

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

Y.M., Appellant)	
)	
and)	Docket No. 22-0327
)	Issued: August 29, 2022
U.S. POSTAL SERVICE, SANTA ANA)	
PROCESSING & DISTRIBUTION CENTER,)	
Santa Ana, CA, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 27, 2021 appellant filed a timely appeal from a December 3, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last OWCP merit decision dated June 2, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 21, 2017 appellant, then a 59-year-old lead clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained right shoulder and low back injuries while trying to pull out a tray holder from a rack while in the performance of duty. He stopped work on May 23, 2017 and returned to full-time light-duty work on August 15, 2017.

OWCP accepted the claim for unspecified sprain of right shoulder joint, strain of the muscles and tendons of the right rotator cuff, lumbar sprain, and strain of muscles and tendons of the lower back. It paid him wage-loss compensation on the supplemental rolls from July 7 through August 11, 2017.

In a report dated November 9, 2017, Dr. Basimah Khulusi, a Board-certified physiatrist, related that appellant sustained a lumbar sprain on May 21, 2017 when he was pulling a tray out from a rack. She explained that appellant's low back sprain resulted in weakness of the ligaments, which together with increased pressure on the intradiscal space, led to aggravation of the displacement of the discs at L3-5. Dr. Khulusi further related that the displaced discs ended up crowding the limited space in the spinal canal and neural foramina, and overcrowding of nerve roots, which led to an aggravation of appellant's lumbar stenosis. She opined that appellant should be maintained on work restrictions indefinitely.

In a November 10, 2017 report, Dr. James T. Tran, a Board-certified internist, noted appellant's history of injury and treatment. He requested that acceptance of appellant's claim be expanded to include spinal stenosis of lumbar region with neurogenic claudication; lumbar disc degeneration, permanent aggravation; lumbar disc displacement; connective tissue and disc stenosis of intervertebral foramina of lumbar region; osseous stenosis of neural canal of lumbar region; and intervertebral disc stenosis of neural canal of lumbar region. Dr. Tran provided a mechanism of injury attributed to appellant's work as a clerk and explained that the May 21, 2017 work injury caused flexion and twisting of the lumbosacral spine and caused force and exertion and disengagement of the facet joints in the lumbar spine at L2-3, L3-4, L4-5, L5-S1. He opined that the May 21, 2017 work injury caused permanent aggravation of disc bulges at L4-5, L5-S1, with lumbar spinal stenosis at L2-3, L3-4, and L4-5, resulting in low back and leg pain. Dr. Tran completed a duty status report (Form CA-17) on November 27, 2017 and requested modified duty.

On February 11, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions, for a second opinion examination with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon. It requested that Dr. Einbund evaluate whether appellant continued to have residuals or disability due to the accepted May 21, 2017 employment injury. OWCP also requested that Dr. Einbund address whether appellant had any other conditions causally related to the accepted employment injury. It noted that lumbar stenosis, as well as right shoulder impingement syndrome with subacromial bursitis and joint arthrosis had also been diagnosed.

In a March 1, 2019 report, Dr. Einbund noted appellant's history of injury and medical treatment. He found that appellant currently had no right shoulder pain, but that he had complaints of numbness in the right long and ring fingers. Dr. Einbund noted that appellant's May 27, 2017 magnetic resonance imaging (MRI) scan revealed a full-thickness tear of the rotator cuff, otherwise

the findings were normal. He noted that appellant had constant dull and aching pain in the low back that increased with bending, prolonged sitting, and standing and that an MRI scan of the low back revealed degeneration disc bulges, stenosis, and retrolisthesis. Dr. Einbund diagnosed right shoulder sprain, improved; right shoulder rotator cuff tear, asymptomatic; lumbar spine sprain, improved.

With regard to the right shoulder, Dr. Einbund noted that rotator cuff tears were commonly seen in appellant's age demographic and the May 21, 2017 initial examination by Dr. Gary Linnermann, a Board-certified family practitioner, which revealed very benign findings with an essentially normal examination. He explained that, if there had been an acute full-thickness tear, there would have been significant abnormal findings on the first examination. Dr. Einbund opined that "the temporary aggravation injury has ceased noting he no longer experiences any symptoms or clinical findings. The aggravation injury ceased on or about August 2017, when the record reflects resolution of his subjective symptoms." Dr. Einbund explained that the normal examination findings and lack of subjective complaints did not support an active diagnosis of right shoulder impingement syndrome, subacromial bursitis, or acromioclavicular (A/C) joint arthrosis.

