

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

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**D.J., Appellant** )

**and** )

**U.S. POSTAL SERVICE, ATLANTA DISTRICT** )  
**SALES OFFICE, Atlanta, GA, Employer** )  
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**Docket No. 21-0371**  
**Issued: November 24, 2021**

*Appearances:*

*Wayne Johnson, 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 January 13, 2021 appellant, through counsel, filed a timely appeal from a July 17, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision dated July 3, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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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> 5 U.S.C. § 8101 *et seq.*

## 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 April 28, 2015 appellant, then a 59-year-old distribution window clerk, signed an occupational disease claim (Form CA-2) alleging that she injured her knees, legs, right shoulder and wrist, left arm, and lower back due to factors of her federal employment. She noted that she first became aware of her conditions on March 17, 2014 and of their relationship to her federal employment on April 28, 2015. Appellant also noted on the form that she filed her claim immediately with her supervisor. Her supervisor signed the form on January 26, 2016 and noted on the claim form that appellant stopped work on April 28, 2015 and reported the condition to her on January 26, 2016.

In an attached narrative statement dated April 28, 2015, appellant advised that she had previously filed a traumatic injury claim (Form CA-1) for a March 17, 2014 injury to both legs, knees, and lower back. She accepted a September 15, 2014 modified job offer after being off work for six months. On April 28, 2015 appellant's right foot got caught in cords under her desk as she was rising from her chair to go to the copier, causing her to fall forward onto her desk.

In a letter dated January 28, 2016, the employing establishment controverted the claim. The employing establishment also noted that appellant was familiar with the claims process as she had previously filed several claims and it questioned why appellant filed a Form CA-2, rather than a claim for traumatic injury (Form CA-1).

In a development letter dated February 3, 2016, OWCP notified appellant that it had converted her claim to a traumatic injury and advised her of the deficiencies of her claim. It informed her regarding the medical and factual evidence required to establish her claim. OWCP advised that the employing establishment controverted appellant's claim and requested that she provide factual evidence addressing the employing establishment's challenge including witness statements. It afforded appellant 30 days to provide the requested information.

In a report dated February 17, 2016, Dr. Jay Bender, a Board-certified physiatrist, noted that appellant had been reevaluated for an April 28, 2015 work injury. He reported that she had continued limited lumbar and bilateral knee flexion and extension and tenderness on palpation of lumbar paraspinalia. Dr. Bender opined that appellant remained totally disabled. He also completed a duty status report (Form CA-17) of even date in which he noted a diagnosis of varicose veins, clinical findings of bilateral lower extremity swelling, injury date of April 28, 2015, and related that appellant was totally disabled.

By decision dated March 8, 2016, OWCP denied appellant's claim, finding the evidence insufficient to establish that the alleged April 28, 2015 incident occurred as alleged. It further found that the medical evidence of record did not provide a medical diagnosis. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 4, 2016 appellant requested a review of the written record by an OWCP hearing representative.

In a report dated April 29, 2016, Dr. Daniel A. Nicholson, diagnosed lumbago, right elbow pain, and left knee pain. He noted appellant's history of tripping over a cord and landing on her right arm. Dr. Nicholson diagnosed left knee and right elbow pain, and lumbago.

In a report dated July 12, 2016, Dr. Bender noted an injury date of March 17, 2014 and related that appellant would remain totally disabled for 30 days. He provided examination findings for the cervical and lumbar spines. In a Form CA-17 of even date, Dr. Bender indicated that appellant was totally disabled, noted an injury date of March 17, 2014, and listed International Classification of Diseases codes of M54.12 and M51.27.

By decision dated January 10, 2017, OWCP's hearing representative affirmed the March 8, 2016 decision denying appellant's traumatic injury claim. The hearing representative found that appellant had failed to establish that the April 28, 2015 incident occurred as alleged.

A May 2, 2017 disability note from Dr. Bender noted that appellant would remain disabled from work for the period May 2 to June 6, 2017. In a Form CA-17 of even date, Dr. Bender described clinical findings of lumbar herniated disc and related that appellant was totally disabled.

