

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

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<b>K.V., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 21-0628</b>
	)	<b>Issued: August 8, 2022</b>
	)	
<b>U.S. POSTAL SERVICE, CHATHAM POST</b>	)	
<b>OFFICE, Chatham, NJ, Employer</b>	)	
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*Appearances:*

*James D. Muirhead, 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  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. McGINLEY, Alternate Judge

**JURISDICTION**

On March 10, 2021 appellant, through counsel, filed a timely appeal from a February 3, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days elapsed from OWCP's merit decision, dated August 10, 2020, 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 an 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> The Board notes that counsel also specifically appealed OWCP's August 10, 2020 merit decision, which denied appellant's claim for disability. As she did not file a timely appeal from the August 10, 2020 decision within 180 days of issuance, the Board, therefore, lacks jurisdiction over OWCP's disability decision. *See* 20 C.F.R. § 501.3(e). The Board further notes that, although OWCP's November 5, 2020 merit decision denying the expansion of the acceptance of appellant's claim to include a consequential cervical condition is within the Board's jurisdiction, counsel has not appealed that decision. Therefore, the Board will not address the November 5, 2020 merit decision in this appeal. *See* 20 C.F.R. § 501.3(a) and (c).

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 the claim.<sup>4</sup>

### **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 August 14, 2019 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 13, 2019 she suffered a laceration to her scalp when a roofing staple gun fell on her head while in the performance of duty. She stopped work on August 13, 2019. On September 9, 2019 OWCP accepted appellant's claim for a laceration without foreign body of the scalp.

In an August 30, 2019 medical report, Dr. Dora Leibu, Board-certified in family medicine, evaluated appellant for the work-related laceration to her coronal structure on the left side with cervical paraspinal hypertonicity and restriction of motion in the cervical spine and left upper extremity. She diagnosed muscle spasm of the cervical muscle of the neck and paresthesia of the upper limb and recommended that appellant undergo magnetic resonance imaging (MRI) scans and physical therapy to treat her conditions.

In a work capacity evaluation (Form OWCP-5c) dated August 30, 2019, Dr. Leibu checked a box marked "No" to indicate that appellant was unable to perform her usual job and opined that she was currently unable to work.

In a September 16, 2019 medical report, Dr. Leibu noted that appellant had begun therapy to treat symptoms of left-sided neck stiffness, swelling of the neck on the left side, ongoing paresthesia on her left extremity, and weakness of the left arm. She diagnosed cervical disc disorder with radiculopathy and monoparesis of the left arm. Dr. Leibu opined that appellant was not able to return to work at that time.

In a September 18, 2019 duty status report (Form CA-17), Dr. Leibu referenced her previous medical report and checked a box marked "No" to indicate that appellant was not able to perform her regular work.

Appellant also submitted physical therapy reports dated September 4 to October 1, 2019 detailing her treatment for cervicalgia.

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

<sup>4</sup> The Board notes that, following the February 3, 2021 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.*

On October 11, 2019 filed a claim for compensation (Form CA-7) for disability for the period from September 28 through October 11, 2019.

In a development letter dated October 16, 2019, OWCP requested that appellant submit additional information to establish her wage-loss compensation claim, including medical evidence establishing that her disability during the period September 28 through October 11, 2019, was causally related to her accepted August 13, 2019 employment injury. It afforded her 30 days to submit the necessary evidence.

In an October 11, 2019 report, Dr. David Poulad, a Board-certified neurosurgeon, evaluated appellant for her two-month history of left-sided neck pain and left upper extremity weakness relating to her August 13, 2019 employment injury. He noted that, approximately one week after her injury, she began to develop severe left-sided neck pain and upper extremity weakness and numbness that had not sense improved with physical therapy. Dr. Poulad diagnosed cervicgia, cervical radiculopathy and left upper extremity weakness.

In an October 18, 2019 attending physician's report (Form CA-20), Dr. Poulad diagnosed cervical radiculopathy, extremity weakness and cervical pain due to the August 13, 2019 employment incident. He checked a box marked "Yes" to indicate his opinion that appellant's condition was caused or aggravated by her employment activity.

In a November 18, 2019 development letter, OWCP advised that appellant's claim had been accepted for lacerations, and that it appeared she was claiming disability due to a consequential condition of cervical radiculopathy. It informed her of the legal, factual, and medical criteria for establishing a consequential condition. OWCP afforded appellant at least 30 days to submit additional factual and medical evidence in support of her claim.

