

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

<b>D.M., Appellant</b>  <b>and</b>  <b>U.S. POSTAL SERVICE, ATLANTA LOGISTICS &amp; DISTRIBUTION CENTER, Atlanta, GA, Employer</b>	) ) ) ) ) ) ) ) ) ) )	<b>Docket No. 22-0527 Issued: October 4, 2022</b>
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*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 25, 2022 appellant filed a timely appeal from an October 1, 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 April 30, 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 over the merits of this case.<sup>2</sup>

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

<sup>2</sup> The Board notes that, following the October 2, 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

This case has previously been before the Board on a different issue.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 26, 2011 appellant, then a 41-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained a bilateral upper extremity condition due to factors of her federal employment including repetitive movements. She noted that she first became aware of her claimed injury on March 31, 2005 and realized its relation to her federal employment on August 22, 2011. Appellant stopped work on January 8, 2014 and, on the same date, she underwent OWCP-authorized revision of right carpal tunnel release surgery.<sup>4</sup> She periodically returned to light-duty work. OWCP accepted appellant's claim for adhesive capsulitis of the left shoulder; bilateral carpal tunnel syndrome; bilateral disorder of bursae and tendons of the shoulder region; other bilateral affections of the shoulder region; other bilateral synovitis and tenosynovitis; bilateral elbow and forearm sprains; bilateral mononeuritis multiplex; right lateral epicondylitis and late effects of complications of medical/surgical care and OWCP paid her appropriate wage-loss compensation for periods of disability.<sup>5</sup>

The findings of an August 10, 2017 electromyogram/nerve conduction velocity (EMG/NCV) study demonstrated mild bilateral cubital tunnel syndrome (ulnar nerve entrapment at the elbow) and mild bilateral carpal tunnel syndrome (median nerve entrapment at the wrist).

In a June 11, 2018 report, Dr. Obinwanne Ugwonal, a Board-certified orthopedic surgeon, noted that appellant reported increased right elbow pain, burning sensation in her right hand, worsening weakness in her right hand, and numbness in her right small finger. He expressed his concern that appellant was experiencing worsening ulnar nerve entrapment and required cubital tunnel release surgery. Dr. Ugwonal diagnosed bilateral cubital tunnel syndrome, right carpal tunnel syndrome and impingement syndrome of the shoulders and indicated that he was submitting a request for authorization from OWCP for cubital tunnel release surgery.

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<sup>3</sup> Docket No. 19-0686 (issued November 13, 2019).

<sup>4</sup> OWCP authorized several other surgeries, including January 31, 2014 right shoulder subacromial decompression, labral debridement, and synovectomy; March 20, 2014 left shoulder subacromial decompression and repair of superior labrum anterior and posterior tear; April 30, 2014 revision of left carpal tunnel release surgery; and April 21, 2016 left shoulder revision subacromial decompression, biceps tenodesis, lysis of adhesions, and labral debridement.

<sup>5</sup> Under a separate file, assigned OWCP File No. xxxxxx125, OWCP accepted that on March 31, 2005 appellant sustained bilateral carpal tunnel syndrome and bilateral tenosynovitis. It has administratively combined OWCP File Nos. xxxxxx125 and xxxxxx717, with the latter designated as the master file.

On June 14, 2018 Dr. Ugwonali submitted a request, on appellant's behalf, for authorization of a proposed revised cubital tunnel release surgery at the right elbow.

In a July 9, 2018 report, Dr. Ugwonali indicated that appellant continued to have pain in her right medial elbow and numbness/weakness in her right hand, which were consistent with cubital tunnel syndrome. He noted that appellant's right cubital tunnel release surgery had not been approved by OWCP and opined that her right cubital tunnel syndrome was related to her work. Dr. Ugwonali maintained that appellant's most recent EMG/NCV study confirmed cubital tunnel syndrome. He noted, "[i]t is my impression that this has been a work-related injury that has worsened recently requiring surgery. It is, therefore, my impression that this surgery should be approved under Workmen's Compensation."

By decision dated August 10, 2018, OWCP denied appellant's request for authorization of surgery, finding that the medical evidence of record was insufficient to establish that the proposed right cubital tunnel release surgery was necessitated by a work-related condition.