On May 11, 2017 appellant provided a response to OWCP's development letter. She described her work duties, noted that varicose veins had been accepted under prior claims, and that on April 28, 2015 she sustained a traumatic injury after returning to a modified job. According to appellant, while attempting to get out of her chair to retrieve documents from the copier that her right foot got caught in cord under her desk and she fell. She listed the names of coworkers she indicated witnessed the incident and also noted that she had immediately notified her supervisor, who came over and saw the wires on the floor.

Dr. Bender, in a June 6, 2017 disability note, indicated that appellant was evaluated that day and that she would remain totally disabled from work until July 19, 2017. In a Form CA-17 dated June 6, 2017, he found appellant totally disabled.

In a November 15, 2017 report, Dr. Victor Osisanya, a Board-certified physiatrist, noted appellant's history of the April 28, 2015 incident. He related appellant's physical examination and diagnostic testing findings. Dr. Osisanya diagnosed cervical and lumbar radiculopathy, right shoulder impingement syndrome, right shoulder rotator cuff strain, right elbow lateral epicondylitis, and bilateral knee osteoarthritis. He found appellant totally disabled since her 2015 fall. Dr. Osisanya explained that appellant's use of her outstretched arms to catch herself on the desk when she fell caused her right rotator cuff inflammation and strain. The force of the fall and whiplash reaction likely increased loading forces on appellant's cervical spine resulting in inflammation to an already strained area resulting in bulging or herniated cervical discs and cervical radiculopathy. Dr. Osisanya attributed the remaining conditions to appellant's repetitive work duties.

On January 10, 2018 appellant, through counsel, requested reconsideration. Counsel asserted that OWCP failed to consider evidence submitted under OWCP File No. xxxxxx071 supporting that she sought medical treatment at the time of the April 28, 2015 incident.

On January 29, 2018 OWCP received additional medical reports.

Dr. Bender, in a February 18, 2015 report, noted an injury date of February 8, 2015, provided examination findings, and diagnosed varicose veins and lumbar strain.

An October 19, 2015 report from Dr. Natalie Chan, a chiropractor, noted a March 17, 2014 injury date, provided examination findings, and diagnosed lumbar strain per Dr. Bender.

In disability notes dated August 25 and December 2, 2015, Dr. Bender advised that appellant was totally disabled due to a March 17, 2014 employment injury.

Dr. Bender, in reports dated December 2 and 7, 2015 report, noted a March 17, 2014 injury date and provided examination findings. He diagnosed cervical radiculitis in the December 2, 2015 report and diagnosed peripheral vascular disease with bilateral lower extremity varicose veins in the December 7, 2015 report.

In a February 17, 2016 disability note, Dr. Bender found appellant totally disabled due to an April 28, 2015 work incident.

In a March 7, 2016 report, Dr. Vidyadhar S. Chitale, a Board-certified neurosurgeon, noted that appellant was seen for an April 28, 2015 work injury and complaints of bilateral arm, low back, neck, and bilateral leg pain due to the incident. Appellant's physical examination findings were noted. A review of a lumbar magnetic resonance imaging scan revealed multilevel lumbar facet arthropathy worse at bilateral L2-5. Dr. Chitale diagnosed lumbar facet arthropathy with effusions.

In an April 1, 2016 report, Dr. David R. Penn, Board-certified in interventional radiology and diagnostic radiology, noted appellant's history of venous insufficiency going back 11 years. Physical examination findings were detailed and he diagnosed chronic peripheral venous insufficiency, low back pain and bilateral extremity varicose veins with pain.

In a January 25, 2018 report, Dr. Osisanya noted appellant's April 28, 2015 history of injury. He detailed appellant's examination findings, reviewed diagnostic testing, and diagnosed cervical and lumbar radiculopathy, right shoulder impingement syndrome, right shoulder rotator cuff strain, right elbow lateral epicondylitis, and bilateral knee osteoarthritis. Dr. Osisanya opined that appellant had been totally disabled since her 2015 fall. In a duty status report (Form CA-17) of even date, he repeated that appellant was totally disabled.

By decision dated April 6, 2018, OWCP denied modification.

