

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, PINK HILL POST
OFFICE, Pink Hill, NC, Employer**

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**Docket No. 22-1166
Issued: April 3, 2023**

Appearances:

Ronald S. Webster, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 4, 2022 appellant, through counsel, filed a timely appeal from a February 8, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated February 5, 2021 to the filing of this appeal, 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.

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 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.

² 5 U.S.C. § 8101 *et seq.*

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 January 29, 2014 appellant, then a 51-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a head injury when she slipped on a snow-covered sign laying on the ground while in the performance of duty. She explained that when she slipped her body twisted sideways and the back of her head struck the side of her vehicle. OWCP accepted the claim for C4-5 and C6-7 herniated cervical discs with myelopathy.³ It authorized anterior C5-6 and C6-7 anterior cervical discectomy and fusion, which was performed on April 17, 2015. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing March 18, 2014, and on the periodic rolls commencing April 5, 2015.

In an October 29, 2018 report, Dr. Robert M. Moore, an OWCP second opinion Board-certified orthopedic surgeon, reviewed a statement of accepted facts (SOAF), noted appellant's history of injury, and that the claim was accepted for the conditions of C5-6 and C6-7 herniated cervical disc with myelopathy. He reviewed the medical evidence of record, noting that he did not have emergency room records, or records from her treating neurologist for review. Dr. Moore noted appellant's physical examination findings as demonstrating no focal upper extremity motor deficit, and bilateral upper extremity motor strength of grade 4 to 5. He also related that, while there was no objective evidence of residual myelopathy or radiculopathy, she had residual limited range of motion and symptoms of neck pain and upper extremity numbness. Dr. Moore opined that appellant had reached maximum medical improvement (MMI) and had permanent work restrictions of no lifting more than 20 pounds occasionally and no pushing/pulling more than 30 pounds.

On March 5, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In an April 11, 2019 note, Dr. John K. John, an internist, advised that, while he had been asked to prepare a permanent impairment rating, he was not trained to provide ratings using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁴ He recommended that appellant be referred to a specialist familiar with the rating process.

In a June 13, 2019 report, Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as an OWCP district medical adviser (DMA), reviewed the SOAF and medical evidence. He referred to the A.M.A., *Guides*, and utilized the diagnosis-based impairment (DBI) rating method to find that, under Table 1 of *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*), the class of

³ Appellant retired from the employing establishment effective March 8, 2018.

⁴ A.M.A., *Guides* (6th ed. 2009).

impairment for spinal nerves C5,C6, C7, C8, and T1 with no motor or sensory deficits, resulted in a Class 0 with a default value of zero for both upper extremities. Dr. Katz found no net adjustment and a total impairment of zero. He indicated that the date of MMI was October 31, 2018, the date of Dr. Moore's examination upon which impairment is based.

By decision dated June 14, 2019, OWCP denied appellant's schedule award claim, finding that the medical evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body as a result of her accepted January 29, 2014 employment injury.

In a report dated November 18, 2019, Dr. William A. Somers, a Board-certified orthopedic surgeon, diagnosed cervical C5-6 herniated discs, central cord syndrome, severe concussion, status posts ACDF C5-7, and postconcussion syndrome, all of which he attributed to the January 29, 2014 work injury, as well as nonwork-related multilevel cervical spine degenerative disc disease and peripheral neuropathy secondary to diabetes. Appellant's physical examination findings were detailed, which included abnormal gait, diminished dexterity and fine manipulation in both hands, and bilateral diffusely decreased motor examination. He opined that she did not have nerve root injuries, but did have residuals of a spinal cord injury. Using Chapter 13, *The Central and Peripheral Nervous System* and Tables 13-11, page 335, and 13-12, page 336 of the A.M.A., *Guides*, he found an 18 percent whole person permanent impairment of the upper extremities and a 19 percent whole person permanent impairment of the lower extremities, resulting in a total 33 percent whole person impairment due to appellant's central cord syndrome.

On December 12, 2019 appellant, through counsel requested reconsideration of the denial of her schedule award. Counsel also requested OWCP expand acceptance of her claim to include an additional condition.

In a January 15, 2020 report, Dr. Katz, based upon his review of the SOAF and medical records including Dr. Somers' November 18, 2019 report, opined that it was not probative of appellant's permanent impairment because he provided a whole person impairment and did not use *The Guides Newsletter* of July/August 2009 in his impairment determination. He recommended referral of appellant for an impartial medical examination due to the conflict in motor weakness physical examination findings between Dr. Somers and Dr. Moore.

On August 13, 2020 OWCP referred appellant, together with a SOAF, medical record, and series of questions, to Dr. Donald Getz, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Moore and Dr. Somers regarding her work-related condition and any resulting permanent impairment.

In a report dated September 15, 2020, Dr. Getz, based upon a review of the SOAF, series of questions, and medical reports, diagnosed symptom magnification and exaggerated pain perception and status post two-level anterior cervical disc removal and fusion. He advised that he was unable to determine appellant's degree of functional impairment due to her profound symptom magnification and exaggerated pain perception, noting that the diagnosis of myelopathy appeared to be based on subjective pain and weakness bilateral extremity complaints. Dr. Getz agreed with Dr. Moore's assessment of her permanent impairment. He further indicated that the diagnosis of central cord syndrome was a neurological condition which was outside the scope of his specialty.

By decision dated September 30, 2020, OWCP denied modification of the June 14, 2019 decision. It found no ratable permanent impairment based on the examination findings of the impartial medical examiner (IME), Dr. Getz, who it indicated agreement with Dr. Moore. OWCP afforded Dr. Getz the special weight of the medical evidence as the IME.

