

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

J.M., Appellant)	
)	
and)	Docket No. 20-1648
)	Issued: February 16, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Wilmington, CA, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Brett E. Blumstein, Esq., for the appellant¹</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 18, 2020 appellant, through counsel, filed a timely appeal from a May 18, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 16, 2019, 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.

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 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.*

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).

FACTUAL HISTORY

On August 12, 1997 appellant, then a 33-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained neck and back injuries that day when he was struck by a vehicle while he was delivering mail in the performance of duty. OWCP accepted his claim for sprain of the neck, sprain of the back, thoracic region and sprain of the back, lumbar region.

Appellant sought treatment with Dr. Ralph N. Steiger, a Board-certified orthopedist, on January 29, 1998, for right arm pain, neck pain, and middle to lower back pain with numbness and tingling. He reported that on August 12, 1997 he began his mail route when he was struck from behind by a vehicle going in reverse and his mailbag got caught on the bumper and he was slammed into the back of the vehicle. Dr. Steiger diagnosed musculoligamentous sprain, cervical spine; musculoligamentous sprain, lumbar spine with right lower extremity radiculitis; and supraspinatus tendinitis of the right shoulder. He opined that as a direct result of the injury on August 12, 1997 appellant injured his neck, low back, and right shoulder. Dr. Steiger noted that appellant was totally disabled.

On May 29, 1998 Dr. Steiger performed arthroscopy with partial resection of the right glenoid labrum. He diagnosed tear of the glenoid labrum, right shoulder, and tendinitis of the rotator cuff. On October 14, 1998, Dr. Steiger performed arthroscopy with partial lateral meniscectomy, chondroplasty of patella, and resection of the medial synovial plica, right knee. He diagnosed tear of the lateral meniscus and chondromalacia of the patella and medial synovial plica, right knee. On May 11, 1999 Dr. Steiger returned appellant to work with restrictions.

Appellant continued treating with Dr. Steiger who submitted interim orthopedic evaluations from July 29, 1999 through September 18, 2007. Dr. Steiger diagnosed cervical, lumbar, right shoulder, and right knee conditions.³

On February 8, 2008 the employing establishment offered appellant a position as a modified mark-up clerk. The duties included keying mail for eight hours a day. The tour of duty was from 5:00 a.m. to 1:30 p.m. The physical requirements included: simple grasping and fine manipulation up to eight hours a day.

In a disability status form dated February 12, 2008, Dr. Steiger noted a date of injury of August 12, 1997. He noted diagnoses and provided work restrictions.

³ By decision dated December 13, 2000, OWCP issued a loss of wage-earning capacity (LWEC) determination based on appellant's actual earnings as a modified letter carrier. It found that he had worked in the position for over 60 days, commencing on or about December 21, 1998 and that the employment fairly and reasonably represented his wage-earning capacity.

On July 7 and August 19, 2008 appellant filed claims for compensation (Form CA-7) for work-related disability for the period June 27 through September 4, 2008.

By decision dated August 28, 2008, OWCP denied appellant's claim, finding that he had not established disability from work for the period beginning June 27 through September 4, 2008 causally related to the accepted August 12, 1997 employment injury. By decision dated February 17, 2009, an OWCP hearing representative affirmed the decision dated August 28, 2008.

On September 4, 2008 appellant filed CA-7 forms for work-related disability for the period beginning September 2, 2008.

By decision dated October 31, 2008, OWCP denied appellant's claims, finding that he had not established disability from work for the period beginning September 2, 2008 causally related to the accepted August 12, 1997 employment injury. By decision dated May 5, 2009, an OWCP hearing representative affirmed the decision dated October 31, 2008.

Appellant continued to file CA-7 forms for work-related disability for the period beginning September 26, 29, October 12, and October 11 through 26, 2011.⁴

By decision dated December 9, 2011, OWCP denied appellant's claim for a recurrence of disability.

On July 22, 2014 appellant filed a Form CA-7 for work-related disability for the period September 10, 2012 through December 24, 2013.

By decision dated October 16, 2014, OWCP denied appellant's claim for compensation.

On July 17, 2015 appellant filed a Form CA-7 for work-related disability for the period May 29 through July 10, 2015.⁵

By decision dated October 7, 2015, OWCP denied appellant's claim for a recurrence of disability.

