United States Department of Labor
Employees' Compensation Appeals Board

D.K., Appellant	)	
and	)	**Docket No. 21-1330**
	)	**Issued: May 4, 2022**
U.S. POSTAL SERVICE, POST OFFFICE, Boston, MA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 1, 2021 appellant filed a timely appeal from a March 12, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated February 5, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the March 12, 2021 decision, appellant submitted additional evidence to OWCP. 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*.

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 October 5, 2020, appellant, then a 39-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on September 24, 2020 she injured her left side, back, and left knee when her mail truck was rear-ended while in the performance of duty. She stopped work on September 24, 2020. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was in the performance of duty at the time of the injury.

On September 24, 2020 Dr. Robert Lowenstein, Board-certified in emergency medicine, treated appellant for injuries sustained in a motor vehicle accident. He diagnosed motor vehicle collision, neck and back pain. In an emergency department document of even date, Dr. Lowenstein noted that appellant presented to the emergency room with left-sided pain after she was rear-ended while driving her postal truck. He diagnosed motor vehicle accident, neck and back pain. Dr. Lowenstein prescribed oral analgesics and excused appellant from work for two days. In a work release form of even date, he noted that she could return to work on September 28, 2020.

In a September 28, 2020 report, Dr. Alice Lin, a Board-certified family practitioner, excused appellant from work for the period September 28 through October 9, 2020. In duty status reports (Form CA-17) dated September 30, October 9, November 9, and December 4, 2020, she diagnosed backache and left knee pain, noting that appellant was unable to work. Similarly, in attending physician's reports (Form CA-20) dated October 9, November 9, and December 4, 2020, Dr. Lin indicated that appellant was driving a work vehicle when she was rear-ended while her vehicle was stopped at a red light. She diagnosed backache and pain in the left knee and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. Dr. Lin noted that appellant was totally disabled from work. In a note dated December 4, 2020, she advised that appellant could not return to work until an x-ray was performed.[3]

In a September 30, 2020 authorization for examination and/or treatment (Form CA-16), the employing establishing authorized appellant to seek medical care. In Part B of the Form CA-16, attending physician's report, of even date, Dr. Lin reported that appellant was driving a work vehicle and was rear-ended on her way back to the station while stopped at a red light. She diagnosed backache and left knee pain. Dr. Lin checked a box marked "Yes" indicating that the diagnosed conditions were caused or aggravated by the described employment activity. She opined that appellant was totally disabled from work commencing September 24, 2020.

In a development letter dated November 2, 2020, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and

[3] On December 8, 2020 appellant filed a claim for compensation (Form CA-7) for work-related disability for the period November 9 through December 4, 2020.

medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a December 4, 2020 letter, Dr. Lin related that appellant could not return to work until she had an x-ray performed.

By decision dated December 15, 2020, OWCP denied appellant's traumatic injury claim, finding that she had not submitted medical evidence containing a medical diagnosis in connection with her accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

OWCP received additional evidence. A magnetic resonance imaging (MRI) scan of the lumbar spine dated December 22, 2020 revealed mild posterior disc bulges seen at L4-5 and L5-S1 with evidence of a tiny annular tear at L5-S1.

On January 8, 2021 Dr. Chadi Tannoury, a Board-certified orthopedist, treated appellant for low back pain after a work-related injury. Appellant reported driving her postal truck on September 24, 2020 when she was rear-ended in a motor vehicle accident. The next day she reported experiencing low back and left knee pain. Examination revealed antalgic gait and difficulty in raising from a seated position. Dr. Tannoury diagnosed work-related injury with lumbar pain and noted that appellant was disabled from work.

On January 20, 2021 Dr. Lin treated appellant in follow up for injuries sustained in a work-related motor vehicle accident on September 24, 2020. She noted that appellant had low back pain that she opined was related to the motor vehicle accident.

On January 22, 2021 appellant requested reconsideration.

By decision dated January 29, 2021, OWCP modified the December 15, 2020 decision, finding that appellant had submitted medical evidence containing a medical diagnosis in connection with her accepted employment incident. However, the claim remained denied as the medical evidence of record was insufficient to establish a causal relationship between her diagnosed conditions and the accepted September 24, 2020 employment incident.

OWCP received additional evidence. In a Form CA-17 dated January 27, 2021, Dr. Tannoury diagnosed disc disease L4-5 and L5-S1 and returned appellant to work with restrictions on February 22, 2021. In a Form CA-20 of even date, he diagnosed lumbar disc prolapse at L4-5 and L5-S1 and checked a box marked "Yes" indicating that her condition had been caused or aggravated by an employment activity. Dr. Tannoury returned appellant to work with restrictions on February 22, 2021.