On December 17, 2020 appellant, through counsel, requested reconsideration of the September 30, 2020 decision. In support of her request appellant submitted a December 9, 2020 report from Dr. Jennifer T. Murphy, chiropractor, and a December 12, 2020 report from Dr. John.

Dr. Murphy, in a December 9, 2020 report, noted that appellant had been a patient for over 20 years. She explained that appellant suffered from vestibular disorder including vertigo, spatial disorientation, vision disturbance, dizziness, imbalance, and cognitive and psychological changes. Dr. Murphy opined that the lack of quality and expeditious care by OWCP was a direct cause of appellant's current issues.

In a December 12, 2020 report, Dr. John disagreed with Dr. Getz' inability to provide a ratable permanent impairment of appellant's functional status. He requested OWCP provide more detailed testing of her functional impairments.

By decision dated February 5, 2021, OWCP denied modification. It noted that Dr. Murphy could not be considered a physician under FECA since she did not diagnosis a spinal subluxation based on x-ray evidence.

In a report dated September 1, 2021, Dr. Angela Gabella, a chiropractor, noted appellant's history of injury and detailed her objective and subjective symptoms. Diagnoses included history of traumatic brain injury/closed head injury, cognitive impairment, generalized anxiety disorder, cognitive communication deficit, cervicgia, frontal lobe and executive function deficient, chronic fatigue, dizziness and disequilibrium, other gait and mobility abnormalities, visuospatial deficit, disorder of the autonomic nervous system, cramp and spasm, abnormal posture, irregular eye movement, deficient saccadic eye movements, deficient smooth eye movement pursuit, generalized muscle weakness, facial nerve disorder, problems related to life management, and limitation of activities due to disability, and general sensation/perception impairment. In concluding, Dr. Gabella attributed appellant's neurological problems to the head injury sustained during the work injury. She found no evidence of inconsistent findings or symptom magnification, or malingering, or exaggeration.

On October 18, 2021 appellant, through counsel, requested reconsideration and that OWCP expand the acceptance of appellant's claim to include the diagnosis of traumatic brain injury.

By decision dated January 7, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim.

On January 24, 2022 counsel for appellant requested that OWCP expand the acceptance of appellant's claim to include a traumatic brain injury and other conditions due to the accepted January 29, 2014 employment injury.

On February 3, 2022 counsel for appellant requested reconsideration of the January 7, 2022 decision. He asserted that OWCP failed to properly develop the claim and fully address all the

injuries appellant sustained due to the accepted January 25, 2014 work injury. Thus, counsel requested OWCP to schedule her for a second opinion evaluation.

In progress notes dated January 11 and December 15, 2021, Dr. Gabella noted appellant's complaints and physical examination findings. She diagnosed history of traumatic brain injury/closed head injury, generalized anxiety disorder, cognitive impairment, cognitive communication deficit, frontal lobe and executive function deficit, cervicgia (chronic neck pain), chronic fatigue, dizziness and disequilibrium, other gait and mobility abnormalities, abnormal posture, visuospatial deficit, cramp and spasm, automatic nervous system disorder, general sensation/perception impairment, irregular eye movements, deficient saccadic eye movements, deficient smooth pursuit eye movement, facial nerve disorder, generalized muscle weakness, problems related to life management, and limitation of activities due to disability.

By decision dated February 8, 2022, OWCP denied reconsideration of the merits of appellant's claim.

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

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

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).

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 (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.

⁸ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *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.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).

The underlying issue in this case is whether appellant has established a permanent impairment of a scheduled member or function of the body, warranting a schedule award. Thus, the Board must determine if she presented new and relevant and pertinent new medical evidence or argument regarding her schedule award claim to warrant a merit review pursuant to 5 U.S.C. § 8128(a).

In her April 25, 2021 reconsideration request, counsel for appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered by OWCP. He reiterated his request that the acceptance of her claim should be expanded to include additional conditions and that OWCP should schedule a second opinion evaluation. The Board has held that the submission of evidence or argument that repeats or duplicates evidence or argument already of record does not constitute a basis for reopening a case.¹⁰ These arguments had been previously raised and considered by OWCP. Accordingly, the Board finds that appellant is 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).¹¹

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. With her reconsideration request, appellant submitted progress reports from Dr. Gabella, a chiropractor. Dr. Gabella, however, did not diagnose a subluxation based on x-ray evidence. Under section 8101(2) of FECA, the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. As Dr. Gabella is a chiropractor who did not diagnose a spinal subluxation based on the results of an x-ray, her reports, therefore,¹² are irrelevant to the underlying issue of whether appellant has a permanent impairment of a scheduled member or function of the body, warranting

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 *S.H.*, Docket No. 22-1179 (issued January 17, 2023); *S.E.*, Docket No. 17-0222 (issued December 21, 2018); *T.H.* Docket Nos. 17-1578 and 17-1651 (issued April 26, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹¹ *Supra* note 6.

¹² *E.R.*, Docket No.21-0829 (issued January 18, 2022); *R.P.*, Docket No. 20-0661 (April 14, 2021). Section 8101(s) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary. *See R.M.*, 59 ECAB 690 (2008); *Merton J. Sills*, 39 ECAB 572 (1988).

a schedule award.¹³ Thus, appellant is not entitled to a review of the merits of her claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁴

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to *id.* at § 10.608, OWCP properly denied merit review.¹⁵

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).

¹³ *D.C.*, Docket No. 21-0947 (issued February 6, 2023); *L.W.*, Docket No. 21-0942 (issued May 11, 2022); *F.H.*, Docket No. 20-0309 (issued January 26, 2021); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁴ *Supra* note 6; *see T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001).

¹⁵ *See A.M.*, Docket No. 21-1413 (issued March 28, 2022); *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 February 8, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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