



## 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 October 24, 2017 appellant, then a 54-year-old administrative officer, filed a traumatic injury claim (Form CA-1) alleging that on that date at 8:40 a.m. she injured her head, neck, back, left shoulder, and left leg while in the performance of duty. She explained that she fell backwards off a step stool, hitting her head, left shoulder, and back. Appellant indicated that pain radiated down her left leg and that her shoulder, back, and left leg ached. On the reverse side of the claim form, appellant's supervisor, M.F., indicated that appellant stopped work on October 24, 2017. Appellant's supervisor indicated by check mark that appellant was injured on October 24, 2017 while in the performance of duty; however, she also checked the box "Yes" in response to the question of whether appellant's injury was caused by her willful misconduct, intoxication, or intent to injure herself or another. She contended that the claim was questionable because appellant had a pending termination action and appellant had sedentary work accommodations. M.F. further related that her knowledge of the facts regarding the alleged injury did not comport with appellant's statements, and she related that she had tried to place appellant on administrative leave because her termination was pending the next day, and the employing establishment could no longer accommodate her work restrictions.<sup>3</sup> She also asserted that while appellant's notice of injury was dated October 24, 2017, she first received medical care on October 27, 2017.

In an October 24, 2017 authorization for examination and/or treatment (Form CA-16), the employing establishment authorized examination and medical treatment of appellant's head, neck, left shoulder, back, and left leg, pending further advice with regard to whether appellant's condition was caused by an injury in the performance of duty.

In an October 24, 2017 medical report, Gerardo Montanez Galvis, a nurse practitioner, indicated that appellant complained of dull neck pain and back pain related to a trauma, which started earlier that day. He conducted a physical examination and diagnosed cervicalgia and a sprain of cervical spine ligaments. Mr. Galvis signed a state workers' compensation form on that same date indicating that appellant sustained a work-related injury on October 24, 2017, and he noted that appellant had a preexisting condition that contributed to her neck sprain and contusion diagnoses. He additionally listed work restrictions for appellant.

OWCP also received an undated list of witnesses who appellant alleged heard or saw her fall.

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<sup>3</sup> In an April 14, 2017 memorandum, the employing establishment denied appellant's reasonable accommodation request for transfer to a vacant position. In an August 4, 2017 memorandum, it affirmed its April 14, 2017 denial of appellant's reasonable accommodation request. In a September 26, 2017 memorandum, the employing establishment notified appellant of her proposed termination of employment due to the medical inability to perform the essential functions of her position. In an October 25, 2017 memorandum, it informed appellant of her termination of employment. The effective date of termination was listed as October 28, 2017.

In an October 27, 2017 report, Dr. Richard Blecha, a Board-certified orthopedic surgeon, indicated that on October 24, 2017 appellant was standing on a two-step stool and fell backward, landing on the back of her head and posterior aspect of her left shoulder. He indicated that she did not lose consciousness, but, experienced head pain; low back pain radiating into her posterior thighs and knees; neck pain radiating into her left shoulder, arm, and forearm; tingling in her left hand; nausea; and dizziness. Dr. Blecha stated that an employing establishment nurse saw appellant immediately after her injury and administered pain medication, and she was seen the next day at an urgent care facility. He conducted a physical examination, noted preexisting conditions, and ordered additional diagnostic testing. In an October 27, 2017 duty status report (Form CA-17), Dr. Blecha indicated that appellant was injured on October 24, 2017, noted clinical findings, diagnosed a cervical/thoracic/lumbar sprain, and stated that appellant should not work for 30 days.

OWCP also received November 7, 2017 magnetic resonance imaging (MRI) scans of appellant's head and the cervical, thoracic, and lumbar areas of her spine.

Mr. Galvis, in a November 6, 2017 attending physician's report (Form CA-20), noted that he examined appellant on October 24, 2017. He and diagnosed a neck sprain and contusion, and provided work restrictions.

In a November 13, 2017 duty status report (Form CA-17), Dr. Blecha indicated that appellant was injured on October 24, 2017, noted clinical findings, diagnosed cervical/lumbar/thoracic sprains, and related that appellant could not return to work for five weeks.

By letter dated December 28, 2017, M.F., appellant's supervisor, controverted appellant's claim indicating that she doubted whether appellant's conditions were caused by her alleged workplace fall. She noted that appellant had been involved in six previous car accidents and sustained all of the medical conditions she was currently alleging prior to her purported fall. M.F. noted that no one saw appellant fall, and she indicated that she was just turning a corner when she and a contractor heard a noise a few feet away that sounded like someone hit a file onto a surface. She immediately went to see what was going on and saw appellant kneeling by a stool with a file in her hand. M.F. stated that if appellant had fallen then she was able to recoup quickly, and she noted that the files on the top shelf could be reached without a stool. She indicated that appellant had clear instructions not to file or use a stool. M.F. had informed her of this several times and another supervisor had also informed her of this and indicated that another employee would pull and file cases. She related that the employing establishment questioned the timing of appellant's alleged fall since her employment was about to be terminated, and she indicated that appellant engaged in willful misconduct.