With regard to the lumbar spine, Dr. Einbund noted that appellant had underlying degeneration of the lumbar spine with associated disc bulges, canal stenosis and retrolisthesis that were non-industrial in nature. He opined that there was no evidence of aggravation due to the work injury and explained that the "noted changes are of a chronic nature and would not have developed within a week of the incident when the MRI scan was obtained." Dr. Einbund noted that appellant's present symptoms were preexisting, there was no indication the underlying lumbar spine condition had been aggravated, that appellant's neurological findings were within normal limits, and there was no material change. He explained the minor findings on examination, including limited range of motion (ROM) of the lumbar spine, were due to appellant's preexisting degenerative conditions. Dr. Einbund opined that appellant had nonindustrial lumbar spine degeneration, disc bulges, stenosis, and retrolisthesis, that there was no aggravation to the lumbar spine and no permanent aggravation, and that the work-related injuries had resolved. He advised that appellant no longer required active medical treatment and was capable of performing his date-of-injury job.

On April 18, 2019 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on the March 1, 2019 second opinion examination report from Dr. Einbund, which related that the accepted conditions had resolved without residuals or disability. It afforded appellant 30 days to submit additional evidence or argument challenging the proposed termination.

In a May 9, 2019 report, Dr. Khulusi, related that she had reviewed and found flaws in Dr. Einbund's report. In particular, she noted that Dr. Einbund opined that appellant's lumbar spine sprain had improved, but did not indicate that it had resolved. Dr. Khulusi noted that Dr. Einbund indicated that appellant's lumbar spine sprain was a temporary aggravation injury, and also that, "[t]here has not been any aggravation injury related to the lumbar spine." She opined that Dr. Einbund contradicted himself. Dr. Khulusi also noted that Dr. Tran provided a November 10, 2017 report that detailed the mechanism of injury and advised that the acceptance of appellant's claim should be expanded to include lumbar disc displacement and aggravation of

lumbar spinal stenosis as a result of the lumbar sprain. She also related appellant's modified-duty work restrictions.

By decision dated June 21, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective June 21, 2019. It found that the weight of medical evidence rested with the second opinion report of Dr. Einbund and established that appellant had no residuals related to his accepted work-related injury and no continuing disability from work.

On July 25, 2019 appellant requested reconsideration and submitted a July 18, 2019 report from Dr. Khulusi. Dr. Khulusi opined that OWCP ignored the opinions of appellant's treating physicians, one of whom was a neurosurgeon specializing in spine conditions. She also indicated that there was a conflict in the medical opinion evidence with the second opinion physician, warranting a referral for an impartial medical examination.

By decision dated October 23, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a). It noted that there was no conflict of medical opinion as the opinions of appellant's treating physicians, Dr. Khulusi and Dr. Tran, were not well-rationalized and were conclusory in nature.

On April 9, 2020 appellant requested reconsideration and submitted an April 2, 2020 report from Dr. Khulusi. In this report, Dr. Khulusi opined that Dr. Einbund's opinion was biased, not based on an accurate history, unrationalized, and should not be given probative value. She noted that Dr. Einbund opined that appellant's lumbar findings on examination would not have developed within a week of the incident, when the MRI scan was obtained. Dr. Khulusi further noted that in another part of his report Dr. Einbund discussed appellant's MRI scan of the lumbar spine and that the radiologist reported, "there is marrow edema at the posterior endplate of L4-L5, likely MODIC type I changed related to *acute alteration* of biomechanics." (Emphasis in the original.) Dr. Khulusi explained that the objective results of the MRI scan showed acute injury at the L4-L5 level caused by alteration of biomechanics that happened about six days prior to the MRI scan when appellant was injured on May 21, 2017.² She noted that Dr. Einbund ignored these findings. Dr. Khulusi further noted that Dr. Einbund found that appellant had a normal gait, which was contradicted by his finding that appellant had difficulty with heel walking and toe walking, and that Dr. Einbund failed to provide any muscle tests. She explained that "not being able to walk on his tiptoes and heels" was "not within normal limits" and raised a concern that appellant had motor weakness; however, Dr. Einbund did not test the individual muscle groups. Dr. Khulusi also noted that Dr. Einbund found that appellant's examination revealed limited range of motion, which contradicted his opinion that appellant had a normal neurologic examination. She requested that OWCP expand acceptance of appellant's claim to include permanent

² Dr. Khulusi indicated 2019, but it appears to be a typographical error as she is describing the May 21, 2017 employment injury.

aggravation of lumbar disc displacement as a result of lumbar sprain, and permanent aggravation of lumbar spinal stenosis as a result of the lumbar sprain and lumbar disc displacement. (rd 4/9/20)

By decision dated June 26, 2020, OWCP denied modification of its June 21, 2019 decision.

