

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

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<b>G.M., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1485</b>
	)	<b>Issued: March 22, 2021</b>
<b>U.S. POSTAL SERVICE, MUNSTER POST</b>	)	
<b>OFFICE, Munster, IN, Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*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 August 6, 2020 appellant, through counsel, filed a timely appeal from a July 8, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days has elapsed from OWCP's last merit decision, dated July 3, 2019, to the filing of this

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<sup>1</sup> 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.

<sup>2</sup> Counsel did not appeal from OWCP's nonmerit decision dated June 2, 2020, which denied appellant's June 1, 2020 reconsideration request. He identified only the nonmerit decision dated July 8, 2020 on the application for review (Form AB-1). Therefore, the Board will not consider the June 2, 2020 OWCP decision on appeal. *See* 20 C.F.R. § 501.3; *see also* *L.J.*, Docket No. 19-0211 (issued July 10, 2019).

appeal, pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

### **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 March 30, 2016 appellant, then a 52-year-old city mail carrier, filed an occupational disease claim (Form CA-2) alleging cervical, lumbar, chest, and left hip conditions due to her repetitive employment duties.<sup>4</sup> She noted that she first became aware of her condition on December 4, 2014 and its relationship to her federal employment on February 17, 2016. Appellant stopped work on December 21, 2015.<sup>5</sup>

In a development letter dated April 19, 2016, OWCP advised appellant of the additional factual and medical evidence necessary to establish her claim and attached a questionnaire for her completion. In a separate letter of even date, it also requested additional information from the employing establishment. OWCP afforded both parties 30 days to submit the requested evidence.

On May 18, 2016 OWCP received appellant's completed development questionnaire. Appellant explained that the wall of her chest ached when she carried and lifted a heavy mail satchel while delivering mail on her walking route. She noted that she sought medical treatment at the hospital. Appellant indicated that she did not sustain any other injury, did not have similar disabilities before the injury, and had never been diagnosed with coronary artery disease. She asserted that the weight of her mail satchel caused a disc in her neck to slip, which caused pain across the wall of her chest, neck, and shoulders.

Appellant submitted a March 5, 2004 job offer for a mail carrier position, an October 27, 2011 employee reassignment and medical assessment questionnaire form, an October 28, 2011 occupational health medical assessment determination, a December 3, 2012 accident information record regarding a November 30, 2012 dog bite incident, and a December 4, 2012 e-mail from an occupational health nurse.

OWCP also received medical reports, including a March 10, 2004 occupational health medical assessment report, a June 17, 2005 work status note, an October 5, 2012 chest x-ray

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The record reveals that the same Form CA-2 was used to create two separate claims. Under OWCP File No. xxxxxx091, appellant has alleged an aggravation of her abdominal pain, nausea, and gastrointestinal issues due to stress and anxiety from factors of her federal employment. Under the current claim, OWCP File No. xxxxxx759, appellant has alleged cervical, lumbar, chest, and left hip conditions due to her repetitive employment duties. These cases have not been administratively combined by OWCP.

<sup>5</sup> Appellant has a previously accepted claim for a lumbar condition. Under OWCP File No. xxxxxx842 OWCP accepted that appellant sustained a low back contusion, resolved, due to an August 13, 2014 employment injury.

examination report, hospital records dated March 7 and 8, 2014, an April 28, 2016 lumbar spine magnetic resonance imaging (MRI) scan report, work status notes dated April 28 and May 9, 2016, hospital emergency department records dated April 25, 2016, a May 9, 2016 work status note, and cervical spine MRI scan reports dated May 9 and 12, 2016.

In reports dated May 9 and 18, 2016, Dr. Mario P. Brkaric, a Board-certified orthopedic surgeon, indicated that a lumbar spine MRI scan had shown degeneration at L5-S1 with disc herniation and that a cervical spine MRI scan report had shown disc herniation at C5-6. He also recounted appellant's complaints of significant radiculopathy into her left arm. Dr. Brkaric authorized appellant to work with restrictions.

In a July 8, 2016 decision, OWCP denied appellant's occupational disease claim finding that she had not submitted medical evidence containing a diagnosis in connection with the accepted employment factors. Accordingly, it found that the requirements had not been met to establish an injury as defined by FECA.

On July 13, 2016 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 16, 2016.

OWCP subsequently received a December 9, 2016 handwritten statement by appellant. Appellant alleged that she developed left side shoulder pain and impingement and cervical pain from carrying a satchel loaded with mail on her left shoulder. She asserted that she developed lumbar radiculopathy, hip pain, and a lower back pinched nerve disc as a result of repetitively walking, twisting, bending, and picking up heavy objects while she walked and delivered mail.

In a January 24, 2017 decision, an OWCP hearing representative affirmed the July 8, 2016 decision with modification. She determined that the medical evidence of record was sufficient to establish diagnosed cervical and lumbar conditions. However, the hearing representative denied appellant's claim because the medical evidence of record was insufficient to establish causal relationship between the diagnosed conditions and the accepted factors of employment.

