

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

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**S.H., Appellant** )

**and** )

**DEPARTMENT OF THE AIR FORCE,** )  
**TINKER AIR FORCE BASE, OK, Employer** )  
\_\_\_\_\_ )

**Docket No. 21-1267**

**Issued: February 1, 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

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 19, 2021 appellant filed a timely appeal from a May 12, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> As more than 180 days has elapsed from the last merit decision dated May 28, 2020 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

**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).

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<sup>1</sup> The Board notes that appellant's Application for Review (AB-1 Form) also indicates that she is appealing from a purported March 30, 2019 OWCP decision. The case record, however, does not contain a final adverse decision of that date. The most recent final adverse decision of OWCP is dated May 12, 2021.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On April 22, 2018 appellant, then a 57-year-old human resources specialist, filed an occupational disease claim (Form CA-2) alleging that she was diagnosed as having scabies from her neck to her buttocks in May 2016 and having Ekbohm's syndrome in December 2017 as a result of her exposure to a coworker's daughter who had scabies. She noted that she first became aware of her conditions on May 26, 2016 and realized their relationship to her federal employment on May 26, 2016. Appellant stopped work on January 8, 2018.

In support of her claim, appellant submitted factual and medical evidence.

In a May 1, 2018 memorandum, the employing establishment controverted the claim, contending, that appellant did not establish that she was exposed to an infectious condition while in the performance of duty and failed to submit medical evidence establishing a diagnosis of Ekbohm's syndrome by a qualified physician.

OWCP, in a development letter dated May 10, 2018, informed appellant of the deficiencies in her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a factual questionnaire for her completion. In a separate development letter of even date, OWCP also requested that the employing establishment provide additional information concerning appellant's claim. It afforded both parties 30 days to respond.

On June 1, 2018 appellant responded to OWCP's development letter. She reiterated her history of injury and diagnoses of scabies and Ekbohm's syndrome. Appellant claimed that her conditions had worsened.

OWCP subsequently received narrative statements dated June 6 and 11, 2018 from appellant's coworkers, S.S. and R.J.E. They noted that appellant informed them that she had been bitten around her feet and ankles while sitting in her cubicle at work. Appellant showed them a tacky strip and a plain white sheet of paper that she had placed at her bare feet in her cubicle, which had black specs and dots moving around.

OWCP also received medical evidence, including a June 12, 2018 report by Dr. John Ellis, an attending Board-certified family practitioner. Dr. Ellis noted appellant's history of injury that in June 2016 she was exposed to a coworker's daughter who had scabies. He also noted her history of medical treatment. Dr. Ellis reviewed medical records, provided examination findings, and diagnosed scabies, infestation of the skin by human itch mite, *Scarpotes scabiei*. He opined that the diagnosed condition was contributed to, aggravated and/or caused by appellant's employment.

In a June 4, 2018 report, Dr. Erika E. Breedlove, a Board-certified family practitioner, noted appellant's history that two years ago she was diagnosed as having scabies for which she received medical treatment. She diagnosed Ekbohm's delusional parasitosis and advised that appellant was incapable of performing her work duties due to her diagnosed conditions.

By decision dated March 20, 2019, OWCP denied appellant's occupational disease claim, finding that she had not submitted a rationalized medical opinion explaining how her diagnosed conditions were causally related to the accepted employment factors/exposure.

OWCP continued to receive medical evidence, including additional reports by Dr. Ellis. In a March 26, 2019 report and a June 17, 2019 addendum report to his June 12, 2018 report, Dr. Ellis reiterated his prior opinion that appellant's scabies condition was caused by her accepted employment exposure.

On July 12, 2019 appellant, through then-counsel, requested reconsideration of the March 20, 2019 decision. Then-counsel contended that Dr. Ellis' March 26, 2019 report was rationalized and sufficient to establish causal relationship.

In an October 30, 2019 decision, OWCP denied modification of its March 20, 2019 decision, finding that Dr. Ellis' reports were insufficient to establish causal relationship between appellant's accepted employment exposure and her diagnosed medical conditions.

On March 2, 2020 appellant, through then-counsel, requested reconsideration. Then-counsel reasserted that Dr. Ellis' March 26 and June 12, 2019 reports were sufficient to establish causal relationship.

OWCP, by decision dated May 28, 2020, again denied modification of its prior decision, finding that there was no rationalized medical opinion evidence establishing causal relationship between appellant's diagnosed conditions and her accepted employment exposure.

