

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

P.W., Appellant)	
)	
and)	Docket No. 23-0643
)	Issued: December 7, 2023
DEPARTMENT OF LABOR, BUREAU OF)	
LABOR STATISTICS, San Francisco, CA,)	
Employer)	
)	

Appearances:
Appellant, pro se
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 March 30, 2023 appellant filed a timely appeal from a November 3, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated July 14, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the November 3, 2022 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.*

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 April 28, 2014 appellant, then a 44-year-old economist, filed a notice of traumatic injury (Form CA-1) alleging that on April 25, 2014 she injured her back and right knee, and experienced emotional distress when the rental vehicle she was driving through a snowy, mountainous area slid off the road, down a slope, and struck a pole while in the performance of duty. She returned to work briefly on April 28, 2014, stopped work, returned to part-time work on July 29, 2014 and resumed full-time work effective February 19, 2016. OWCP accepted the claim for bilateral hand contusions, neck sprain, lumbar sprain, cervical radiculopathy, and lumbar radiculopathy. Appellant remained under medical treatment.³

In a September 8, 2021 report, Dr. Carl Fieser, a Board-certified physiatrist, recounted a history of the accepted April 25, 2014 employment injury and subsequent treatment. He diagnosed cervical radiculopathy, unspecified dorsalgia, unspecified neuralgia and neuritis, and pain in unspecified shoulder. Dr. Fieser prescribed medication and held appellant off work through October 6, 2021.

In an October 6, 2021 work slip, Dr. Fieser held appellant off work for the period October 6 through November 3, 2021.

On October 13, 2021 appellant filed a claim for compensation (Form CA-7) for disability from work for the period October 6 through November 3, 2021.⁴

In a development letter dated October 19, 2021, OWCP informed appellant of the deficiencies in her recurrence claim. It advised her of the type of additional medical and factual evidence necessary to establish her claim, provided a questionnaire for her completion, and afforded her 30 days to submit additional evidence.

In response, appellant submitted Dr. Fieser's January 12, 2021 prescription for an H-wave home electrotherapy system. OWCP also received an unsigned patient care plan from Dr. Fieser's practice dated September 8, 2021.

³ On May 24, 2017 appellant underwent an OWCP-authorized cervical intra-articular injection at C7-T1. She underwent a second cervical intra-articular injection at C7-T1 on June 28, 2021. A September 15, 2017 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated small central disc protrusions at C2-3, C3-4, C4-5, C5-6, and C6-7. A September 15, 2017 MRI scan of the left shoulder demonstrated mild-to-moderate biceps tendinosis and tenosynovitis without a focal tear, mild supraspinatus tendinosis, and a 1.7 centimeter nonedematous or acromiale. An October 17, 2019 MRI scan of the left shoulder demonstrated a Type A of acromiale with suggested instability, biceps tenosynovitis, and no rotator cuff tendinopathy.

⁴ On December 16, 2021 appellant filed a Form CA-7 for disability form work for the period December 1 through 15, 2021.

In an October 6, 2021 report, Dr. Fieser recounted appellant's symptoms of neck, back, and bilateral shoulder pain. He diagnosed cervical radiculopathy, unspecified dorsalgia, unspecified neuralgia and neuritis, and pain in unspecified shoulder. Dr. Fieser attributed the diagnosed conditions to the April 25, 2014 employment injury. He noted work restrictions limiting lifting, pulling, and pushing to 10 pounds, no repetitive bending or twisting, and commuting to 30 minutes.

By decision dated November 19, 2021, OWCP denied appellant's claim for a recurrence of disability, finding that the medical evidence of record was insufficient to establish a material change/worsening of her accepted April 25, 2014 employment injury such that she was disabled from her work duties commencing October 6, 2021.

On November 24, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received a November 3, 2021 report by Dr. Fieser. Dr. Fieser diagnosed cervical radiculopathy, unspecified dorsalgia, unspecified neuralgia and neuritis, and pain in unspecified shoulder. He maintained appellant on modified duty with restrictions.

A November 24, 2021 MRI scan of the lumbar spine demonstrated an L3-4 circumferential disc bulge with asymmetric left-sided protrusion, causing mild foraminal stenosis, left greater than right, and mild disc bulges at L3-4 and L4-5.

In a November 30, 2021 report, Dr. Fieser repeated prior diagnoses. He requested authorization of bilateral L3 and L4 lumbar intra-articular injections to address appellant's worsening bilateral radicular pain. Dr. Fieser held her off work.

In a work slip dated November 30, 2021, Dr. Fieser held appellant off work.

A telephonic hearing on OWCP's November 19, 2021 recurrence decision was held on March 18, 2022.

OWCP received psychiatry reports and test results dated from January 21, 2016 through March 22, 2022.⁵

OWCP also received reports and work slips by Dr. Fieser dated from June 9, 2017 through March 10, 2022, reiterating prior diagnoses.⁶ Dr. Fieser maintained appellant on modified-duty work with restrictions through April 21, 2021, and held her off work for the periods April 21 through May 4, 2021, July 6 through August 10, 2021, and October 6, 2021 and continuing.⁷

⁵ The January 21, 2016 report recounts that appellant had been in "two car accidents, one in 2014 and one in 2015."