On August 29, 2017 appellant requested reconsideration and submitted a May 6, 2017 narrative report by Dr. Kevin Schendel, a Board-certified internist, who opined that appellant had left low back pain syndrome aggravated by her job as a mail carrier. Dr. Schendel also reported that it seemed "very likely" that appellant's left shoulder impingement syndrome and neck pain were aggravated by her occupation. He noted that she carried a heavy satchel of mail, reached into the mail satchel, and used her rotator cuff system to dispense the mail to residents.

By decision dated November 27, 2017, OWCP denied modification of the January 24, 2017 decision.

Appellant disagreed with the decision and continued to request reconsideration on May 9 and September 26, 2018. She submitted a June 27, 2018 lumbar spine MRI scan report and a September 13, 2018 cervical spine MRI scan report.

OWCP also received a March 7, 2018 report by Dr. Nilda Durany, who specializes in family medicine, who reviewed appellant's history, conducted an examination, and discussed diagnostic testing results. Dr. Durany described appellant's employment duties of carrying a

satchel full of mail, walking, and rotating her neck to deliver mail and packages. She opined that appellant's medical conditions were a direct result of her work duties on April 17, 2016.

Appellant submitted an undated report by Dr. Jerry Powell, who specializes in family medicine. Dr. Powell noted physical examination findings, discussed recent diagnostic testing, and diagnosed other cervical disc degeneration, kyphosis of the cervical spine, spondylosis cervical and lumbar region, lumbar intervertebral disc disorder with myopathy, right hip contusion, and left rotator cuff sprain. He concluded that appellant sustained the above-described medical conditions as a direct result of her required work duties for the employing establishment on April 17, 2016.

By decisions dated August 7 and November 1, 2018, OWCP denied modification of its prior decisions.

On November 26, 2018 appellant requested reconsideration. By decision dated December 3, 2018, OWCP denied her request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

On February 26, 2019 appellant requested reconsideration and submitted a December 28, 2018 report by Dr. Powell. Dr. Powell reiterated his previous opinion and discussion of how appellant's repetitive employment duties, including lifting heavy packages out of the back of the mail truck, wearing the heavy mail satchel on her left shoulder, and walking, bending, lifting, and twisting to deliver mail caused and aggravated her cervical, lumbar, left shoulder, and right hip conditions.

By decision dated July 3, 2019, OWCP denied modification of its prior decision.

On July 1, 2020 appellant, through counsel, requested reconsideration and submitted a January 13, 2020 inclinometry study signed by Dr. Powell.

OWCP also received a January 13, 2020 examination report by Krysta Graham, a certified nurse practitioner, who recounted that appellant was seen for a reexamination of a work-related injury to the cervical spine, left shoulder, and lumbar spine. Upon examination of appellant's lumbar spine, she reported positive straight leg raise testing on the left and positive Kemps, Milgrams, and apprehension tests. Ms. Graham diagnosed cervical and lumbar spine sprains, cervical congenital kyphosis, cervical and lumbar spondylosis, lumbar intervertebral disc disorders with radiculopathy, left hip contusion, and unspecified rotator cuff sprain.

By decision dated July 8, 2020, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

## LEGAL PRECEDENT

Section 8128(a) of FECA<sup>6</sup> 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>7</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>8</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>9</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>10</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>11</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).

In her timely request for reconsideration, appellant, through counsel, did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>12</sup>

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<sup>6</sup> *Supra* note 2.

<sup>7</sup> 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).

<sup>8</sup> 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).

<sup>9</sup> *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 OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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). Chapter 2.1602.4b.

<sup>10</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>11</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>12</sup> *Supra* note 8; *see K.F.*, Docket No. 19-1846 (issued November 3, 2020).

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. With her reconsideration request, appellant submitted a January 13, 2020 inclinometry study signed by Dr. Powell. The study did not include any discussion of whether appellant's diagnosed conditions were causally related to the accepted factors of her employment. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>13</sup> Similarly, the January 13, 2020 examination report by Ms. Graham is irrelevant to appellant's case as nurse practitioners are not considered physicians as defined by FECA and their opinion, therefore, is of no probative value.<sup>14</sup> As appellant failed to provide relevant and pertinent new evidence related to the underlying issue of causal relationship, she was not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>15</sup>

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for reconsideration without reopening the case for review on the merits.<sup>16</sup>

On appeal counsel argues that OWCP's July 8, 2020 decision is contrary to fact and law. As stated above, the evidence appellant submitted on reconsideration has not met the requirements to reopen her case for a review of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

### **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>13</sup> *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *E.G.*, Docket No. 18-0270 (issued August 24 2018); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>14</sup> 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *W.Z.*, Docket No. 20-0191 (issued July 31, 2020) (medical reports signed solely by nurse practitioners or physical therapists are of no probative value as such health care providers are not considered "physician[s]" as defined under FECA and are, therefore, not competent to provide medical opinions).

<sup>15</sup> *Supra* note 8.

<sup>16</sup> *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

**ORDER**

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

Issued: March 22, 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