In a January 15, 2018 report, Dr. Blecha indicated that appellant continued to complain of head, neck, shoulder, and low back pain. He conducted a physical examination, reviewed diagnostic studies, and indicated that appellant's October 24, 2017 fall from a two-tiered stool aggravated her preexisting conditions of cervical spondylosis with radiculopathy and lumbar spondylosis and directly caused her left-sided occipital neuralgia. Dr. Blecha stated that appellant should not return to work for at least the next month.

By development letter dated January 25, 2018, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit additional evidence and respond to its inquiries.

OWCP subsequently received an October 30, 2017 statement, wherein J.L., a manager, indicated that on March 1, 2017 she told appellant that she could not engage in any heavy lifting, and appellant acknowledged and agreed. In mid-June appellant began working on a new project where J.L. rolled a cart with case files to her desk, she would remove tabs from case files, and she would then inform J.L when she was done and J.L. would return the case files and bring her new ones. J.L. reminded appellant again that she should not lift any case files and should call J.L. or another employee to return cases to the shelf and get her a new batch. Appellant acknowledged she understood and agreed. J.L. saw appellant getting her own files and reminded her not to do that and reiterated that appellant should not perform any lifting, and appellant stated that she understood and nodded in agreement. On October 24, 2017 she was told that appellant stated that she fell from a step stool when she tried to put a case back onto the file shelf. J.L. immediately went to see appellant, who was sitting at her desk. She asked if appellant was okay or wanted to see the nurse, and appellant stated that she did not know. A few moments later J.L. reminded appellant that she had told her on several occasions that she was not supposed to retrieve or return her own cases, and appellant stated that she was aware of that. J.L. again asked if she needed anything and appellant again stated that she did not know.

In a February 8, 2018 response to OWCP's development questionnaire, appellant, through her representative, indicated that she needed to use the two-tiered step stool to reach the top shelf of a five-tiered metal bookcase in order to return case files to their proper place. She indicated that the stool was provided by the employing establishment for this exact purpose. Appellant related that when she finished removing sticky tabs and staples from a file, she would place the file on a cart, and when she finished with all the files she would push the cart across the hall to the bookcase. She alleged that when she stepped up onto the stool to place the files on the top shelf she fell backward and landed on her left shoulder, which caused a whiplash reaction that caused the left side of her head to hit the floor. Appellant's lower back and buttocks also hit the floor. She indicated that because she was in the process of putting a file away she was unable to use her hands to break her fall. She stated that there were three employees who heard her fall and saw her after she fell, but she could not get statements from them because she was terminated from her employment and could not return to her prior workplace. Appellant noted that immediately after falling she felt pain in her left shoulder that radiated into the left side of her neck and pain in her lower back that radiated into her lower extremities and the rest of her back. She related that she got up off of the floor a minute or two after her fall. Appellant noted that M.F. walked by and appellant told her that she was going to the nurses' station because she fell and felt severe back pain. She went to the nurses' station and was given pain medication and icepacks, and appellant remained there for two hours. Appellant then returned to her desk, filled out worker's compensation forms, and went to an urgent care center. She also indicated that she had preexisting conditions due to six nonwork-related car accidents.

Dr. Blecha, in a February 12, 2018 medical report, indicated that appellant reported that her symptoms worsened. He conducted a physical examination and opined that appellant's October 24, 2017 fall from a two-tiered stool directly caused the aggravation of her cervical and

lumbar spondylosis and her occipital neuralgia. A February 12, 2018 duty status report (Form CA-17) he noted that appellant was injured on October 24, 2017 and stated that she would be unable to work for two months.

By decision dated June 27, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that she was injured in the performance of duty, as alleged. It noted that she did not provide any factual evidence in order to substantiate her claim.

