

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

C.G., Appellant)	
)	
and)	Docket No. 21-0444
)	Issued: November 5, 2021
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Tampa, FL,)	
Employer)	
)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 2, 2021 appellant, through counsel, filed a timely appeal from an August 6, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated June 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.

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.*

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 24, 2019 appellant, then a 44-year-old forklift operator, filed an occupational disease claim (Form CA-2) alleging that she developed neck and back pain; and bilateral arm, shoulder, hand, leg, and foot numbness, tingling and spasms due to her repetitive work duties including moving, unloading, and emptying equipment, and transporting mail.³ She noted that she first became aware that her conditions were related to her employment duties on March 5, 2019. Appellant stopped work on March 6, 2019.

A January 15, 2019 magnetic resonance imaging (MRI) scan of appellant's left shoulder revealed moderate acromioclavicular joint osteoarthritis, similar to prior, and small low-grade partial thickness articular surface subscapularis tendon tear. A lumbar MRI scan of even date revealed L3-4, L4-5, and L5-S1 mild degenerative changes without significant stenosis.

In a February 13, 2019 report, Dr. Robert C. Nucci, a Board-certified orthopedic surgeon, noted that appellant was seen for cervical, lumbar and left shoulder and arm pain. Appellant stated that she had a history of three work injuries, but that all of her cases were closed on March 18, 2015. Physical examination findings included positive left shoulder impingement. Dr. Nucci diagnosed cervicalgia, cervical ligaments sprain, other specified cervical and lumbar dorsopathies, left shoulder pain, left shoulder impingement syndrome, low back pain, sciatica lumbar ligaments sprain, and lumbosacral intervertebral disc displacement. In duty status report (Form CA-17) of even date, he diagnosed cervical, lumbar, and shoulder strains and related that appellant could resume work with restrictions.

A February 21, 2019 cervical MRI scan revealed C3-4 and C4-5 disc herniations, C5-6 disc bulge, and C6-7 anterior disc bulge.

In a March 6, 2019 report, Dr. Dario A. Grisales, a physician specializing in anesthesiology and pain medicine, reported that appellant was seen for complaints of neck, shoulder, and low back pain, which she had experienced for over 10 years. Physical examination findings were detailed. Dr. Grisales diagnosed chronic pain syndrome; low back pain; lumbosacral spondylosis, without myelopathy or radiculopathy; sacral and sacrococcygeal region spondylosis without myelopathy or radiculopathy; sacroiliitis; lumbosacral intervertebral disc disorders, with radiculopathy; lumbar region intervertebral disc disorders, with radiculopathy; cervicalgia; C4-5 cervical disc disorder with radiculopathy; left shoulder pain; left upper arm and shoulder muscles, fascia, and tendons strain; left shoulder bursitis; and left shoulder muscle contracture.

In a development letter dated May 13, 2019, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical

³ Appellant noted that she had previously sustained permanent injuries to her neck, back, left shoulder, and right leg in OWCP File Nos. xxxxxx098, xxxxxx723 and xxxxxx258.

evidence required to establish her claim. Appellant was afforded 30 days to submit the necessary evidence.

In response, appellant submitted an April 14, 2015 report and Form CA-17 duty status reports dated March 7 and September 12, 2018, from Dr. Richard M. Blecha, a Board-certified orthopedic surgeon. In the April 14, 2015 report, Dr. Blecha noted a February 9, 2009 injury date and that appellant had accepted conditions of cervical and lumbar sprain. He also noted that she had returned to modified work for five hours per day for the first time in four years. Dr. Blecha, in the March 7, 2018 Form CA-17, diagnosed cervical/lumbar degenerative disc disease and advised that appellant could return to modified work on March 7, 2018. In the September 12, 2018 Form CA-17, he diagnosed cervical and left shoulder strain and released appellant to return to modified work on September 16, 2018.

Dr. Nucci, in progress notes dated May 2, 2019, noted appellant's history of injury and medical treatment.

In a May 7, 2019 report, Dr. Grisales diagnosed low back pain; lumbosacral, sacral, and sacrocygeal spondylosis, without myelopathy or radiculopathy; sacroiliitis; and lumbosacral and lumbar intervertebral disc disorders, with radiculopathy.

Dr. Nucci, in a May 7, 2019 report, provided examination findings, reviewed diagnostic test, and noted that appellant was seen for complaints of low back, neck, and left shoulder pain. Diagnoses included cervicgia, cervical ligaments sprain, other specified cervical and lumbar dorsopathies, left shoulder pain, left shoulder impingement syndrome, low back pain, sciatica lumbar ligaments sprain, and lumbosacral intervertebral disc displacement.

By decision dated June 17, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that the diagnosed medical conditions were causally related to the identified employment factors.

