ulnar nerves.

In medical reports dated from July 7 to December 15, 2014, Dr. Von Gillern also noted that appellant was experiencing pain in her cervical spine and suggested she undergo a magnetic resonance imaging (MRI) scan. In a July 12, 2014 diagnostic report, Dr. Casey Veach, a Board-certified diagnostic radiologist, conducted an MRI scan of her cervical spine and noted minimal change without significant narrowing. In a September 8, 2014 diagnostic report, Dr. Anthony Kwan, Board-certified in physical medicine and rehabilitation, conducted EMG tests of appellant's cervical spine and found no peripheral entrapment neuropathy and no cervical radiculopathy. He

also noted normal nerve conduction studies of the right and left median motor and sensory nerves. In the September 22, 2014 medical report, Dr. Von Gillern reviewed the diagnostic tests and diagnosed cervical spine osteoarthritis.

Dr. Von Gillern, in medical reports dated from February 16 to August 3, 2015, evaluated appellant for right hand and elbow pain and diagnosed bilateral elbow lateral epicondylitis. He administered right lateral epicondyle injections on February 16 and June 1, 2015 to treat her symptoms and suggested she undergo an EMG test and MRI scan for further evaluation.

In an August 6, 2015 diagnostic report, Dr. John Swanson, a Board-certified radiologist, conducted an arthrogram of appellant's right elbow and opined that his findings were suggestive of a tiny partial tear of the deep fibers of the flexor wad. An August 7, 2015 left elbow arthrogram appeared normal. In August 26, 2015, Dr. Kwan performed an EMG test that also returned normal.

In medical reports dated from November 16, 2015 to April 18, 2016, Dr. Von Gillern diagnosed right wrist pain, a possible triangular fibrocartilage complex (TFCC) tear and improving bilateral elbow lateral epicondylitis. He recommended that appellant undergo a right wrist MRI scan for further evaluation. In a November 24, 2015 diagnostic report, Dr. George Patramanis, a Board-certified diagnostic radiologist, conducted an MRI scan of appellant's right wrist and found a small tear of the radial aspect of the TFCC. On review of appellant's diagnostic reports Dr. Von Gillern diagnosed right wrist pain, a right wrist small TFCC tear, and improving bilateral elbow epicondylitis.

Dr. Kwan performed an EMG test of appellant's bilateral upper extremities on April 27, 2016 and found that it returned normal. In a May 12, 2016 medical report, Dr. Von Gillern reviewed appellant's diagnostic test and diagnosed right wrist pain, a right wrist small TFCC tear and bilateral elbow lateral epicondylitis. He performed a right lateral epicondyle injection to treat her symptoms.

In medical reports dated from June 20 to August 15, 2016, Dr. Von Gillern diagnosed right wrist pain, a right wrist small TFCC tear, right wrist extensor carpi ulnaris (ECU) tenosynovitis and bilateral elbow lateral epicondylitis. He performed multiple surgical procedures on July 14, 2016 to appellant's right upper extremity conditions. Dr. Von Gillern recommended that she participate in physical therapy and suggested work restrictions following her surgery.

OWCP received an October 17, 2016 medical report from Dr. Von Gillern where he indicated that appellant underwent an x-ray of her left wrist and diagnosed left wrist pain, left wrist osteoarthritis, and a possible left wrist TFCC tear. In an October 31, 2016 medical report, Dr. Von Gillern indicated that she underwent an MRI scan of her left wrist on October 24, 2016 and diagnosed left wrist pain, left wrist osteoarthritis, a left wrist TFCC tear, and a left wrist scapholunate ligament tear.

In medical reports dated from March 13 to September 18, 2017, Dr. Von Gillern indicated that appellant's left wrist pain continued and diagnosed left wrist pain, left wrist osteoarthritis, a left wrist TFCC tear, and a left wrist scapholunate ligament tear. He performed multiple injections in order to treat her left wrist symptoms.

