

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

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A.G., Appellant )

and )

DEPARTMENT OF HOMELAND SECURITY, )  
IMMIGRATION AND CUSTOMS )  
ENFORCEMENT, HOMELAND SECURITY )  
INVESTIGATIONS, Miami, FL, Employer )

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**Docket No. 22-1052**  
**Issued: December 14, 2022**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 8, 2022 appellant filed a timely appeal from a January 10, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision on this issue, dated November 16, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

**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).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On October 1, 2021 appellant, then a 45-year-old criminal investigator, filed a traumatic injury claim (Form CA-1) alleging that on August 4, 2021 he sustained neck and back soreness when the employing establishment vehicle he was driving was rear-ended, while in the performance of duty.

An x-ray of appellant's cervical spine obtained on August 5, 2021 revealed no acute fracture, subluxation, or multilevel degenerative changes. X-rays of his thoracic and lumbar spine obtained on the same date revealed no acute fracture and mild multilevel degenerative changes.

In a development letter dated October 12, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of additional medical evidence necessary, and afforded him 30 days to respond. No response was received.

By decision dated November 16, 2021, OWCP denied appellant's traumatic injury claim. It accepted that the alleged incident occurred as alleged, but found that he had not submitted sufficient medical evidence containing a medical diagnosis in connection with the accepted incident.

Appellant thereafter submitted an after-visit summary from Teddy Hanna, a certified physician assistant, dated August 5, 2021. Mr. Hanna noted appellant's complaints of cervical and thoracic pain.

On January 4, 2022 appellant requested reconsideration of OWCP's November 16, 2021 decision. He resubmitted the August 5, 2021 after-visit summary and the August 5, 2021 diagnostic tests. OWCP also received a billing statement from a medical provider dated September 26, 2021.

By decision dated January 10, 2022, 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.<sup>2</sup>

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

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<sup>2</sup> 5 U.S.C. § 8128(a); *see 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.<sup>3</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>4</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>5</sup> 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.<sup>6</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's January 4, 2022 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, it did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not 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).

In support of his reconsideration request, appellant submitted an August 5, 2021 after-visit summary from Mr. Hanna, a certified physician assistant. While this evidence is new, the underlying issue in this case is medical in nature. Physician assistants are not considered physicians as defined under FECA.<sup>7</sup> Therefore, this evidence is irrelevant and is insufficient to warrant a merit review. While the billing statement dated September 26, 2021 from a medical provider was also new evidence, it also did not address the underlying medical issue of causal relationship. It was therefore also insufficient to require merit review of the claim.<sup>8</sup> Appellant

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<sup>3</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>4</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 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 2.1602.4b.

<sup>5</sup> *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>6</sup> *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).

<sup>7</sup> 5 U.S.C. § 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *K.C.*, Docket No. 19-0834 (issued October 28, 2019); *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

<sup>8</sup> *F.L.*, Docket No. 20-1288 (issued July 13, 2021); *D.P.*, Docket No. 20-1225 (issued January 8, 2021); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *T.B.*, Docket No. 18-1214 (issued January 29, 2019).

also resubmitted the diagnostic reports dated August 5, 2021. However, medical evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.<sup>9</sup> Therefore, appellant is also not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that appellant has not met 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 10, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 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

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<sup>9</sup> See *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).