On September 11, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review with respect to the August 10, 2018 decision.<sup>6</sup> Following a review of the written record, by decision dated March 27, 2020, OWCP's hearing representative affirmed the August 10, 2018 decision.

On April 23, 2020 appellant requested reconsideration of the March 27, 2020 decision. She submitted reports, dated between 2017 and 2020, from Dr. Ugwonali and Dr. William Epps, a Board-certified orthopedic surgeon. By decision dated May 13, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On September 1, 2020 appellant again requested reconsideration of OWCP's denial of her request for authorization of right cubital tunnel release surgery. She submitted a September 1, 2020 report from Dr. Ugwonali who continued to support authorization of right cubital tunnel release surgery. Dr. Ugwonali repeated his earlier assertion that appellant's right cubital tunnel syndrome was a work-related condition.

On November 27, 2020 OWCP referred appellant's case to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), and requested that he provide an opinion regarding whether right cubital tunnel syndrome release surgery should be authorized. In a December 2, 2020 report, Dr. Katz recommended that appellant undergo a second opinion examination regarding the matter.

On March 3, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and series of questions, for a second opinion examination/evaluation with Dr. John G.

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<sup>6</sup> By decision dated October 19, 2018 OWCP denied appellant's request for review of the written record as untimely filed. Appellant appealed the October 19, 2018 decision to the Board. By decision dated November 13, 2019, the Board set aside the October 19, 2018 decision finding that OWCP improperly denied appellant's request for a review of the written record and remanded the case for further proceedings. *See supra* note 3.

Keating, a Board-certified orthopedic surgeon. It requested that he provide an opinion regarding whether right cubital tunnel syndrome release surgery should be authorized.

In a March 22, 2021 report, Dr. Keating reported physical examination findings and maintained that there was no objective evidence that appellant had right cubital tunnel syndrome. He determined that the right cubital tunnel release for which appellant requested authorization was not necessitated by an accepted employment condition.

By decision dated April 30, 2021, OWCP denied modification of its March 27, 2020 decision denying authorization for right cubital tunnel surgery.

On September 10, 2021 appellant requested reconsideration of the April 30, 2021 decision.

In support of her reconsideration request, appellant submitted a May 6, 2021 report from Dr. Epps who reported physical examination findings, including tenderness to palpation over the acromioclavicular joint at the bicipital tendon of the left shoulder. Dr. Epps diagnosed pain in both shoulders and detailed his intra-articular injection into the subacromial space of appellant's left shoulder. On June 3, 2021 he noted that appellant reported significant relief from her intra-articular injection.

In a June 15, 2021 referral order, Dr. Ugwonalu ordered physical and occupational therapy for appellant.

In a June 16, 2021 report, Dr. Ugwonalu diagnosed adhesive capsulitis of the left shoulder, right carpal tunnel syndrome, bilateral cubital syndrome, glenoid labrum detachment of the left shoulder, medial epicondylitis of the right elbow, subacromial impingement, and neck strain. He indicated that appellant showed him a "denial letter," based on Dr. Keating's report, which was based on a lack of "adequate medical rationale and objective study findings." Dr. Ugwonalu posited that appellant had objective study findings of right cubital tunnel syndrome as a 2017 EMG/NCV study clearly diagnosed appellant with right cubital tunnel syndrome. He indicated that appellant's right elbow was "currently active" and awaiting cubital tunnel surgery. On July 21, 2021 Dr. Ugwonalu again indicated that appellant's right elbow was "currently active" and awaiting cubital tunnel surgery.

Appellant submitted a July 8, 2021 magnetic resonance imaging (MRI) scan of her cervical spine, which showed multi-disc pathology. She also submitted a September 3, 2020 report of Damien McMurray, a nurse anesthetist; unsigned reports from healthcare providers dated April 14 and 22, 2021; and reports of physical therapy sessions, dated July 12 through 20, 2021, signed by her therapist, Dawn Bowen.

Appellant also submitted copies of previously-submitted documents, including: a March 22, 2021 report of Dr. Keating; November 15, 2017 and September 3, 2020 reports of Dr. Epps; September 3, 2020 anesthesia records; a March 15, 2021 report of Dr. Ugwonalu; and a November 15, 2017 prescription for home electrotherapy.

By decision dated October 1, 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.<sup>7</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>8</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>9</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>10</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>11</sup>

The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already of record<sup>12</sup> and the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>13</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).

