

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

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L.F., Appellant)	
)	
and)	
)	Docket No. 20-1371
)	Issued: March 12, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Piscataway, NJ, Employer)	
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Appearances:
James D. Muirhead, 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 1, 2020 appellant, through counsel, filed a timely appeal from an April 8, 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 July 17, 2019, 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 April 8, 2020 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 October 17, 2016 appellant, then a 48-year-old city carrier assistant, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2016 she sustained multiple injuries when her vehicle was hit head on as she was waiting to make a left turn while in the performance of duty. OWCP accepted the claim for facial laceration, sprain/strain of neck, lumbar sprain, and contusion of the left knee. It expanded acceptance of appellant's claim to include right shoulder labral tear, right carpal tunnel syndrome, left knee lateral meniscus tear, bulging disc at L4-5 with radiculopathy, and cervical disc displacement at C4-5, C5-6, and C6-7.

On June 5, 2017 Dr. Robert Greenblum, a Board-certified orthopedic surgeon, performed authorized left knee arthroscopy, partial lateral meniscectomy, major synovectomy, and chondroplasty of the lateral tibial plateau. He diagnosed complex tear of body and posterior horn of lateral meniscus, diffuse synovitis, chondromalacia grade I to II medial tibial plateau and trochlea and grade II to III lateral tibial plateau, and arthropathy of the left lower extremity with degenerative osteoarthritis of the left knee.

On August 1, 2017 OWCP referred appellant for a second opinion examination, along with a statement of accepted facts (SOAF), a set of questions, and the medical record to Dr. Timothy Henderson, a Board-certified orthopedic surgeon, to determine the extent of her work-related injuries, work tolerance limitations, and treatment recommendations.

In a September 13, 2017 report, Dr. Henderson diagnosed cervical neck sprain with disc herniation at C5-6, C6-7, right shoulder sprain, lumbar back sprain with disc herniation at L4-5, and left knee internal derangement with tear of the lateral meniscus. He opined that appellant had residuals of the accepted conditions, which precluded her from performing the duties of a city carrier assistant. Dr. Henderson further noted that she was not capable of performing any work at this time secondary to her multiple injuries. He recommended that appellant continue an additional two months of physical therapy three times a week, use anti-inflammatories, and be reevaluated in three months. In a work capacity evaluation (Form OWCP-5c) Dr. Henderson noted that she was unable to return to work and had not reached maximum medical improvement (MMI).

On October 13, 2017 appellant's physician requested authorization for a transforaminal epidural injection into the cervical region.

On October 16, 2017 OWCP requested that Dr. Henderson address whether appellant's request for authorization of interlinear cervical/thoracic injection, epidurography, and fluoroguide spinal injection were medically necessary and causally related to her accepted work injury.

In an October 24, 2017 supplemental report, Dr. Henderson opined that based upon his previous physical examination and review of the medical evidence the requested procedures were not medically necessary or causally related to the accepted work injury and conditions.

On November 16, 2017 appellant's physician requested authorization for a transforaminal epidural injection into the lumbar/sacral region.

By decision dated January 23, 2018, OWCP denied authorization for lumbar and cervical spine injections finding that the evidence of record did not support that they were medically necessary to address the effects of the work-related injury.

On March 20, 2018 OWCP requested a supplemental opinion from Dr. Henderson. On April 2, 2018 OWCP referred appellant for a second opinion examination, along with a SOAF, a series of questions, and the medical record to Dr. Andrew Farber, an osteopath and Board-certified orthopedic surgeon, to determine the extent of her work-related injuries, work tolerance limitations, and treatment recommendations.

In an April 23, 2018 report, Dr. Farber diagnosed neck sprain, lumbar sprain, and status post left knee arthroscopy. He noted subjective complaints of pain and radicular symptoms in the neck and back, however, there was no objective evidence of restricted range of motion, weakness, radiculopathy, or neurologic compromise. Dr. Farber noted that based on his physical examination appellant did not have residuals related to the surgery performed on June 5, 2016. He opined that she could return to work full-time full duty and did not require further treatment with regard to the neck and back. In a Form OWCP-5c Dr. Farber indicated that appellant reached MMI and could return to regular duty.

On July 17, 2018⁴ OWCP request clarification from Dr. Farber. It requested that he address whether the accepted conditions had resolved, specifically the facial laceration, neck sprain, lumbar sprain, contusion of the left knee, right shoulder labral tear, right upper limb carpal tunnel syndrome, left knee lateral meniscus tear, bulging disc at L4-5 with radiculopathy and cervical disc displacement at C4-5, C5-6, and C6-7.

In a report dated July 19, 2018, Dr. Farber opined that all of the accepted work conditions were resolved without residuals and appellant could return to work full-time full duty.