OWCP received additional evidence. Appellant continued to receive treatment from Dr. Steiger who submitted interim orthopedic evaluations dated July 7, 2015 through April 25, 2018. Dr. Steiger noted a date of injury of August 12, 1997 and provided multiple diagnosed conditions and continued appellant's work restrictions. He submitted disability status reports from October 6, 2015 through April 2, 2019 that noted diagnoses and work restrictions.

On April 2, 2019 appellant filed a Form CA-7 for work-related disability for the period August 12, 2018 through May 12, 2019.⁶

⁴ OWCP developed the claim as a recurrence of disability.

⁵ OWCP developed the claim as a recurrence of disability.

⁶ OWCP developed the claim as a recurrence of disability.

In support of his claim, appellant submitted interim orthopedic evaluations from Dr. Steiger dated August 14, 2018 through March 5, 2019. Dr. Steiger noted a date of injury of August 12, 1997 and diagnosed musculoligamentous sprain cervical, musculoligamentous sprain lumbar with right lower extremity radiculitis, tear of superior and anterior glenoid labrum right shoulder, herniated disc at L3-4 and L4-5, some shredding of the right rotator cuff, arthroscopy of the right shoulder with partial resection of glenoid labrum, May 29, 1998, bilateral patellar tendinitis, tear lateral meniscus of the right knee, medial plica, right knee, chondromalacia patella right knee, status post arthroscopy of the right knee with partial meniscectomy and synovectomy and chondroplasty patella, October 14, 1998, herniated disc thoracic spine, disc bulges C5-6 and C6-7, impingement syndrome right shoulder, osteoarthritis of the right knee, posterior dislocation terminal portion of coccyx, and bilateral C6-7 radiculopathy. He opined that appellant was temporarily totally disabled. Dr. Steiger also submitted disability status reports from August 14, 2018 through April 2, 2019. He repeated the diagnosed conditions listed in his interim reports and opined that appellant was temporarily totally disabled.

In a development letter dated April 11, 2019, OWCP advised appellant of the deficiencies of his recurrence claim and informed him of the type of factual and medical evidence needed. It provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested evidence.

Appellant thereafter submitted disability status reports from Dr. Steiger from February 19 through May 10, 2019. He repeated the diagnosed conditions listed in his interim reports and opined that appellant was temporarily totally disabled.

On April 25, 2019 appellant filed a Form CA-7 for work-related disability for the period March 30 through April 12, 2019.⁷

In response to the development letter on May 8, 2019 appellant indicated that he worked at the Santa Ana Processing and Distribution Center as an automation clerk. His job duties included standing, walking, ledge loading, casing mail, pulling down mail, feeding mail into the automation machine, pushing, pulling all-purpose containers (APC), and hampers. Appellant indicated that he did not have to perform real physical labor until he started working at the main facility and began to experience pain and stiffness. He reported that his symptoms were present continuously and were made worse by standing, walking, pushing, pulling, and lifting. Appellant advised that he did not sustain any other injuries and had no outside hobbies.

By decision dated May 16, 2019, OWCP denied appellant's recurrence claim, finding that he had not established that he was disabled or further disabled due to a material change or worsening of his accepted work-related conditions.

OWCP received additional evidence. Appellant submitted interim orthopedic evaluations from Dr. Steiger dated March 5, 2019 through February 11, 2020. In these reports he noted a date of injury of August 12, 1997 and diagnosed musculoligamentous sprain cervical, musculoligamentous sprain lumbar with right lower extremity radiculitis, tear of superior and anterior glenoid labrum right shoulder, herniated disc at L3-4 and L4-5, some shredding of the

⁷ OWCP developed the claim as a recurrence of disability.

right rotator cuff, arthroscopy of the right shoulder with partial resection of glenoid labrum, patellar tendinitis of right knee, tear lateral meniscus of the right knee, medial plica right knee, chondromalacia patella right knee, status post arthroscopy of the right knee with partial meniscectomy and synovectomy and chondroplasty patella, herniated disc thoracic spine, disc bulges C5-6 and C6-7, impingement syndrome right shoulder, osteoarthritis of the right knee, posterior dislocation terminal portion of coccyx, and bilateral C6-7 radiculopathy. Dr. Steiger opined that appellant was temporarily totally disabled.