On June 26, 2019 appellant, through her representative, requested reconsideration. In an accompanying letter, the representative asserted that OWCP failed to properly develop the factual evidence in the claim, as it accepted the allegations of the employing establishment as factual without any supporting evidence, in violation of FECA and OWCP's procedure manual. He alleged that since OWCP was the employing establishment, it failed to properly develop the evidence in order to protect itself. Appellant's representative indicated that one of the reasons OWCP denied appellant's claim was due to lack of witnesses; however, the law states that to establish that an injury occurred as alleged, eyewitnesses were not necessary, but an appellant's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. He stated that appellant's statements regarding her injury had been consistent with the surrounding facts and circumstances, as she notified her supervisor, which her supervisor acknowledged, sought medical treatment on the date of her injury, and provided medical documentation indicating that she sustained an injury when she fell. Appellant's representative additionally noted that appellant provided a valid reason for her inability to provide witness statements from the witnesses she listed, namely that she was unable to access the employing establishment's premises due to the termination of her employment. He stated that as OWCP is not a disinterested arbiter and shares the responsibility in the development of evidence to see that justice is done, it should have requested witness statements from the employing establishment, and he referred to a section of OWCP's procedure manual indicating that witness statements can be obtained by a claimant or an employing establishment. Appellant's representative also indicated that appellant's supervisor, M.F., failed to provide any documentation indicating that appellant was restricted to sedentary duty, and that appellant stated that she was never told by supervisors to not engage in lifting, pushing, and pulling, as she never had those restrictions. He stated further that the restrictions listed by appellant's doctors in the additional medical evidence provided and in the functional capacity evaluation did not include any restrictions on appellant's ability to lift, push, or pull. The representative indicated that M.F. provided incorrect information on appellant's CA-1 form when she indicated that appellant first received treatment on October 27, 2017, which he indicated reflected the willingness of the employing establishment to provide incorrect information, which was a violation of federal law. He also indicated that the medical evidence submitted to date showed that appellant suffered an aggravation of her preexisting conditions.

In support of her reconsideration request, appellant submitted medical records that predated her alleged workplace fall, an October 3, 2016 functional capacity evaluation.

Appellant additionally submitted a May 30, 2017 e-mail from J.L. indicating that appellant would soon be pulling cases from files. J.L. stated that appellant would send an e-mail noting the last name and the last four (digits) of the files she pulled.

By decision dated September 11, 2019, OWCP denied further merit review of appellant's claim. It found that her request for reconsideration neither raised substantive legal questions, nor included new and 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.<sup>4</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 OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>5</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>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</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>8</sup>

### **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).

On reconsideration, appellant's representative alleged that appellant's statements regarding her injury were consistent with the surrounding facts and circumstances, as she notified her supervisor, which her supervisor acknowledged, sought medical treatment on the date of her injury, and provided medical documentation indicating that she sustained an injury when she fell. The representative alleged that appellant did not have to provide witness statements to establish her claim if her own allegations were consistent with the surrounding facts and circumstances.

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<sup>4</sup> 5 U.S.C. § 8128(a); *H.A.*, Docket No. 18-1253 (issued April 23, 2020); *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).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3); *L.S.*, Docket No. 19-1790 (issued March 11, 2020); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>6</sup> *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.

<sup>7</sup> *Id.* at § 10.608(a); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

These assertions do not show a legal error by OWCP or constitute a new and relevant legal argument.<sup>9</sup> These allegations are a reassertion of the facts which OWCP considered in weighing the evidence presented in the case and finding that appellant had not met her burden of proof. 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.<sup>10</sup>

Appellant's representative additionally contended that appellant provided a valid reason for her inability to provide witness statements, namely that she was unable to access the employing establishment's premises due to the termination of her employment. He asserted that OWCP should have requested that the employing establishment provide statements from additional witnesses. The representative, however, has not explained why appellant could not have otherwise contacted witnesses *via* other means outside of the workplace. This argument, therefore, lacks a reasonable color of validity.<sup>11</sup> As such, appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, and it did not advance a new and relevant legal argument not previously considered. Accordingly, appellant is not entitled to a 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).

In support of her request for reconsideration appellant submitted medical records that predated her alleged workplace fall, an October 3, 2016 functional capacity evaluation, and a May 30, 2017 e-mail from J.L. indicating that appellant would soon be pulling cases from files. The Board finds, however, that this evidence is not relevant to the underlying factual issue of the present case, *i.e.*, whether appellant submitted probative factual evidence supporting that she fell on October 24, 2017 as alleged. Thus, appellant is not entitled to a review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>12</sup>

The Board, therefore, finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3).<sup>13</sup> 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).

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<sup>9</sup> *See* *Y.K.*, Docket No. 18-1167 (issued April 2, 2020).

<sup>10</sup> *G.D.*, Docket No. 18-1665 (issued March 12, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>11</sup> *V.R.*, Docket No. 19-1761 (issued April 15, 2020); *E.R.*, Docket No. 18-0446 (issued November 6, 2019).

<sup>12</sup> *M.B.*, Docket No. 19-0596 (issued August 6, 2019); *see H.H.*, Docket No. 18-1660 (issued March 14, 2019).

<sup>13</sup> *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *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 September 11, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2021  
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