

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 May 23, 2021³ appellant, then a 51-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed cervical and lumbar spine conditions that required surgical intervention due to the accepted factors of her federal employment, including lifting, pulling, and pushing packages and containers filled with parcels, catalogs, trays, and miscellaneous items. She noted that she first became aware of her condition and realized its relation to her federal employment on June 1, 2019. Appellant initially stopped work on December 8, 2020. She later returned to work, but subsequently stopped work again on April 11, 2021, pending spinal surgery on May 13, 2021.

Appellant submitted a May 14, 2021 work status note from Dr. Lindsey Tyler, a Board-certified neurosurgeon, indicating that she should remain off work from April 12 through June 28, 2021 and would require at least six weeks to recover after her May 13, 2021 cervical and lumbar spine surgery.

In a June 8, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and provided a factual questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In response, appellant submitted progress reports from encounters with Dr. Tyler dated March 14, 2018, July 17, October 21, November 18, and December 23, 2020, and February 5, April 12, May 3 and 26, 2021.

By decision dated July 15, 2021, OWCP denied appellant's claim, finding that she had not submitted sufficient evidence to establish that the events occurred as alleged. Consequently, it found that she had not met the requirements to establish an injury as defined by FECA.

Appellant continued to submit evidence, including a March 14, 2018 progress report from Dr. Tyler, noting that she had undergone a magnetic resonance imaging (MRI) scan on February 28, 2018, and diagnosed lumbar disc herniation with radiculopathy and numbness/tingling in her left hand. Dr. Tyler noted that she reported chronic pain in her right hip, leg, and back, and recommended physical therapy.

In a July 17, 2020 progress report, Dr. Tyler diagnosed lumbar degenerative disc disease and recommended physical therapy for persistent back pain.

³ Appellant filed three substantially similar CA-2 forms, two of which were filed on May 23, 2021 and one on May 25, 2021.

On October 21, 2020 Dr. Tyler evaluated appellant and reiterated his diagnoses, ordered a new MRI scan for further evaluation, and noted that injections to date had provided no relief.

In a November 18, 2020 progress report, Dr. Tyler noted that appellant underwent an MRI scan on November 12, 2020 and diagnosed a C5-6 herniated disc with radiculopathy and L4-5 stenosis with neurogenic claudication.

Appellant also submitted a December 23, 2020 progress report from Dr. Tyler recommending that she increase physical activity and decrease the use of pain medication.

In a February 5, 2021 progress report, Dr. Tyler diagnosed C5-6 disc herniation with radiculopathy status post anterior cervical discectomy and fusion, spinal stenosis of lumbar region with radiculopathy, and noted that appellant underwent cervical spine x-rays on February 2, 2021.

OWCP also received an April 12, 2021 progress report in which Dr. Tyler diagnosed L4-5 stenosis and noted that appellant underwent lumbar flexion extension x-rays. Dr. Tyler recommended an L4-5 laminectomy, indicated that appellant will likely always have some degree of back pain, and issued a referral to pain management.

In a May 3, 2021 progress report, Dr. Tyler indicated that appellant reported neck pain and that her symptoms had worsened after holding her 28-pound grandchild. She noted that conservative treatment had failed and that appellant was scheduled for a May 13, 2021 laminectomy procedure.

Appellant also submitted a May 26, 2021 progress report in which Dr. Tyler diagnosed L4-5 stenosis with radiculopathy status post laminectomy.

In a September 21, 2021 response to OWCP's development questionnaire, appellant related that in 2005 she began working at the postal distributing center in a position that involved extensive lifting, pulling, and pushing. Her duties included unloading trucks with forklifts, pallet jacks, power jacks, and by hand, and lifting packages and bags weighing 70 pounds or more. Appellant asserted that the forklifts jostled her body constantly and the pallet jacks required her to use her body to stop the momentum. She related that her duties required her to constantly bend to lift objects and containers, often on uneven surfaces, and she performed these duties throughout her career in 8-hour shifts, 5 days a week, with additional overtime. Appellant asserted that, prior to this position, she had no lumbar or cervical conditions and the duties of the position caused her current conditions. She further related that her pain was not as severe prior to June 1, 2019 and that her lower back pain was documented by Dr. Tyler on March 14, 2018.

On September 12, 2021 appellant requested reconsideration of the July 15, 2021 decision.

Along with her request, appellant submitted an August 9, 2021 letter from Dr. Tyler opining that the manual labor that she had performed for the postal service for more than 13 years, including loading and unloading trucks and lifting over 70 pounds, contributed to her cervical and lumbar spinal stenosis. Dr. Tyler further noted that appellant was status post C5-6 anterior cervical discectomy fusion on December 10, 2020 and status post laminectomy on May 13, 2021.

By decision dated November 30, 2021, OWCP modified its July 15, 2021 decision to find that the evidence of record was sufficient to establish fact of injury. The claim remained denied, however, because the evidence of record was insufficient to establish a causal relationship between appellant's diagnosed conditions and the accepted factors of her federal employment.

On December 12, 2021 appellant requested reconsideration of the November 30, 2021 decision and submitted additional evidence, including a December 9, 2021 letter from Dr. Tyler reiterating his August 9, 2021 opinion.

By decision dated December 21, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a 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 did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP.

⁴ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the OWCP 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). *Id.* at Chapter 2.1602.4b.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of her reconsideration request, appellant submitted a December 9, 2021 letter from Dr. Tyler. This letter is substantially similar to his August 9, 2021 letter in which he opined that the accepted employment factors of repetitive lifting, pushing, and pulling of packages weighing 70 pounds are more over the 13 years appellant worked for the employing establishment contributed to her cervical and lumbar spine conditions. The Board has held that evidence, which merely duplicates or is substantially similar to evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.⁹ Thus, Dr. Tyler's December 9, 2021 letter does not constitute relevant and pertinent new evidence not previously considered by OWCP. Appellant, therefore, was not entitled to a review of the merits of her claim based on the third above-noted requirements 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.¹⁰

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).

⁹ *M.F.*, Docket No. 21-1221 (issued March 28, 2022); *R.B.*, Docket No. 21-0035 (issued May 13, 2021); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *Richard Yadron*, 57 ECAB 207 (2005); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁰ *See D.M.*, Docket No. 18-1003 (issued July 16, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *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 December 21, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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