In medical reports dated November 14 and December 12, 2019, Dr. Leibu observed that appellant experienced improved range of motion in her neck, as well as an improved pain level and increased strength in her left upper extremity following her physical therapy. She diagnosed cervical radiculopathy and neck pain.

Appellant submitted physical therapy reports dated from October 8 to January 2, 2020 detailing treatment for cervicgia.

In a January 8, 2020 Form CA-20, Dr. Leibu recounted the events of the August 13, 2019 employment injury and diagnosed cervical radiculopathy, left upper extremity paresthesia and weakness, as well as cervical pain. She checked a box marked "Yes" to indicate her opinion that appellant's conditions were caused or aggravated by the August 13, 2019 employment injury. Dr. Leibu opined that she would be able to resume light-duty work as of January 8, 2020.

Appellant also filed additional CA-7 forms dated from October 25 to December 20, 2019, requesting wage-loss compensation for disability from work for the period October 12 to December 20, 2019.

By decision dated January 16, 2020, OWCP denied appellant's disability claim, finding that the medical evidence of record did not establish how she was disabled as a result of her accepted work-related medical conditions.

OWCP continued to receive evidence. Appellant submitted additional physical therapy notes dated January 8 and 10, 2020 detailing her continued treatment for cervicalgia.

Appellant filed additional CA-7 forms dated January 17, 2020, requesting wage-loss compensation for disability from work for the period December 21, 2019 to January 17, 2020.

The record also contains copies of medical evidence from Drs. Leibu and Poulad, previously received by OWCP.

On January 30, 2020 appellant requested a review of the written record of the January 16, 2020 disability decision by a representative of OWCP's Branch of Hearings and Review.

Appellant submitted a January 15, 2020 physical therapy report detailing her continued treatment for cervicalgia.

In a January 27, 2020 report, Dr. Leibu reviewed appellant's history of cervical radiculopathy and left arm monoparesis that first occurred after her August 13, 2019 employment injury. She explained that the nail gun that fell on appellant's head fell with enough force to cause a laceration and to exert cervical force on her cervical spine. As a result, the nucleus pulposus, which comprised the "gelatinous" matter of the cervical disc, protruded through the vertebrae at the levels C4-C6, effectively, impinging on the affected spinal nerves that corresponded with her left arm and forearm. Dr. Leibu continued, reasoning that immediately after her injury, appellant's cervical paraspinal muscles that surrounded her spine tightened quickly and effectively went into a spasm in an effort to protect the integrity of her cervical spine. Appellant then began to develop neck pain as well as neck muscle spasm with progressive paresthesia and weakness in her left arm, forearm and hand. Dr. Leibu noted that she had been treating appellant since 2017 and that she had never had any cervical spine pathologies or upper extremity weakness prior to her injury. She diagnosed cervical radiculopathy and monoplegia of the upper limb affecting the non-dominant side.

On February 25, 2020 appellant, through counsel, requested that her January 30, 2020 request for a review of the written record of the January 16, 2020 decision be converted to a request for a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

In a March 5, 2020 medical report, Dr. Poulad reviewed the history of the August 13, 2019 employment incident and the resulting lacerations to the head and cervical spine injuries that appellant sustained. He noted that she underwent magnetic resonance imaging (MRI) scans of her C5 to C7 disc bulges that likely resulted in her symptoms. Appellant indicated that she had completed 36 physical therapy sessions and that she felt approximately 75 percent improved since her initial injury. On evaluation Dr. Poulad diagnosed cervical pain, cervical radiculopathy and left upper extremity weakness. He opined that appellant's conditions were causally related to the August 13, 2019 employment incident, reasoning that the significant impact to her head most likely resulted in disc herniation.

In a March 18, 2020 Form CA-17, Dr. Leibu diagnosed cervical radiculopathy and noted that appellant's injury occurred on August 13, 2019. She checked a box marked "No" to advise that appellant not return to work at the time.

Appellant filed CA-7 forms dated from January 31 to March 27, 2020 requesting wage-loss compensation for disability from work for the periods January 18 through 31, 2020, and February 15 through March 27, 2020.

On March 27, 2020 appellant filed a notice of recurrence (Form CA-2a), alleging that on March 18, 2020 she sustained a recurrence of disability causally related to her accepted August 13, 2019 employment injury.<sup>5</sup>

In an April 9, 2020 medical note, Dr. Leibu indicated that she evaluated appellant on April 6, 2020 and advised that she was able to return to work with restrictions.