On May 21, 2021 appellant requested reconsideration and submitted new evidence.

In an August 24, 2020 report, Dr. Khulusi reiterated that the report of Dr. Einbund was insufficiently rationalized to carry the weight of the evidence. He explained that Dr. Einbund made a mistake and disregarded the accepted conditions. Dr. Khulusi repeated his request that OWCP accept the additional conditions of lumbar disc displacement as a result of lumbar sprain and aggravation of lumbar spinal stenosis.

By decision dated June 2, 2021, OWCP denied modification of the June 26, 2020 decision. It found that Dr. Khulusi's reports were not sufficiently rationalized to overcome the weight of the evidence as represented by the second physician opinion of Dr. Einbund.

On September 8, 2021 appellant requested reconsideration and submitted new evidence from Dr. Khulusi.

In a report dated August 25 2021, Dr. Khulusi argued that OWCP made legal errors in the handling of the claim. She noted that OWCP developed the claim regarding the aggravation of lumbar stenosis and that Dr. Einbund opined that the lumbar spine degeneration was nonindustrial and there was no aggravation injury related to the lumbar spine. Dr. Khulusi argued that OWCP should have issued a decision regarding the acceptance or denial of the additional claimed conditions. She quoted the Federal (FECA) Procedure Manual, Part 2, Chapter 2.0806, paragraph 4a, which states "If all claimed conditions have been developed and the evidence of record supports acceptance of some but not all of the conditions claimed, the [claims examiner] CE should issue an acceptance letter for the compensable conditions and issue a formal decision with appeal rights denying the remaining claimed conditions."³ Dr. Khulusi argued that OWCP hurried and terminated the patient's claim without doing what was legally required.

By decision dated December 3, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

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 argument which: (1) shows that OWCP erroneously applied or interpreted a

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Acceptances*, Chapter 2.0806.4a (September 2020).

⁴ 5 U.S.C. § 8128(a); *see R.G.*, Docket No. 21-1098 (issued March 28, 2022); *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).

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).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law. Dr. Khulsi argued that OWCP did not follow its procedures as it should have issued a formal letter of denial and appeal rights regarding appellant's request for expansion of the claim. The Board finds that this argument is cumulative and duplicative of previous arguments. The Board has held that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁹

The underlying issue on appeal is whether OWCP properly terminated appellant's wage-loss and medical benefits for the accepted conditions. Dr. Khulsi's disagreement with OWCP's acceptance of the claim for lumbar strain caused by the work injury on May 21, 2017, fails to show that OWCP erroneously applied or interpreted a specific point of law when it subsequently terminated appellant's wage-loss compensation and benefits, effective June 21, 2019. 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.¹⁰ As the reconsideration request failed to show that OWCP erroneously applied or interpreted a specific point of law, appellant is not

⁵ 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).

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 (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). *Id.* at Chapter 2.1602.4b.

⁷ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁸ *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).

⁹ *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁰ *R.G.*, *supra* note 4; *L.M.*, Docket No. 20-0315 (issued October 8, 2021); *A.J.*, Docket No. 20-0926 (issued January 26, 2021); *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹¹

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request. The August 25, 2021 report from Dr. Khulusi was new, however it repeated and reiterated information in her prior reports which had previously been considered by OWCP. As previously noted, evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹² No other relevant and pertinent new evidence was submitted. As appellant failed to provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹³

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.

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).

¹¹ 20 C.F.R. § 10.608(b); *see B.S.*, *supra* note 8; *E.R.*, *supra* note 8.

¹² *See L.W.*, Docket No. 21-0789 (issued March 25, 2022); *C.L.*, *supra* note 9; *M.G.*, *supra* note 9; *D.K.*, *supra* note 9; *Kenneth R. Mroczkowski*, *supra* note 9; *Eugene F. Butler*, *supra* note 9.

¹³ *See S.A.*, Docket No. 21-0813 (issued December 27, 2021); *E.V.*, Docket No. 16-0080 (issued June 21, 2016).

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 29, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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