

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 28, 2018 appellant, then a 58-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 27, 2018 she twisted and pulled a muscle on the left side of her middle-to-lower back while in the performance of duty. She stopped work on March 27, 2018.

In a development letter dated April 5, 2018, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of additional factual and medical information needed and afforded her 30 days to submit the necessary evidence.

By decision dated May 9, 2018, OWCP denied appellant's traumatic injury claim. It found that she had established that the identified work factor of lifting a heavy package from the bottom of a hamper occurred as alleged. OWCP determined, however, that appellant had not established the medical component of fact of injury.

On May 23, 2018 appellant, through counsel, requested reconsideration.

In a report dated June 18, 2018, Dr. Thomas M. Larkin, a Board-certified anesthesiologist, noted that appellant was status post an L4-5 laminectomy. He diagnosed lumbar radiculitis, lumbar facet arthropathy, nerve pain, thoracic back spasm, and pain in both knees.

By decision dated September 5, 2018, OWCP denied modification of its May 9, 2018 decision. It found that appellant had not submitted medical evidence that contained a diagnosis associated with the March 27, 2018 employment incident.

On January 23, 2019 appellant, through counsel, requested reconsideration.

By decision dated April 23, 2019, OWCP modified its September 5, 2018 decision to reflect that appellant had established the medical component of fact of injury. It found, however, that she had not established causal relationship between the diagnosed conditions and the accepted employment incident.

On August 7, 2019 appellant requested reconsideration. She submitted a report from a physician assistant and progress reports from Dr. Larkin and Dr. Rehan Waheed, an osteopath.

By decision dated November 4, 2019, OWCP denied modification of its April 23, 2019 decision.

In a report dated March 5, 2020, Dr. Larkin recounted that he had begun treating appellant after her December 4, 2017 laminectomy at L4-5. She returned to work on March 23, 2018, but injured her back on March 27, 2018 lifting a 45-pound package at work. Dr. Larkin related that he had evaluated appellant on March 28, 2018 for "severe low back pain, which was worsening and radiating into the lower extremity. He noted that this pain was directly related to the injury she sustained on March 27, 2018 when she attempted to lift the 45[-]pound box at work." Dr. Larkin opined that the lifting injury on March 27, 2018 caused foraminal narrowing and

damage to an existing nerve. He opined that, since the nerve damage had failed to improve in a year after the injury, it was a permanent condition. Dr. Larkin advised that appellant was disabled from her usual employment due to her work injury.

On March 16, 2020 appellant requested reconsideration.

By decision dated June 12, 2020, OWCP denied modification of its November 4, 2019 decision.

In a report dated March 19, 2021, Dr. Larkin related that when he examined appellant on March 27, 2018 she described the immediate onset of severe pain in her low back radiating into the lower extremity, increased paresthesia, and new pain in her thoracic spine. He advised that an examination revealed new findings of muscle spasm and a limp. Dr. Larkin opined that a functional capacity evaluation (FCE) confirmed that appellant was unable to perform her usual employment and attributed her disability to “the pain emanating from L4-5 and L5-S1, which began after the work injury.” He opined that lifting could increase the spine’s axial load and that the work injury was “likely related to a rapid compression of the exiting nerve while lifting the package.” Dr. Larkin noted that appellant had the symptoms that would be caused by such an injury, including muscle spasms, gait problems, loss of motion, nerve pain, and numbness. He advised that finding on a May 20, 2020 magnetic resonance imaging (MRI) scan supported that she had sustained a new injury as it showed worsening L4-5 and L5-S1 foraminal stenosis.

On March 24, 2021 appellant, through counsel, requested reconsideration.

By decision dated June 24, 2021, OWCP denied modification of its June 12, 2020 decision.⁴

In an undated report received on December 9, 2021, Dr. Larkin again advised that he had evaluated appellant on March 28, 2018 for severe pain in her lower back, new thoracic pain, and severe lower back pain with radiation. He noted that an FCE had confirmed that she had damaged a spinal exit nerve at L4-5 and L5-S1. Dr. Larkin indicated that appellant had bent down into a hamper, which was over 24 inches deep. He related, “The process of attempting to lift a heavy package, which weighed at least 45 pounds from the parcel hamper/bin created immediate back pain and resulted in [appellant] not being able to stand or walk.” Dr. Larkin diagnosed chronic pain syndrome, chronic back pain more than three months duration, and lumbar radiculopathy. He opined that the “act of lifting the heavy package caused a significant axial load on [appellant’s] spine that resulted in the injury, which caused rapid compression of the L4-5 and L5-S1 in her lower back.” Dr. Larkin opined that appellant was disabled from employment due to the work injury.

On December 9, 2021 appellant requested reconsideration. She also submitted two photographs.

⁴ OWCP indicated that it was denying modification of a March 24, 2021 decision; however, it appears that this is a typographical error.

By decision dated March 9, 2022, OWCP denied appellant's request for reconsideration as she had not submitted evidence or raised an argument sufficient to warrant reopening her claim for merit review under 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.⁵

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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

In support of her request for reconsideration, appellant submitted a report from Dr. Larkin. Dr. Larkin described in detail the accepted employment incident, noting that she had reached into a hamper over 24 inches deep to retrieve a package. He diagnosed lumbar radiculopathy, chronic pain syndrome, and chronic back pain. Dr. Larkin found that lifting the package resulted in an axial load on the spine that caused compression at L4-5 and L5-S1. In his report received December 9, 2021, he described with greater specificity the accepted employment incident and provided an opinion on causation with supporting rationale. Dr. Larkin addressed the underlying

⁵ 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).

⁶ 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).

⁷ *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 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.

⁸ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

issue of whether appellant sustained a back condition causally related to the accepted employment incident and, thus, his report constitutes relevant and pertinent new evidence that was not previously considered. Therefore, the Board finds that the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).¹⁰

Consequently, the Board will set aside OWCP's March 9, 2022 decision and remand the case for an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that OWCP improperly 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 the March 9, 2022 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 9, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁰ *Supra* note 6; *see also* *R.S.*, Docket No. 22-0087 (issued April 19, 2022); *F.K.*, Docket No. 21-0998 (issued December 29, 2021); *J.T.*, Docket No. 20-1301 (issued July 28, 2021).