

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

_____)	
J.D., Appellant)	
)	
and)	Docket No. 21-1191
)	Issued: July 14, 2022
U.S. POSTAL SERVICE, EAST NAPLES)	
CARRIER ANNEX POST OFFICE, Naples, FL,)	
Employer)	
_____)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
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 30, 2021 appellant, through counsel, filed a timely appeal from a February 1, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated May 31, 2019, to the filing of this appeal,

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.

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

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 April 14, 2017 appellant, then a 56-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her right hand and arm while in the performance of duty. She further alleged that she had sustained a mental injury on that date as the result of a racial slur. Appellant stopped work on April 14, 2017.

In an undated statement accompanying her claim, appellant related that D.B., her supervisor, had watched her deliver mail. A customer who had put mail in her box wanted her to return and retrieve it, but she told her that she could not go back without her supervisor's permission. Appellant stated that D.B. yelled the "N" word at her and tried to enter her vehicle. She related that she managed to close her car door and lock it, but that her arm began hurting shortly after the incident. In an incident report dated April 14, 2017, appellant advised that D.B. had grabbed the door when she tried to close it and used a racial epithet.

In an assault and threat specialty report dated April 14, 2017, L.S., an inspector with the employing establishment, reviewed appellant's assertion that D.B., her supervisor, had assaulted her on that date and referred to her by a racial epithet. He advised that D.B. acknowledged yelling at appellant, but not assaulting her or using profanity. L.S. determined that there was "no credible assault."

On April 14, 2017 appellant received treatment at the emergency department for complaints of right wrist pain after pushing hard against a door.

In a May 5, 2017 incident report from the sheriff's office, appellant related that on April 14, 2017 D.B. had opened her vehicle door, yelled at her, and called her the "N" word. D.B. also tried to grab her keys, injuring her wrist.

In an authorization for examination and/or treatment (Form CA-16) dated May 25, 2017, a physician diagnosed right wrist sprain and checked a box marked "Yes" that the condition was

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 1, 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.*

caused or aggravated by the described employment injury of an injury to the right wrist/shoulder/arm.

By decision dated June 21, 2017, OWCP denied appellant's traumatic injury claim. It found that she had established as a compensable employment factor that D.B. yelled at her on April 14, 2017. OWCP determined that she had failed to factually establish that D.B. called her the "N" word or jammed her hand injuring her wrist. It found that the medical evidence was insufficient to establish a medical condition causally related to the accepted employment factor.

On October 27, 2017 appellant requested reconsideration. She submitted medical evidence regarding her right wrist condition and a pre-arbitration settlement dated October 24, 2017. The settlement provided that D.B. would apologize to appellant and take a course in communication.

By decision dated February 23, 2018, OWCP denied modification of its June 21, 2017 decision.

On February 22, 2019 appellant, through counsel, requested reconsideration. He submitted an October 8, 2017 Equal Employment Opportunity (EEO) investigative affidavit from C.B., who periodically supervised appellant. C.B. asserted that appellant had complained to her that D.B. had yelled at her in front of customers and referred to her by the "N" word.

In a report dated February 22, 2019, Dr. Jane Harrington, who specializes in family medicine, diagnosed an anxiety disorder and post-traumatic stress disorder (PTSD) causally related to D.B. yelling at appellant on April 14, 2017.

By decision dated May 31, 2019, OWCP vacated in part and affirmed in part its February 23, 2018 decision. It accepted appellant's claim for PTSD and anxiety disorder causally related to D.B. yelling at her on April 14, 2017. OWCP affirmed its finding that she had not established a right wrist injury.⁴

Subsequently, appellant resubmitted a May 4, 2017 report from a counselor diagnosing workplace stress. She further submitted a Step B grievance impasse regarding her contention that the employing establishment failed to provide her with work within her restrictions.

In a June 12, 2019 report, Dr. Harrington evaluated appellant for PTSD, which she attributed to inappropriate behavior by a coworker and manager. In a work capacity evaluation dated July 17, 2019, she found that appellant could perform light/limited duty as a result of PTSD and requested that she have a change of venue with regard to her job location.

In an OWCP-5a dated July 17, 2019, Dr. Harrington indicated that appellant had been verbally harassed and had PTSD. She advised that she could perform limited-duty employment.

On May 31, 2020 appellant requested reconsideration. She submitted medical evidence from a podiatrist dated March 14, 2018 through August 25, 2020 regarding a right foot injury.

⁴ OWCP paid appellant wage-loss compensation for intermittent periods from May 30 through July 21, 2017, June 12 through 21, 2019 and July 20 through August 16, 2019.