On February 2, 2021 appellant requested reconsideration.

By decision dated February 5, 2021, OWCP denied modification of the January 29, 2021 decision.

OWCP received additional evidence. Appellant submitted a report from Dr. Lowenstein dated September 24, 2020 and Dr. Tannoury dated January 27, 2021, previously of record.

In a report dated January 28, 2021, Dr. Tannoury examined appellant for low back pain following a work-related motor vehicle accident on September 24, 2020. Findings on examination revealed ambulation with antalgic gait, difficulty raising from seated position, limited flexion at the waist, and motor strength weakness in the bilateral lower extremities. Dr. Tannoury reviewed x-rays of the lumbar spine that revealed no instability and an MRI scan dated December 22, 2020, which revealed disc bulges/annular tears at L4-5 and L5-S1. He diagnosed work-related injury with lumbar pain. Dr. Tannoury returned appellant to light-duty work on February 22, 2021. He recommended an epidural steroid injection at L4-5 and L5-S1. An x-ray of the lumbar spine dated January 28, 2021 revealed trace retrolisthesis at L5 on S1.

On February 23, 2021 appellant requested reconsideration.

In a February 22, 2021 report, Denis Murphy, a physician assistant, treated appellant and indicated that she should remain off work until her follow-up appointment on March 11, 2021.

By decision dated March 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 or her own motion or on application.[4]

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.[5]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[6] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[7] If the request is timely, but fails to meet at least one of the

[4] 5 U.S.C. § 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).

[5] 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).

[6] *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.

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

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[8]

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 has not shown that OWCP erroneously applied or interpreted a specific point or law, nor did she advance a new and relevant legal argument not previously considered in her February 19, 2021 reconsideration request. Consequently, she was not entitled to a review of the merits of her claim based on the first or second above-noted requirements under section 10.606(b)(3).[9]

The underlying issue in the case is whether appellant has provided sufficient medical evidence to establish that she sustained a medical condition causally related to the accepted September 24, 2020 employment incident.

Appellant resubmitted a report from Dr. Lowenstein dated September 24, 2020 and from Dr. Tannoury dated January 27, 2021. As these reports repeat evidence already in the case record, it is cumulative and does not constitute relevant and pertinent new evidence. The Board has held that providing additional evidence that either repeats or duplicates information already in the record does not constitute a basis for reopening a claim.[10]

Appellant submitted a new January 28, 2021 report from Dr. Tannoury who treated her for low back pain following a work-related motor vehicle accident on September 24, 2020. Dr. Tannoury reviewed x-rays of the lumbar spine, which revealed no instability and an MRI scan dated December 22, 2020, which revealed disc bulges/annular tears at L4-5 and L5-S1. He diagnosed work-related injury with lumbar pain. Dr. Tannoury returned appellant to light-duty work beginning February 22, 2021 and recommended epidural steroid injections at L4-5 and L5-S1. However, this report is similar to Dr. Tannoury's January 8, 2021 report that was previously considered by OWCP in its January 29, 2021 decision and determined to be insufficient. As these reports are duplicative of evidence previously 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.[11]

[8] *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).

[9] *Id.* at § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

[10] *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).

[11] *Id.*

Appellant submitted a report from a physician assistant dated February 22, 2021. However, certain healthcare providers such as physician assistants[12] are not considered "physician[s]" as defined under FECA.[13] Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.[14]

As appellant did not provide relevant and pertinent new evidence not previously considered by OWCP, she was not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).[15]

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.[16]

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] *C.P.*, Docket No. 19-1716 (issued March 11, 2020) (a physician assistant is not a physician as defined under FECA).

[13] Section 8101(2) of FECA provides that 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 6 at Chapter 2.805.3a(1) (January 2013); *L.W.*, Docket No. 21-0789 (issued March 25, 2022) (physician assistants are not considered physicians as defined 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).

[14] *Id*.

[15] *See* 20 C.F.R. § 10.606(b)(3)(iii).

[16] *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 March 12, 2021 decision of the Office of Workers' Compensation Programs is affirmed.[17]

Issued: May 4, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[17] The Board notes that the case record contains a Form CA-16, dated September 30, 2020. A properly completed Form CA-16 form authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. 20 C.F.R. § 10.300(c); *P.R.*, Docket No. 18-0737 (issued November 2, 2018); *N.M.*, Docket No. 17-1655 (issued January 24, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).