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<sup>7</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>9</sup> 20 C.F.R. § 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.

<sup>10</sup> *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>11</sup> *Id.* at § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>12</sup> *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>13</sup> *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

On September 10, 2021 appellant filed a timely request for reconsideration of an April 30, 2021 decision regarding the denial of authorization for right cubital tunnel release surgery.<sup>14</sup> The Board finds, however, that she did not submit argument or evidence establishing that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).

On reconsideration, appellant submitted medical evidence, including a June 16, 2021 report from Dr. Ugwonali who indicated that she showed him a “denial letter,” based on Dr. Keating’s report, which was based on a lack of “adequate medical rationale and objective study findings.” Dr. Ugwonali posited that there were objective study findings of right cubital tunnel syndrome as a 2017 EMG/NCV study clearly diagnosed appellant with right cubital tunnel syndrome. The Board notes, however, this report does not require reopening of appellant’s claim for merit review because it is similar to previously submitted reports of Dr. Ugwonali, including a July 9, 2018 report, which OWCP reviewed and deemed insufficient to establish the need for right cubital tunnel release surgery to treat an accepted employment condition. The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already of record does not constitute a basis for reopening a case.<sup>15</sup>

Appellant submitted a May 6, 2021 report from Dr. Epps who diagnosed pain in both shoulders and detailed his intra-articular injection into the subacromial space of appellant’s left shoulder. On June 3, 2021 Dr. Epps noted that appellant reported significant relief from her intra-articular injection. In a June 15, 2021 referral order, Dr. Ugwonali ordered physical and occupational therapy for appellant. On July 21, 2021 he indicated that appellant’s right elbow was “currently active” and awaiting cubital tunnel surgery. Appellant also submitted a July 8, 2021 MRI scan of her cervical spine, which showed multi-disc pathology. While this medical evidence is new, it is not relevant because it does not directly address the underlying issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to establish the necessity for right cubital tunnel surgery. The Board has held that the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>16</sup>

Appellant also submitted a September 3, 2020 report of Damien McMurray, a nurse anesthetist; and reports dated July 12 through 20, 2021, signed by a physical therapist, Dawn Bowen. However, certain healthcare providers such as physician assistants, nurses, nurse practitioners, physical/occupational therapists, and social workers are not considered

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<sup>14</sup> See *J.F.*, Docket No. 16-1233 (issued November 23, 2016).

<sup>15</sup> See *supra* note 11.

<sup>16</sup> See *supra* note 12.

“physician[s]” as defined under FECA.<sup>17</sup> Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits. Therefore, given their lack of probative value on medical matters, these reports are not relevant to the underlying medical issue of the present case. As noted above, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>18</sup>

OWCP also received unsigned reports from healthcare providers dated April 14 and 22, 2021. The Board has held that a report that is unsigned or bears an illegible signature lacks proper identification and cannot be considered probative medical evidence as the author cannot be identified as a physician.<sup>19</sup> These reports are, therefore, insufficient to reopen the case on the merits of the claim.

Appellant also resubmitted copies of previously-submitted documents, including a March 22, 2021 report of Dr. Keating; November 15, 2017 and September 3, 2020 reports of Dr. Epps; September 3, 2020 anesthesia records; a March 15, 2021 report of Dr. Ugwonal; and a November 15, 2017 prescription for home electrotherapy. As noted above, the Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>20</sup>

Appellant has not submitted pertinent new and relevant evidence in connection with her reconsideration request. The Board finds that appellant is not entitled to further review of the merits of her 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 her claim, pursuant to 5 U.S.C. § 8128(a).

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<sup>17</sup> 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); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *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); *see S.T.*, Docket No. 17-0913 (issued June 23, 2017) (physical therapists are not considered physicians under FECA); *R.S.*, Docket No. 16-1303 (issued December 2, 2016) (physician assistants and physical therapists are not considered physicians under FECA); *see also R.L.*, Docket No. 19-0440 (issued July 8, 2019) (nurse practitioners and physical therapists are not considered physicians under FECA).

<sup>18</sup> *See supra* note 12.

<sup>19</sup> *B.S.*, Docket No. 22-0918 (issued August 29, 2022); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>20</sup> *See supra* note 11.

**ORDER**

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

Issued: October 4, 2022  
Washington, DC

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

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

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