In a report dated September 11, 2020, Dr. Migdalia I. Figueredo, a psychologist, advised that appellant had a history of physical, verbal, and emotional abuse and harassment by her supervisors and multiple employment-related physical injuries. He noted that her supervisor had advised that there was no work available within her restrictions. Dr. Figueredo diagnosed anxiety disorder and PTSD due to “abusive experiences [appellant] has received and continues to receive from her superiors.” He recommended psychotherapeutic therapy.

On September 15, 2020 OWCP referred appellant to Dr. Krishan K. Batra, a Board-certified psychiatrist, for a second opinion examination. In an accompanying statement of accepted facts, it noted that she was currently disabled as a result of a right toe injury under OWCP File No. xxxxxx399.

In a report dated October 29, 2020, Dr. Batra indicated that appellant was currently disabled due to a right foot injury. He noted that she related that D.B. had screamed at her and used a racial epithet. Dr. Batra diagnosed mild-to-moderate depression due to chronic physical pain and the emotional injury. He found that appellant did not have PTSD. Dr. Batra opined that she could perform sedentary employment and required continued psychiatric care.

By decision dated February 1, 2021, 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). It found that none of the evidence submitted referenced her denied allegations of April 14, 2017 or a right wrist condition.

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

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).

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 properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).¹⁰

Appellant has not established that OWCP erroneously applied or interpreted a specific point of law, or advanced a relevant legal argument not previously considered by OWCP. Consequently, she 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).¹¹

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. With her request for reconsideration, appellant submitted evidence from a podiatrist dated March 2018 through August 2020 regarding a right foot condition and a grievance impasse determination regarding the employing establishment's failure to provide her with work within her restrictions. This evidence, however, is not relevant to the underlying issue of whether she sustained an employment-related right wrist condition on April 14, 2017. The

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). 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).

¹⁰ OWCP's procedures provide that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review the merits of the case by the Board, OWCP should conduct a merit review. However, the procedures note that there is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7a (September 2020). OWCP issued the last merit decision in this case on May 31, 2019. Appellant had 180 days after this decision, or until November 27, 2019, to appeal that decision to the Board. OWCP received her reconsideration request on May 31, 2020. Accordingly, it received appellant's reconsideration request after the 180-day period for the appeal expired and, therefore, OWCP's delay in issuing the decision on the request for reconsideration did not impact appellant's appeal rights. *E.A.*, Docket No. 17-1231 (issued January 17, 2018); *V.D.*, Docket No. 16-1484 (issued January 6, 2017).

¹¹ 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also B.W.*, Docket No. 21-0709 (issued December 29, 2021); *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

Board has held the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

Appellant resubmitted a May 4, 2017 report from a counselor. The Board has held that evidence, which repeats or duplicates evidence already in the case record, does not constitute a basis for reopening a case for merit review.¹³

In a report dated June 12, 2019, Dr. Harrington evaluated appellant for PTSD. In an OWCP-5c dated July 17, 2019, she provided work restrictions. On September 11, 2020 Dr. Figueredo noted that appellant had experienced physical, verbal, and emotional abuse at work as well as physical injuries. He diagnosed anxiety disorder and PTSD due to past and continued abuse by superiors. On October 29, 2020 Dr. Batra, an OWCP referral physician, obtained a history of D.B. screaming at appellant and using a racial epithet. He diagnosed mild-to-moderate depression as a result of physical pain and the emotional injury. The submitted evidence fails to address the underlying issue of whether appellant submitted medical evidence sufficient to establish a right wrist injury. As discussed, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ Appellant has not provided relevant and pertinent new evidence and, thus, is not entitled to a merit review based on the third requirement under section 10.606(b)(3).¹⁵

On appeal counsel contends that OWCP erred in failing to accept that appellant sustained a right-hand injury. As explained above, however, the Board lacks jurisdiction to review the merits of the claim.¹⁶

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.¹⁷

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).

¹² See *P.G.*, Docket No. 20-1419 (issued September 16, 2021); *C.C.*, Docket No. 20-0950 (issued October 29, 2020); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹³ See *T.T.*, Docket No. 19-0559 (issued July 19, 2019); *D.K.*, 59 ECAB 141 (2007).

¹⁴ *Id.*; see also *C.C.*, Docket No. 21-0820 (issued December 22, 2021).

¹⁵ 20 C.F.R. § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

¹⁶ See *A.N.*, Docket No. 20-1450 (issued May 11, 2021).

¹⁷ *T.G.*, Docket No. 20-0329 (issued October 19, 2020); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 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