On December 17, 2018 OWCP notified appellant that it proposed to terminate her wage-loss compensation and medical benefits as the weight of the medical evidence, represented by the reports of Dr. Farber, established that she no longer had continued disability from work as a result of her accepted employment injury.⁵ It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed action.

Dr. Nancy Speez, Board-certified in physical medicine and rehabilitation, on March 14, 2018, diagnosed cervical disc displacement and myofascial pain and requested authorization for trigger point injections.

On June 20, 2018 appellant was evaluated by Dr. Daniel Rothstein, Board-certified in anesthesiology, who diagnosed lumbalgia, lumbar and cervical radiculopathy, lumbar and cervical disc herniation, lumbar and cervical facet syndrome, cervicgia, and cervical radiculopathy. He opined that appellant continued to have severe debilitating low back pain with radiation into the

⁴ OWCP noted the date of the letter as July 17, 2017; however, this appears to be a typographical error.

⁵ OWCP listed Dr. Sean Lager as the second opinion physician; however, this was a typographical error.

lower extremities secondary to lumbar radiculopathy. Dr. Rothstein recommended bilateral transforaminal epidural steroid injections.

On January 7, 2019 appellant through counsel objected to the notice of proposed termination and asserted that she continued to have residuals of her accepted conditions. She indicated that Dr. Farber did not refer to all of the accepted conditions in his reports and noted that his findings were contradicted by the prior second opinion physician, Dr. Henderson. Appellant further asserted that she was sent to Dr. Henderson for a reexamination, but she was examined by Dr. Farber which she found to be irregular.

On February 6, 2019 the medical examination scheduler for OWCP, Mitchell MCN, reported that Dr. Henderson left his prior practice and was no longer performing referral examinations as of February 19, 2018. They received an OWCP referral for reexamination on March 30, 2018 and advised that Dr. Farber would be a suitable substitute for Dr. Henderson.

By decision dated February 7, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective February 8, 2019, finding that the reports from Dr. Farber constituted the weight of the medical evidence and established that she was capable of performing the physical requirements of her date-of-injury position.

On January 30, 2019, Dr. Joseph F. Altongy, a Board-certified orthopedist, treated appellant for injuries sustained in a motor vehicle accident at work. He presented with persistent pain in her lower back and left knee. Dr. Altongy diagnosed cervical and lumbar disc displacement, cervical and lumbar radiculopathy, cervical and lumbar facet syndrome, sprain/strain of the right shoulder, contusion of the right shoulder and left knee, right shoulder impingement, chondromalacia of the left patella, and effusion of the left knee. He advised that continued evaluation of the lumbar spine and left knee was medically necessary and recommended a new magnetic resonance imaging scan of the lumbar spine and left knee.

On February 14, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on June 3, 2019.

By decision dated July 17, 2019, an OWCP hearing representative affirmed the decision dated February 7, 2019.

On April 3, 2020 appellant requested reconsideration. She contended that OWCP improperly relied on the reports of Dr. Farber to terminate her benefits noting that he was "a regular second opinion doctor for OWCP." Appellant further indicated that his report contradicted the initial second opinion physician's findings. In support of her request, she resubmitted reports from Dr. Henderson dated September 13 and October 24, 2017 and Dr. Altongy dated January 30, 2019, previously of record.

By decision dated April 8, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (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.⁹ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

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 her request for reconsideration, appellant, through counsel, reiterated arguments that OWCP had improperly terminated her wage-loss compensation and medical benefits based on reports from Dr. Farber who contradicted the reports of Dr. Henderson, the first second opinion physician. However, this argument was duplicative of an argument previously of record and therefore does not constitute a basis for reopening the case.¹¹ Appellant further asserted that Dr. Farber was "a regular second opinion doctor for OWCP." 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).¹²

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). 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). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

¹⁰ *Id.* at § 10.608.

¹¹ *See B.O.*, Docket No. 20-0156 (issued May 13, 2010).

¹² 20 C.F.R. § 10.606(b)(3); *see D.S.*, Docket No. 18-0353 (issued February 18, 2020).

The underlying issue in this case is medical in nature, however, appellant did not submit any relevant and pertinent new medical evidence with her April 3, 2020 request for reconsideration.

Appellant resubmitted the reports from Dr. Henderson dated September 13 and October 24, 2017 and Dr. Altongy dated January 30, 2019. As these reports repeat evidence already in the case record, they are cumulative and do not constitute relevant and pertinent new evidence. Providing additional evidence that either repeats or duplicates information already in the record does not constitute a basis for reopening a claim.¹³ Therefore, it is insufficient to require OWCP to reopen the claim for consideration of the merits. Because appellant has not provided relevant and pertinent new evidence, she was not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹⁴

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).

¹³ *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹⁴ *See* 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 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