Subsequent to the April 6, 2018 decision, OWCP received a March 8, 2017 report regarding a bilateral extremity venogram and a November 28, 2017 report regarding an endovenous laser treatment of appellant's left greater saphenous vein. It also received reports including CA-17 forms covering the period March 29 through June 5, 2019 from Dr. Osisanya, which were repetitive of prior reports, a May 7, 2019 left knee x-ray interpretation, and physical therapy notes covering the period April 5, 2018 through June 10, 2019. The record also contains progress notes dated January 16, 2018 from Dr. Chitale detailing physical examination findings, and diagnosing right elbow lateral epicondylitis, cervical and lumbar radiculopathy, right shoulder

rotator cuff muscle and tendon strain, right shoulder impingement syndrome, and bilateral knee osteoarthritis.

On April 6, 2019 appellant, through counsel, requested reconsideration asserting that her consistent statements established that the April 28, 2015 incident occurred as alleged.

By decision dated July 3, 2019, OWCP denied modification, finding the evidence insufficient to establish that the April 28, 2015 incident occurred as alleged. It found counsel's argument not compelling to overcome the deficiencies of the claim including the nine-month delay in filing the claim and the failure to seek contemporaneous medical treatment for the specific April 28, 2015 incident.

Subsequent to the denial of appellant's claim, OWCP received physical therapy reports covering the period July 2 through September 24, 2019. It also received reports covering the period May 1, 2019 through January 22, 2020 cosigned by Dr. Osisanya, which reiterated findings and diagnoses from prior reports, and a July 23, 2019 bilateral lower extremities electromyography/nerve conduction velocity (EMG/NCV) study reviewed by Dr. Osisanya. Dr. Osisanya also submitted CA-17 forms dated July 15, August 19, and September 23, 2019, finding appellant totally disabled and noting an injury date of April 28, 2015.

On July 3, 2020 appellant, through counsel, requested reconsideration.

By decision dated July 17, 2020, OWCP denied appellant's request for reconsideration. It found the medical evidence she submitted was irrelevant to the underlying issue, which was whether the April 28, 2015 incident occurred as alleged.

### **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>3</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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>4</sup>

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<sup>3</sup> 5 U.S.C. § 8128(a); *see D.G.*, Docket No. 20-1203 (issued April 28, 2021); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

<sup>4</sup> 20 C.F.R. § 10.606(b)(3); *see D.G., id.; 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)

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>5</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</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>7</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 July 3, 2020 appellant requested reconsideration. She did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. As such, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>8</sup>

In support of her request for reconsideration, appellant submitted additional medical evidence, including physical therapy reports covering the period July 2 through September 23, 2019, a July 23, 2019 bilateral lower extremities EMG/NCV study, reports covering the period May 1, 2019 through January 22, 2020 and CA-17 forms dated July 15, August 19, and September 23, 2019 from Dr. Osisanya. While this medical evidence is new, it is not relevant because it does not address the underlying issue of the present case which is factual in nature, *i.e.*, whether appellant submitted probative factual evidence supporting that she fell onto a desk after her right foot got caught in cords under her desk while in the performance of duty on April 28, 2015, as alleged. The submission of this medical evidence does not warrant a review of appellant's claim on the merits because the Board has held that the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>9</sup> Moreover, the contents of the reports and CA-17 forms from Dr. Osisanya were similar to previously submitted reports from Dr. Osisanya, which have already been considered by OWCP. The Board has held that the submission of evidence or argument which repeats or duplicates

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<sup>5</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 (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 2.1602.4(b).

<sup>6</sup> *Id.* at § 10.608(a); *D.G.*, *supra* note 3; *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>8</sup> *Id.* at § 10.606(b)(3); *G.K.*, Docket No. 20-1026 (issued December 11, 2020); *D.T.*, Docket No. 20-0456 (issued September 1, 2020); *M.S.*, *supra* note 6.

<sup>9</sup> *G.K.*, *id.*; *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>10</sup> Therefore, for the above reasons, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board, therefore, finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3).<sup>11</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).

**ORDER**

**IT IS HEREBY ORDERED THAT** July 17, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 24, 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

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<sup>10</sup> *G.K., id.; N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>11</sup> *R.R.*, Docket No. 20-0378 (issued March 9, 2021); *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).