

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

R.M., Appellant	)	
	)	
and	)	Docket No. 23-0078
	)	Issued: April 11, 2023
U.S. POSTAL SERVICE, POST OFFICE,	)	
Birmingham, AL, Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant,<sup>1</sup>  
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 October 21, 2022 appellant, through counsel, filed a timely appeal from a May 11, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated February 12, 2021, to the filing 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 the claim.

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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 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.

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

## 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 September 12, 2020 appellant, then a 48-year-old labor relations human resources clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2020 he suffered bilateral quadriceps tendon tears in the knees when he injured himself falling on stairs while in the performance of duty. He stopped work on September 9, 2020.

In a September 22, 2020 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In an October 9, 2020 response to OWCP's development questionnaire, appellant related that he injured himself when his left foot slipped after reaching the top of the stairs and he fell backwards, causing his right leg to become pinned underneath him. He indicated that this event caused a rupture of his quadriceps tendons in the knees and left him unable to walk or stand without use of leg braces and a walker.

By decision dated October 27, 2020, OWCP accepted that the September 9, 2020 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim, finding that he had not submitted medical evidence containing a medical diagnosis from a qualified physician in connection with the accepted September 9, 2020 employment incident. Consequently, OWCP found that the requirements had not been met to establish an injury as defined by FECA.

Appellant continued to submit evidence, including a September 10, 2020 consult note from Dr. Russell Goode, a Board-certified orthopedic surgeon, assessing a left quadriceps tendon rupture and possible right quadriceps tendon rupture. Dr. Goode noted that appellant reported that the pain began after appellant's knees gave out and he fell backward, causing a sharp bilateral stabbing pain and inability to walk.

In a September 11, 2020 operative report, Dr. Goode diagnosed bilateral quadriceps tendon ruptures and performed tendon repair surgery. He noted that appellant tolerated the procedure well. An October 22, 2020 progress note from Dr. Goode assessed bilateral quadriceps muscle strains and six-week status post bilateral quadriceps tendon repairs.

In physical therapy notes dated October 27 through November 17, 2020, Leslea Wallis, a physical therapist, indicated that appellant performed therapeutic exercise.

On November 17, 2020 appellant requested reconsideration.

By decision dated February 12, 2021, OWCP modified the October 27, 2020 decision to find that the medical evidence of record established a medical diagnosis. However, the claim

remained denied as the medical evidence of record was insufficient to establish that appellant's diagnosed condition was causally related to the accepted September 9, 2020 employment incident.

On February 14, 2022 appellant requested reconsideration of the February 12, 2021 decision and submitted additional evidence.

In an October 18, 2021 functional capacity evaluation (FCE), Matthew Hassell, an occupational therapist, and David Dimmick, an exercise physiologist, assessed appellant's functional capabilities and limitations and related that appellant sustained an injury when he slipped on a porch while delivering mail and one foot traveled forward while the other foot extended backward, causing immediate pain in both quadriceps.

A December 30, 2021 letter from the employing establishment related that there had been no light-duty work available for appellant since his claimed September 9, 2020 injury.

In a February 9, 2022 statement, appellant noted that he has worked as a letter carrier for 24 years and his daily duties consist of delivering and collecting mail on foot or by vehicle in all types of weather conditions, carrying mail in shoulder bags weighing up to 35 pounds, and unloading mail weighing up to 70 pounds. He related that on September 9, 2020 he exited his postal vehicle to make a home delivery, ascended the steps, and slipped on the top step, causing both legs to become pinned beneath him. Appellant could no longer stand or bear weight on his legs. At the hospital, he was diagnosed with ruptured quadriceps tendons of the knees and required emergency surgery. Appellant related that he remains unable to perform the essential functions of his job, including mounting and dismounting his vehicle and navigating stairs, and he has not been offered any light-duty work.

By decision dated May 11, 2022, 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 does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>4</sup> 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.<sup>5</sup> 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

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<sup>3</sup> *Id.* at § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> *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 OWCP 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.

considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> 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.<sup>7</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 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. Consequently, he 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).

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. The underlying issue in the February 12, 2021 decision is causal relationship. In support of his reconsideration request, appellant submitted a February 9, 2022 statement describing his work duties and the events of September 9, 2020. He also submitted an October 18, 2021 FCE from Mr. Hassell, an occupational therapist, and Mr. Dimmick, an exercise physiologist. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup> The Board has further held that occupational therapists and exercise physiologists are not considered physicians as defined under FECA.<sup>9</sup> Because this evidence does not contain an opinion from a physician addressing the issue of causal relationship, it does not constitute probative medical evidence,<sup>10</sup> and thus is irrelevant.<sup>11</sup> Therefore, the above evidence does not constitute relevant and pertinent new

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<sup>6</sup> *Id.* at § 10.606(b)(3).

<sup>7</sup> *Id.* at § 10.608(a), (b).

<sup>8</sup> *R.L.*, Docket No. 20-1403 (issued July 21, 2021); *D.P.*, Docket No. 13-1849 (issued December 19, 2013).

<sup>9</sup> Section 8101(2) of FECA provides that medical opinions can only be given by a qualified physician. This section defines a physician as 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 supra* note 5 at Chapter 2.805.3a(1) (January 2013); *J.P.*, Docket No. 22-0061 (issued January 13, 2023) (occupational therapists are not considered physicians as defined by FECA); *H.K.*, Docket No. 19-0429 (issued September 18, 2019) (a physician assistant, a physical therapist, and an acupuncture specialist 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); *see also D.S.*, Docket No. 18-0353 (issued February 18, 2020) (physical therapists are not considered physicians under FECA).

<sup>10</sup> *R.P.*, Docket No. 20-0661 (April 14, 2021).

<sup>11</sup> *See D.C.*, Docket No. 21-0947 (issued February 6, 2023); *F.H.*, Docket No. 20-0309 (issued January 26, 2021); *T.T.*, Docket No. 19-0319 (issued October 26, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECB 140 (2000); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

evidence not previously considered by OWCP and appellant was not entitled to a merit review of his claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>12</sup>

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.<sup>13</sup>

**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 May 11, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2023  
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

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<sup>12</sup> *Id.*

<sup>13</sup> 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).