A September 27, 2017 diagnostic report for an MRI scan of the left wrist, performed by Dr. Jason Mueller, a Board-certified diagnostic radiologist, revealed a full-thickness TFCC tear.

In an October 23, 2017 medical report, Dr. Von Gillern reviewed appellant's diagnostic report and diagnosed left wrist pain, left wrist primary osteoarthritis, a left wrist full-thickness TFCC tear, left hand paresthesia, and possible left carpal tunnel syndrome.

In a November 13, 2017 diagnostic report, Dr. Jeffery Stedwill, Board-certified in physical medicine and rehabilitation, conducted a nerve conduction study of appellant's left wrist and found no evidence of left median or ulnar neuropathy, peripheral polyneuropathy or any left upper limb radiculopathy. In a subsequent November 16, 2017 medical report, Dr. Von Gillern reviewed appellant's nerve conduction study and diagnosed left wrist pain, left wrist primary osteoarthritis a left wrist full-thickness TFCC tear, and left hand paresthesia.

Appellant, in a February 8, 2018 statement, indicated that she attached all of her previous medical evidence and requested that her sick leave and pay lost due to her injury be restored.

By decision dated May 1, 2018, OWCP affirmed, as modified, the April 6, 2017 decision, finding that the new evidence submitted by appellant was sufficient to establish fact of injury. The claim remained denied, however, because appellant failed to submit a rationalized opinion from her treating physician explaining how her diagnosed conditions were causally related to the accepted factors of her federal employment.

On January 16, 2019 appellant requested reconsideration of OWCP's May 1, 2018 decision.

Appellant submitted a January 7, 2019 narrative medical report from Dr. Von Gillern where he recounted his history of treatment right arm and hand pain beginning December 12, 2013. Dr. Von Gillern indicated that she attributed her pain to working with a cash register and lifting items at work, as well as a jerking injury to her arm caused by her dog. Given appellant's history of injury, he opined that her conditions were at least aggravated and possibly caused by her employment activities. Dr. Von Gillern reasoned that her history of bilateral upper extremity pain and her known employment activities likely aggravated her symptoms.

By decision dated March 22, 2019, OWCP denied modification of its May 1, 2018 decision.

In an April 7, 2019 letter, appellant indicated that she was preparing a request for reconsideration and explained that the previous decision contained an error as the date of injury should have been corrected to May 16, 2013.

On March 15, 2020 appellant requested reconsideration of OWCP's March 22, 2019 decision. In an attached letter of even date, she advised that she would be submitting a report from

Dr. Peter Orris, Board-certified in occupational medicine.³ However, this medical report is not contained within the evidence of record.

By decision dated April 16, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that her March 15, 2020 letter neither raised substantial legal questions, nor included new or relevant evidence.

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.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).

³ The Board notes that Dr. Orris' medical report is not within the evidence of record.

⁴ 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).

⁵ 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).

⁶ *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 the merit 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.

⁷ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

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

Appellant 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 appellant 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).⁹

Appellant also did not submit relevant and pertinent new evidence in support of her March 15, 2020 request for reconsideration. The underlying issue on reconsideration was whether appellant had met her burden of proof to establish that her diagnosed conditions were causally related to the accepted factors of her federal employment. This is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹⁰ However, appellant did not submit any additional medical evidence with her request for reconsideration.

On appeal appellant asserted that she submitted an envelope containing Dr. Orris' report and provided a United States Postal Service tracking number stating that it was received by OWCP on March 18, 2020. She also submitted additional medical evidence. The record, however, does not contain the medical report from Dr. Orris referenced by appellant in reconsideration. Additionally, as stated previously, 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.¹¹ Therefore, because appellant did not provide any "relevant and pertinent new evidence," she is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹²

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 her claim pursuant to 5 U.S.C. § 8128(a).

⁹ *Supra* note 6.

¹⁰ *E.T.*, Docket No. 14-1087 (issued September 5, 2014).

¹¹ *Supra* note 3.

¹² 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 8, 2021
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