Appellant filed CA-7 forms dated from April 10 to May 10, 2020 requesting wage-loss compensation for disability from work for the period March 28 through May 8, 2020.

In a May 11, 2020 medical report, Dr. Leibu observed appellant's work restrictions and diagnosed cervical radiculopathy and cervical disc disorder. In a May 14, 2020 Form CA-20, she referred to her previous medical report and diagnosed cervical radiculopathy, left upper extremity weakness and cervical muscle spasm. Dr. Leibu checked a box marked "Yes" to indicate her opinion that appellant's conditions were caused or aggravated by the August 13, 2019 employment injury. In a Form CA-17 and medical note of even date, she diagnosed cervical radiculopathy due to the August 13, 2019 employment injury and advised that appellant was able to work with restrictions as of May 12, 2020.

A telephonic hearing was held on June 15, 2020. Appellant recounted the events of the August 13, 2019 employment injury and insisted that she began to experience symptoms in her left arm and cervical spine shortly after. Counsel for appellant also reasoned that Dr. Leibu's January 27, 2020 medical report was sufficient to establish that appellant's cervical conditions were causally related to the August 13, 2019 employment injury.

By decision dated August 10, 2020, OWCP's hearing representative affirmed OWCP's January 16, 2020 decision denying appellant's claim for disability.<sup>6</sup>

OWCP continued to receive evidence. Appellant submitted a December 28, 2020 note where Dr. Leibu diagnosed cervical radiculopathy with left upper extremity weakness and paresthesia due to the August 13, 2019 employment injury. She recommended work restrictions for appellant to adhere to.

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<sup>5</sup> In a development letter dated April 7, 2020, OWCP informed appellant that it had administratively converted the recurrence claim under the present claim to a new traumatic injury claim occurring on March 18, 2020 under OWCP File No. xxxxxx155. The claims have been administratively combined by OWCP with the present claim, OWCP File No. xxxxxx638, serving as the master file.

<sup>6</sup> The hearing representative explained that Dr. Leibu's January 27, 2020 medical report was insufficient as she did not discuss a previous November 3, 2016 employment injury accepted for a lumbar strain and denied for cervical radiculopathy under OWCP File No. xxxxxx768. Upon return of the case file, OWCP's hearing representative instructed that OWCP File Nos. xxxxxx768 and xxxxxx155 be administratively combined with the present case file.

On January 5, 2021 appellant, through counsel, requested reconsideration of OWCP's August 10, 2020 decision. Counsel contended that she never complained of cervical radiculopathy, nor did she indicate that she had cervical radiculopathy, at any time during her November 3, 2016 claim and her related treatment. He asserted that this was a mistake by the medical provider and that OWCP itself recognized that appellant did not develop cervical radiculopathy as a result of her November 3, 2016 employment injury, under File No. xxxxxx768. Counsel attached a December 28, 2020 report from Dr. Leibu in which she indicated that appellant's cervical radiculopathy with left upper extremity weakness and paresthesia was not a preexisting condition. She noted that appellant's previous medical attention with Dr. Nirmala Akkappeddi, a Board-certified internist, was only for left hip and low back pain and that she was not suffering from cervical radiculopathy prior to August 2019.

By decision dated February 3, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that her newly submitted evidence was cumulative and, thus, substantially similar to the evidence already contained in the case file and previously considered.

### **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>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

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<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 the merit 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.

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

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

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).<sup>12</sup>

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. In support of her reconsideration request, appellant submitted a December 28, 2020 note from Dr. Leibum who explained that her cervical radiculopathy was not a preexisting condition and was caused by the August 13, 2019 employment injury. However, this evidence is not relevant to the underlying issue in this case of whether appellant has met her burden of proof to establish disability from work for the period commencing September 28, 2019 causally related to the accepted August 13, 2019 employment injury. 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>13</sup> Consequently, as appellant failed to provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>14</sup>

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.<sup>15</sup>

### CONCLUSION

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).

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

<sup>12</sup> *Supra* note 8.

<sup>13</sup> *T.D.*, Docket No. 21-1381 (issued June 21, 2022); *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); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>14</sup> *Supra* note 8.

<sup>15</sup> *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *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 February 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 8, 2022  
Washington, DC

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

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board