

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

_____)
A.M., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Hialeah, FL, Employer)
_____)

Docket No. 22-0529
Issued: August 12, 2022

Appearances:

Misty L. Wenger, for the appellant¹

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 February 27, 2022 appellant, through her representative, filed a timely appeal from an August 31, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated September 23, 2020 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.³

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 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the August 31, 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.*

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

This case has previously been before the Board on a different issue.⁴ The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On July 25, 2009 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on July 24, 2009 she injured her left thumb while in the performance of duty. OWCP accepted the claim for left thumb tendinitis or synovitis of the metacarpal joint. It paid appellant wage-loss compensation benefits on the supplemental rolls commencing December 2, 2010 and on the periodic rolls commencing January 10, 2016.

On June 27, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Clinton G. Bush, III, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's ability to return to gainful employment. In a report dated July 10, 2018, Dr. Bush noted appellant's physical examination findings. He diagnosed status post-acute left thumb inflammatory episode, possible acute gouty arthritis versus acute bacterial infection, resolved and degenerative arthritis of the trapeziometacarpal joint of the left thumb. Dr. Bush found that based on the medical record and his examination there was no credible evidence of a work-related injury. He concluded that appellant could return to her date-of-injury job with no restrictions or limitations due to her accepted left thumb condition.

On April 4, 2019 OWCP advised appellant of its notice of proposed termination of her wage-loss compensation and medical benefits as she no longer had disability or residuals due to her accepted July 24, 2009 employment injury.

In a letter dated May 2, 2019, appellant disagreed with the proposal to terminate her compensation benefits. She disagreed with Dr. Bush's conclusion that she was capable of performing her date-of-injury job without restrictions. Appellant asserted that she was still unable to perform repetitive duties using her left wrist and hand.

Accompanying appellant's response was a report dated April 18, 2019 from Dr. Franklin A. Reyes, a physician specializing in orthopedic hand surgery, who attributed appellant's subluxated tendon to an infection of her left thumb. Dr. Reyes noted that appellant had complete resolution of the infection, which began at work on July 24, 2009, however, appellant currently had a subluxation of the extensor pollicis longus, due to the prior infection. In support of this conclusion, he noted the lack of other reasons that could produce the tendon dislodgement.

By decision dated August 22, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits effective September 15, 2019. It found that the opinion of

⁴ Docket No. 13-17 (issued January 24, 2013).

Dr. Bush, the second opinion physician represented the weight of the evidence and established that appellant no longer had disability or residuals due to her accepted employment injury.

On July 12, 2020 appellant requested reconsideration. In support of her request, she submitted a June 24, 2020 report from Dr. Dawn Quashie, a Board-certified family medicine physician, who provided a permanent impairment rating of appellant's left thumb. Dr. Quashie provided examination findings and diagnosed left hand first carpometacarpal joint osteoarthritis and left hand post-traumatic first carpometacarpal joint osteoarthritis, which she attributed to her federal work duties. She concluded that appellant had an eight percent permanent impairment of the left thumb. Dr. Quashie also found that appellant was temporarily restricted from any heavy lifting, straining, and bending.

By decision dated August 13, 2020, OWCP denied modification of its August 22, 2019 termination decision.

On August 20, 2020 and June 23, 2021 OWCP received copies of Dr. Quashie's June 24, 2020 report.

On June 21, 2021 appellant requested reconsideration of the August 13, 2020 decision. She asserted error in that the record failed to contain a copy of the SOAF provided to Dr. Bush. In addition, she asserted that Dr. Quashie's opinion was entitled to greater weight because Dr. Bush's opinion did not contain an accurate history of injury, did not address her physical restrictions, or noted her current complaint status.

OWCP, by decision dated August 31, 2021, denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ does not entitle a claimant to review of an OWCP decision as a matter of right.⁶

OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸ A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a

⁵ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or a gainst payment of compensation at any time on his own motion or on application.

⁶ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or a gainst payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of its 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.

specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁹ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹¹ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹² When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's request for reconsideration and any evidence submitted in support thereof.¹³

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).

Appellant's request for reconsideration does not demonstrate that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that she did not advance a relevant legal argument not previously considered by OWCP. On reconsideration appellant alleged deficiencies in Dr. Bush's July 10, 2018 second opinion report and contended that she continued to suffer from employment-related residuals and disability.¹⁴ However, her own opinion on the cause of her continuing residuals and disability is not relevant to the underlying issue in this case, *i.e.*, whether OWCP properly terminated her wage-loss compensation and medical benefits, effective September 15, 2019, as she no longer had continuing residuals and disability causally related to the July 24, 2009 employment injury. This is a medical issue which must be addressed by relevant medical evidence.¹⁵ The Board has held that the submission of argument or evidence which does not address the particular issue involved does not constitute a

⁹ *Id.* at § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(b).

¹¹ *L.O.*, Docket No. 21-0030 (issued May 19, 2022); *F.E.*, Docket No. 20-0070 (issued August 4, 2020); *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

¹² *See supra* note 2. *F.E., id.*; *Mark H. Dever*, 53 ECAB 710 (2002).

¹³ *L.O.*, *supra* note 11; *G.K.*, Docket No. 20-1026 (issued December 11, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁴ Appellant also alleged that the record does not contain the SOAF provided to Dr. Bush. The record does include a SOAF prepared on February 8, 2013. The record also establishes that the SOAF was provided to and reviewed by Dr. Bush.

¹⁵ *See L.W.*, Docket No. 22-0141 (issued May 16, 2022); *A.P.*, Docket No. 20-0089 (issued June 17, 2020); *A.M.*, Docket No. 18-1033 (issued January 8, 2019); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

basis for reopening a case.¹⁶ Consequently, appellant 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).

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP in support of her reconsideration request under 20 C.F.R. § 10.606(b)(3). As noted, OWCP previously terminated her wage-loss compensation benefits effective September 15, 2019 as she no longer had continuing employment-related residuals or disability. In support of her reconsideration request, appellant resubmitted Dr. Quashie's June 24, 2020 report. The Board has held that evidence that repeats or duplicates evidence already in the case record, has no evidentiary value, and does not constitute a basis for reopening a case.¹⁷ As appellant did not 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).¹⁸

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.¹⁹

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).

¹⁶ *L.W., id.; A.M., id.; A.D., id.; Bobbie F. Cowart, id.; Edward Matthew Diekemper, id.*

¹⁷ *R.G.*, Docket No. 21-0098 (issued May 19, 2021); *J.V.*, Docket No. 19-0990 (issued August 26, 2020); *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *A.A.*, Docket No. 18-0031 (issued April 5, 2018); *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁸ *See L.W.*, *supra* note 15; *S.V.*, Docket No. 20-1309 (issued December 22, 2020); *C.C.*, Docket No. 20-0950 (issued October 29, 2020).

¹⁹ *M.L.*, Docket No. 22-0120 (issued May 12, 2022); *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

ORDER

IT IS HEREBY ORDERED THAT the August 31, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 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