On June 17, 2020 appellant, through counsel, requested reconsideration. Counsel outlined appellant's history of injury, explaining that appellant had sustained employment injuries in 2009 and 2011 and thereafter remained out of work until her compensation benefits were terminated on March 24, 2015. He noted that appellant returned to modified work; however, in 2017 she was placed in a forklift operator position, which caused further injury. Counsel also alleged that OWCP had erroneously found that the medical evidence of record did not provide a diagnosis.

In support of her request for reconsideration appellant also submitted an affidavit dated June 17, 2020. In this affidavit she related her employment history prior to March 9, 2017. Appellant described her duties as a forklift operator after March 9, 2017 and the alleged strain that was placed on her neck, shoulders, arms and back due to jerking motions of the forklift.

In reports dated March 11 and April 29, 2020, Dr. Grisales diagnosed chronic pain syndrome; low back pain; lumbosacral spondylosis, without myelopathy or radiculopathy; sacral and sacrococygeal region spondylosis, without myelopathy or radiculopathy; sacroiliitis; lumbosacral intervertebral disc disorders with radiculopathy; lumbar region intervertebral disc disorders with radiculopathy; cervicgia C4-5 cervical disc disorder with radiculopathy; left shoulder pain; left upper arm and shoulder muscles, fascia, and tendons strain; left shoulder

bursitis; overweight; and left shoulder muscle contracture. He reported an onset history of back pain and cervicalgia on March 6, 2019. Appellant was seen for pain complaints in person at the clinic on March 11, 2020 and *via* a telephone conference on zoom on April 29, 2020. Physical examination findings and treatment recommendations were unchanged from prior reports.

By decision dated August 6, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim.

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

⁴ 5 U.S.C. § 8128(a); *see J.R.*, Docket No. 20-0887 (issued May 26, 2021); *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 J.R., 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).

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 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).

⁷ *Id.* at § 10.608(a); *see also J.R., supra* note 4; *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *J.R., supra* note 4; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

In the June 17, 2020 request for reconsideration, counsel argued that OWCP erred in denying her claim on the basis that no medical condition had been diagnosed. Contrary to counsel's assertion, OWCP found that a medical condition had been diagnosed, but denied the claim as the record contains no medical opinion on causal relationship. The argument presented by counsel is therefore irrelevant to the underlying issue of whether appellant established that the diagnosed conditions were causally related to the accepted employment factors.⁹ Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently, she was 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).¹⁰

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her reconsideration request under 20 C.F.R. § 10.606(b)(3). OWCP denied her claim because the medical evidence of record did not contain a rationalized opinion finding that her diagnosed conditions were causally related to the accepted employment factors. In support of her reconsideration request, appellant submitted new reports dated March 11 and April 29, 2020 from Dr. Grisales who diagnosed chronic pain syndrome; low back pain; lumbosacral spondylosis, without myelopathy or radiculopathy; sacral and sacrococcygeal region spondylosis, without myelopathy or radiculopathy; sacroiliitis; lumbosacral intervertebral disc disorders with radiculopathy; lumbar region intervertebral disc disorders with radiculopathy; cervicalgia, C4-5 cervical disc disorder with radiculopathy; left shoulder pain; left upper arm and shoulder muscles, fascia, and tendons strain; left shoulder bursitis; overweight; and left shoulder muscle contracture. Dr. Grisales did not, however, provide a medical opinion as to whether appellant's diagnosed conditions were causally related to the accepted employment factors. The underlying issue in this case is causal relationship. 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.¹¹ These additional medical reports, while new, were therefore not relevant and pertinent to the underlying issue.

In support of appellant's request for reconsideration appellant submitted an affidavit in which she described why she believed her current conditions were causally related to factors of her employment as a forklift operator. As previously noted, the underlying issue on appeal was whether appellant's diagnosed medical conditions were causally related to factors of her federal employment. This is a medical issue which must be determined by rationalized medical evidence.¹² The lay opinion of appellant expressed regarding causal relationship does not constitute rationalized medical evidence.¹³ As appellant did not provide relevant and pertinent

⁹ *D.C.*, Docket No. 19-0354 (issued May 27, 2020)

¹⁰ *Supra* note 4.

¹¹ *R.G.*, Docket No. 19-1889 (issued April 14, 2021); *Y.L.*, Docket No. 20-1025 (issued November 25, 2020); *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *R.R.*, Docket No. 18-1562 (issued February 22, 2019).

¹² *E.D.*, Docket No. 18-0138 (issued May 14, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹³ *E.H.*, Docket No. 19-0365 (issued March 17, 2021).

evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁴

The Board, accordingly, finds that appellant did not meet 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.¹⁵

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 August 6, 2020 decision of the Office of Workers' Compensation Programs is affirmed.¹⁶

Issued: November 5, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ *Supra* note 4.

¹⁵ *R.G.*, *supra* note 11; *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

¹⁶ Upon return of the case record, OWCP should consider combining the current file with the master File No. xxxxxx098.