

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

M.J., Appellant)	
)	
and)	Docket No. 23-0566
)	Issued: December 5, 2023
U.S. POSTAL SERVICE, HARWOOD)	
HEIGHTS POST OFFICE, Harwood Heights, IL,)	
Employer)	
)	

Appearances:
Samantha Hartwig, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 14, 2023 appellant, through her representative, filed a timely appeal from a September 15, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated September 7, 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

OWCP accepted that on February 3, 1994 appellant, then a 38-year-old part-time flexible city carrier, sustained a contusion of the right hip, a sprain of the right acromioclavicular (AC) joint of the shoulder and upper arm, a medial meniscus tear of the right knee, and a strain of the right rotator cuff of the shoulder and upper arm when he fell descending stairs while in the performance of duty. It subsequently expanded its acceptance of the claim to include traumatic arthropathy of the right lower leg.

By decision dated April 23, 2002, OWCP reduced appellant's wage-loss compensation to zero as her actual earnings as a modified full-time letter carrier, effective October 22, 2001, fairly and reasonably represented her wage-earning capacity.³

By decision dated June 14, 2010, OWCP modified its April 23, 2002 loss of wage-earning capacity determination and accepted that appellant sustained a recurrence of disability. It further found that acceptance of her claim should be expanded to include right knee arthritis and authorized a right knee arthroplasty. OWCP paid appellant wage-loss compensation beginning March 24, 2010.

On May 6, 2010 Dr. Guido Marra, a Board-certified orthopedic surgeon, diagnosed impingement syndrome following a decompression. He found that appellant required no further medical treatment and could resume work with restrictions.

Appellant returned to full-time modified employment on December 6, 2010. OWCP paid her wage-loss compensation for intermittent time lost from work until February 7, 2014. Appellant retired on disability effective February 18, 2014.

Appellant continued to receive medical treatment for right knee and right shoulder conditions through September 6, 2016. In a report dated September 6, 2016, Dr. Marra advised that he would see her again on an "as-needed basis."

On July 6, 2021 appellant filed an undated notice of recurrence (Form CA-2a) due to her February 3, 1994 employment injury. In an accompanying statement, she related that she had not seen a physician for her right shoulder and knee condition due to other health issues for which she underwent multiple surgeries. Appellant also noted that she had relocated. She requested that OWCP reopen her case so that she could obtain medical treatment.

³ By decision dated July 11, 2002, OWCP granted appellant a schedule award for eight percent permanent impairment of the right upper extremity. By decision dated February 10, 2003, it granted her a schedule award for 12 percent permanent impairment of the right lower extremity.

In a development letter dated July 16, 2021, OWCP informed appellant of the deficiencies of her recurrence claim. It advised her of the type of additional medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In response, appellant submitted medical evidence dated 2013 to 2016.

By decision dated September 7, 2021, OWCP found that appellant had not established a recurrence of the need for medical treatment causally related to her accepted February 3, 1994 employment injury. It noted that she had submitted medical evidence from previous years, but none of the evidence showed that she required additional medical treatment as a result of her accepted employment injury or that the evidence contained a reasoned opinion regarding how any current conditions were employment related.

In a report dated May 25, 2022, Dr. Matthew Johnston, an osteopath and Board-certified orthopedic surgeon, discussed appellant's complaints of right knee pain beginning in 1993. He noted that her symptoms "began with no identifiable injury (gradual onset)." Dr. Johnston diagnosed a right rotator cuff sprain, a suspected rotator cuff tear, and postoperative right total knee replacement. He recommended a magnetic resonance imaging (MRI) scan of the right shoulder.

An MRI scan of the right shoulder, obtained on June 8, 2022, demonstrated moderate arthrosis and spurring in the AC joint with fluid in the subacromial bursa.

On June 15, 2022 Dr. Johnston related that he had counseled appellant on May 25, 2022 regarding her right artificial knee joint. On examination he found positive impingement of the right shoulder. Dr. Johnston diagnosed right shoulder arthritis and primary osteoarthritis of the right shoulder.

On August 25, 2022 appellant requested reconsideration. She noted that she had submitted a statement explaining why she did not receive continued medical treatment. Appellant provided her summary of the newly submitted medical evidence and asserted that it was sufficient to reopen her claim for further medical treatment due to her accepted employment injury.

By decision dated September 15, 2022, 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 own motion or on application.⁴

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

⁴ 5 U.S.C. § 8128(a); *see C.V.*, Docket No. 22-0078 (issued November 28, 2022); *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).

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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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.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 has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).⁹

Moreover, appellant has not provided relevant and pertinent new evidence in support of her request for reconsideration. In support of her request, she submitted a May 25, 2022 report from Dr. Johnston. Dr. Johnston related that appellant's symptoms began gradually in 1993 with no identifiable injury. He diagnosed a right rotator cuff sprain, a suspected rotator cuff tear, and postoperative right total knee replacement. Dr. Johnston, however, did not address the relevant issue of whether appellant required further medical treatment due to her accepted February 3, 1994 employment injury. The Board has held the submission of evidence or argument which does not address the issue involved does not constitute a basis for reopening a case.¹⁰ Therefore,

⁵ 20 C.F.R. § 10.606(b)(3); *see K.D.*, Docket No. 22-0756 (issued November 29, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *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.

⁷ *Id.* at § 10.608(a); *see also D.B.*, Docket No. 22-0518 (issued November 28, 2022); *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁸ *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).

⁹ 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

¹⁰ *See P.G.*, Docket No. 20-1419 (issued September 16, 2021); *C.C.*, Docket No. 20-0950 (issued October 29, 2020); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

Dr. Johnston's report is insufficient to warrant reopening appellant's claim for further merit review.

Appellant further submitted a June 8, 2022 MRI scan of the right shoulder and a June 15, 2022 report from Dr. Johnston, who diagnosed right shoulder arthritis and primary osteoarthritis. Again, however, this evidence failed to provide an opinion regarding whether she sustained a recurrence of the need for medical treatment as a result of her accepted employment injury. As discussed, the submission of evidence that fails to address the issue involved does not constitute a basis for reopening a claim.¹¹

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.¹²

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).

¹¹ *Id.*; *see also E.N.*, Docket No. 19-1687 (issued May 27, 2020).

¹² *D.A.*, Docket No. 22-0762 (issued September 30, 2022); *T.G.*, Docket No. 20-0329 (issued October 19, 2020); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 5, 2023
Washington, DC

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

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

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