Appellant submitted disability status reports from Dr. Steiger from May 10, 2019 through February 11, 2020. Dr. Steiger noted a date of injury of August 12, 1997 and diagnosed musculoligamentous sprain cervical, musculoligamentous sprain lumbar with right lower extremity radiculitis, tear of superior and anterior glenoid labrum right shoulder, herniated disc at L3-4 and L4-5, some shredding of the right rotator cuff, arthroscopy of the right shoulder with partial resection of glenoid labrum, patellar tendinitis right knee, tear lateral meniscus of the right knee, medial plica right knee, chondromalacia patella right knee, status post arthroscopy of the right knee with partial meniscectomy and synovectomy and chondroplasty patella, herniated disc thoracic spine, disc bulges C5-6 and C6-7, impingement syndrome right shoulder, osteoarthritis of the right knee, posterior dislocation terminal portion of coccyx, and bilateral C6-7 radiculopathy. In a June 14, 2019 disability status report, Dr. Steiger noted a date of injury of May 11, 2000 and provided diagnoses and opined that appellant was partially disabled and could work with restrictions.⁸

On May 8, 2020 appellant, through counsel, requested reconsideration. He asserted that new reports from Dr. Steiger dated June 14, 2019 and January 7, 2020 were well rationalized and supported appellant's claim for a recurrence of disability.

By decision dated May 18, 2020, 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 or her own motion or on application.⁹

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

⁸ Appellant filed several CA-7 forms for work-related disability for the period May 11 through 24, 2019, June 4 through 21, 2019, July 20 through August 16, 2019, August 24 through September 6, 2019, September 28 through October 11, 2019, October 26 through November 8, 2019, December 21, 2019 through January 7, 2020, and February 22 through March 6, 2020.

⁹ *Id.* at § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹⁰

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹¹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹² 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.¹³

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 neither established that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. In his May 8, 2020 request for reconsideration, appellant's counsel argued that he was disabled due to a material change or worsening of his accepted work-related conditions. He referenced new reports from Dr. Steiger dated June 14, 2019¹⁴ and January 7, 2020, which listed multiple diagnoses due to appellant's August 12, 1997 work injury and opined that appellant was temporarily totally disabled. Counsel's reconsideration request does not advance a new legal argument not previously considered, nor show that OWCP erroneously applied or interpreted a specific point of law. The Board finds that the argument made by appellant on reconsideration was cumulative, duplicative, or repetitive in nature and was insufficient to warrant reopening the claim for merit review.¹⁵ Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁶

In support of his request for reconsideration, appellant submitted interim orthopedic evaluations from Dr. Steiger dated March 5, 2019 through February 11, 2020 and disability status reports dated May 10, 2019 through February 11, 2020. However, these reports are similar to

¹⁰ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹¹ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

¹² *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹³ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁴ In this report Dr. Steiger provides a date of injury of May 11, 2000 and opined that appellant could return to work with restrictions.

¹⁵ *J.V.*, Docket No. 19-1554 (issued October 9, 2020); *see T.B.*, Docket No. 16-1130 (issued September 11, 2017).

¹⁶ *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

Dr. Steiger's other interim reports dated July 7, 2015 through March 5, 2019 and disability status reports dated October 6, 2015 through May 10, 2019 that were previously considered by OWCP in its May 16, 2019 decision and determined to be insufficient. As these reports repeat evidence already of record, it is cumulative and does not constitute relevant and pertinent new evidence. Therefore, it is insufficient to require OWCP to reopen the claim for consideration of the merits.¹⁷ Because appellant did not provide relevant and pertinent new evidence not previously considered by OWCP, he was not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁸

On appeal counsel argues that Dr. Steiger's reports were well rationalized and establish that appellant was further disabled due to a material change/worsening of his accepted work-related conditions and was unable to work. As explained above, he has not shown that OWCP erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered by OWCP, or constitutes relevant and pertinent new evidence not previously considered by OWCP.

The Board accordingly finds that appellant has not meet any of the three requirements under 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).

¹⁷ *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁸ *See* 20 C.F.R. § 10.606(b)(3)(iii).

¹⁹ *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 May 18, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 16, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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