On February 1, 2021 then-counsel, requested reconsideration. He again argued that Dr. Ellis' March 26, 2019 report was well rationalized and sufficient to establish that appellant's scabies was causally related to her accepted employment exposure. Then-counsel also submitted additional evidence.

In a July 1, 2020 report, Stephen Johnston, a certified physician assistant, noted appellant's diagnoses of somatization disorder, generalized anxiety disorder, and single episode of mild major depressive disorder. He indicated that her severe physical symptoms and inability to perform her work duties were related to her May 2016 scabies infestation.

Duplicate copies of the June 8 and 11, 2018 narrative statements from S.S. and R.J.E., Dr. Breedlove's June 4, 2018 report, and Dr. Ellis' June 12, 2018 and March 26, 2019 reports were resubmitted.

OWCP also received photographs of appellant's skin condition.

By decision dated May 12, 2021, OWCP 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 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>3</sup>

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.<sup>4</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>5</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</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>7</sup>

## 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 did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. While then-counsel repeated the contention that Dr. Ellis' March 26, 2019 report was rationalized and established that appellant's scabies condition was causally related to the accepted employment exposure, this argument and Dr. Ellis' March 26, 2019 report were previously considered by OWCP in its prior decisions. The Board has held that evidence which repeats or duplicates evidence already in the

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<sup>3</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).

<sup>4</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>5</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>6</sup> *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *see B.S.*, Docket No. 20-0761 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

case record, has no evidentiary value, and does not constitute a basis for reopening a case.<sup>8</sup> For these reasons, the Board finds that then-counsel's assertion is insufficient to warrant reopening appellant's claim for further review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).<sup>9</sup>

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). Appellant submitted a new report dated July 1, 2020 from Mr. Johnston, a certified physician assistant. The Board finds, however, that submission of this report did not require reopening appellant's case for merit review because it has no probative value on the underlying issue on reconsideration. This report does not constitute competent medical evidence because physician assistants are not considered physicians as defined under FECA.<sup>10</sup> Therefore, this evidence is not relevant and is insufficient to require a merit review.<sup>11</sup>

Appellant also submitted pictures of her skin. While this evidence is new, it is not relevant because it was not medical evidence from a physician and did not address the underlying issue on reconsideration, whether appellant had met her burden of proof to establish that her diagnosed skin conditions were causally related to the accepted employment exposure. The Board has held that the submission of evidence that does not address the underlying issue involved does not constitute a basis for reopening a case.<sup>12</sup> Therefore, these photographs are insufficient to warrant a merit review.

Appellant resubmitted statements dated June 8 and 11, 2018 from Ms. Sipes and Mr. Enriquez, respectively, a report dated June 4, 2018 from Dr. Breedlove, and reports dated June 12, 2018 and March 26, 2019 from Dr. Ellis. As noted above, 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.<sup>13</sup> As these statements and reports were previously considered and reviewed by OWCP in its prior decisions, they do not constitute relevant and pertinent new evidence. Therefore, this evidence is insufficient to require OWCP to reopen the claim for consideration of the merits. As appellant did not provide relevant and pertinent new

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<sup>8</sup> *L.G.*, Docket No. 21-0689 (issued October 25, 2021); *P.G.*, Docket No. 20-1419 (issued September 16, 2021); *F.P.*, Docket No. 19-1861 (issued April 5, 2021); *B.O.*, Docket No. 20-0156 (issued May 13, 2020); *Eugene F. Butler*, 36 ECAB 393 (1984).

<sup>9</sup> *Id.*

<sup>10</sup> Section 8101(2) of FECA provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also supra* note 5 at Chapter 2.805.3a(1) (January 2013); *R.G.*, Docket No. 19-1889 (issued April 14, 2021) (physician assistants are not physicians under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

<sup>11</sup> *Id.*

<sup>12</sup> *P.G.*, *supra* note 8; *R.E.*, Docket No. 21-0172 (issued June 15, 2021); *see also Edward Matthew Diekemper*; 31 ECAB 224, 225 (1979).

<sup>13</sup> *Supra* note 8.

evidence not previously considered by OWCP, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

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.<sup>14</sup>

**CONCLUSION**

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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 1, 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

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<sup>14</sup> *P.G.*, *supra* note 8; *R.E.*, *supra* note 12; *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).