⁶ A March 6, 2022 MRI scan of the cervical spine demonstrated small disc protrusions at C2-3, C3-4, C4-5, C5-6, and C6-7, and progressed bilateral uncovertebral hypertrophy and facet arthropathy at C6-7.

⁷ OWCP also received unsigned patient care plans dated from May 2021 through January 25, 2022.

In reports dated March 22, 2022, Dr. Fieser reiterated prior diagnoses. He referred appellant to an orthopedic spine specialist to evaluate her increased pain symptoms. Dr. Fieser held her off work.

OWCP received an April 19, 2022 report by Dr. Fieser reiterating prior diagnoses and holding appellant off work. On May 20, 2022 Dr. Fieser prescribed aquatherapy.

By decision dated June 1, 2022, an OWCP hearing representative affirmed OWCP's November 19, 2021 decision denying a recurrence of disability.

OWCP received a May 17, 2022 report and work slip of even date by Dr. Fieser, reiterating prior diagnoses. Dr. Fieser held appellant off work.

On June 20, 2022 appellant, through counsel, requested reconsideration of OWCP's June 1, 2022 decision.

OWCP received a June 16, 2022 report by Dr. Fieser recounting that physical therapy, aquatherapy, chiropractic manipulation, and medication had not relieved appellant's symptoms of pain and paresthesias throughout her spine and lower extremities. Dr. Fieser diagnosed cervical radiculopathy, lumbosacral radiculopathy, pain in unspecified shoulder, left shoulder pain, right shoulder pain, pain disorder with related psychological factors, cervical disc disorder with radiculopathy, cervicothoracic radiculopathy, low back pain, unspecified dorsalgia, unspecified neuralgia and neuritis, cervical spine sprain, and lumbar spine sprain. He attributed appellant's conditions to the accepted employment injuries. Dr. Fieser recommended a midline epidural injection at L4-5. He prescribed medication and held appellant off work.

By decision dated July 14, 2022, OWCP denied modification of its June 1, 2022 decision.

OWCP received a July 7, 2022 report by Dr. Fieser reiterating prior diagnoses. Dr. Fieser continued to hold appellant off work "due to pain exacerbation." He prescribed medication.

On August 3, 2022 appellant, through counsel, requested reconsideration of OWCP's July 14, 2022 decision and submitted additional evidence.

In a June 16, 2022 report, Dr. Fieser reiterated prior diagnoses and recommendations. He held appellant off work.

OWCP received August 11, 2022 drug screen test results.

In a September 29, 2022 report, Dr. Fieser diagnosed an April 25, 2014 rollover motor vehicle accident, bilateral lumbar radiculopathy, cervical radiculitis, left shoulder impingement syndrome, and right tarsal tunnel syndrome. He attributed the diagnosed conditions to the accepted employment injury. Dr. Fieser prescribed medication and held appellant off work.

OWCP also received copies of the November 24, 2021 lumbar MRI scan and Dr. Fieser's June 16 and July 7, 2022 reports previously of record.

By decision dated November 3, 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.⁸

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.⁹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ 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.¹²

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).

In her request for reconsideration, appellant, through counsel, neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that she did not advance a relevant legal argument not previously considered by

⁸ 5 U.S.C. § 8128(a); *see C.B.*, Docket No. 22-0144 (issued March 16, 2023); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

⁹ 20 C.F.R. § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2010); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁰ *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.

¹¹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹² *Id.* at § 10.608(b); *C.B.*, *supra* note 8.

OWCP. Consequently, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).¹³

Appellant also failed to submit relevant and pertinent new evidence in support of her August 3, 2022 request for reconsideration. OWCP received reports from Dr. Fieser dated from June 16 through September 29, 2022, which merely reaffirmed his earlier conclusions. While these reports are new, they are substantially similar to the prior evidence of record wherein Dr. Fieser opined that appellant's current conditions were causally related to her accepted employment injury. Additionally, appellant submitted copies of medical evidence previously of record. As the Board has held, medical evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.¹⁴ Thus, this evidence does not constitute a basis to reopen appellant's case for further merit review.

OWCP also received August 11, 2022 drug screen test results. 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 issue involved, does not constitute a basis for reopening a case.¹⁵ As such, this evidence is insufficient to warrant merit review. As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁶

Accordingly, the Board finds that appellant has not met 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.¹⁷

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 *Id.* at § 10.608(b)(3); *E.R.*, Docket No. 22-1279 (issued January 10, 2023); *S.W.*, Docket No. 21-1094 (issued April 18, 2022); *see M.C.*, Docket No. 18-1278 (issued March 7, 2019); *see S.M.*, Docket No. 17-1899 (issued August 3, 2018).

¹⁴ *C.B.*, *supra* note 8; *see B.S.*, Docket No. 20-0927 (issued January 29, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁵ *R.C.*, Docket No. 22-0612 (issued October 24, 2022); *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).

¹⁶ *S.H.*, Docket No. 19-1897 (issued April 21, 2020); *M.K.*, *id.*; *Edward Matthew Diekemper*, *id.*

¹⁷ *See D.S.*, Docket No. 18-0353 (issued February 18, 2020).

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 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