

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

R.C., Appellant	)	
	)	
and	)	<b>Docket No. 22-0612</b>
	)	<b>Issued: October 24, 2022</b>
<b>U.S. POSTAL SERVICE, NORFOLK</b>	)	
<b>PROCESSING &amp; DISTRIBUTION CENTER,</b>	)	
<b>Norfolk, VA, Employer</b>	)	
	)	

*Appearances:*  
Wayne Johnson, Esq., for the appellant<sup>1</sup>  
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  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On March 16, 2022 appellant, through counsel, filed a timely appeal from a September 17, 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 September 9, 2020, to the filing

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<sup>1</sup> 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.

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.<sup>3</sup>

### **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 April 7, 2011 appellant, then a 60-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 1, 2011 he strained his low back while lifting a heavy box out of a hamper while in the performance of duty. OWCP accepted his claim for sprain of the back, lumbar region. Appellant did not immediately stop work.

On December 28, 2012 Dr. Paul B. Mitchell, a Board-certified neurosurgeon, performed partial L2 and partial S1 laminectomies, total L3-L5 laminectomies, resection of L4-L5 synovial cyst, and resection of thoracic subcutaneous cysts. He diagnosed L2-S1 stenosis and thoracic subcutaneous cysts.

By decision dated March 29, 2016, OWCP suspended appellant's compensation pursuant to 5 U.S.C. § 8123(d), effective April 2, 2016, as he had failed to attend a scheduled second opinion examination.<sup>4</sup>

On March 1, 2017 the employing establishment offered appellant a full-time modified-duty position as a mail processing clerk, effective March 3, 2017. On March 7, 2017 appellant accepted the position and returned to work.

On April 12, April 17, and May 5, 2017 appellant filed claims for compensation (Form CA-7) for disability from work commencing March 18, 2017.

By decision dated July 20, 2017, OWCP denied appellant's claims for wage-loss compensation, finding that he had not established disability from work commencing March 18, 2017 causally related to the accepted April 1, 2011 employment injury.

On May 9, 2019 appellant filed a notice of recurrence (Form CA-2a) claiming a recurrence of disability beginning March 30, 2019 causally related to his accepted work injury.

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

<sup>3</sup> The Board notes that following the September 17, 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.*

<sup>4</sup> On January 19, 2016 OWCP referred appellant to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion examination. Appellant failed to attend the appointment.

In a development letter dated June 4, 2019, OWCP informed appellant of the deficiencies in his recurrence claim. It advised him of the type of evidence necessary to establish his claim and provided appellant a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary evidence.

By decision dated July 8, 2019, OWCP denied appellant's recurrence claim.

OWCP received additional evidence. A duty status report (Form CA-17) dated July 29, 2019 from a physician whose signature was illegible diagnosed lumbar degenerative joint disease and status-post laminectomy and returned appellant to work with restrictions.

On July 30, 2019 the employing establishment offered appellant a modified position as a mail processing clerk, effective July 30, 2019. Appellant accepted the position and returned to light-duty work.

On August 9, 2019 appellant filed a Form CA-7 for intermittent disability from work during the period July 29 through August 2, 2019.

On November 19, 2019 Dr. Mitchell treated appellant in follow up for chronic low back pain. He noted findings on examination of decreased range of motion and pain on palpation. Dr. Mitchell diagnosed lumbar spondylosis. He opined that appellant had hypermobility at L4-5 and instability. On February 18, 2020 Dr. Mitchell reported that in December 2012 appellant underwent a complex spinal surgery for a work-related injury. He referenced updated imaging studies that revealed instability at the previously operated on levels. Dr. Mitchell opined that because appellant's current condition was a direct sequela of his work-related surgery the pain and subsequent treatment were work related.

On July 8, 2020 appellant, through counsel, requested reconsideration.

By decision dated September 9, 2020, OWCP denied modification of the July 8, 2019 decision.

OWCP received additional evidence. A magnetic resonance imaging (MRI) scan of the lumbar spine dated August 29, 2020 revealed prior L2-3 through L5-S1 laminectomies without change since the prior study, multilevel spondylosis including grade 1 anterolisthesis secondary to facet arthropathy at L4-5, small left facet joint effusion, foraminal stenosis potential source of bilateral L4 nerve impingement, and moderate bilateral foraminal and lateral recess stenosis at L5-S1, possibly the source of L5 and S1 radiculopathy.

On September 9, 2021 appellant requested reconsideration.

By decision dated September 17, 2021, 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.<sup>5</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>6</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>7</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</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>9</sup>

## 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 not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. Consequently, 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).<sup>10</sup>

On reconsideration, appellant submitted an August 29, 2020 MRI scan of the lumbar spine. While this evidence is new, it is irrelevant as it does not address appellant's recurrence claim. The Board has held that the submission of evidence or argument, which does not address the particular

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<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> *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.

<sup>8</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *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).

<sup>10</sup> *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

issue involved does not constitute a basis for reopening a case.<sup>11</sup> As such, this evidence is insufficient to warrant merit review. Therefore, appellant is also not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to 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.

**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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 17, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>11</sup> *J.R.*, Docket No. 19-1280 (issued December 4, 2019); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).