

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

D.E., Appellant)	
)	
and)	Docket No. 22-1045
)	Issued: January 10, 2023
U.S. POSTAL SERVICE, SEASIDE POST)	
OFFICE, Seaside, CA, Employer)	
)	

Appearances:
Darcie Gardea, 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 July 6, 2022 appellant, through his representative, filed a timely appeal from an April 21, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated April 28, 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 to review 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 his claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 8, 2020 appellant, then a 57-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 30, 2020 he injured his lower back when he slipped and fell on some seeds coming down a driveway while in the performance of duty. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured in the performance of duty. He did not stop work.

In support of his claim, appellant submitted an October 8, 2020 report from Leslie Hohenbrink, a physician assistant, relating his history of injury. Examination revealed limited range of motion (ROM) in the right shoulder due to pain in all fields, tenderness to palpation in paraspinal muscles of thoracic and lower back, tenderness to palpation in glute and along the iliotibial band, and normal back ROM with mild pain. Ms. Hohenbrink diagnosed pain in right shoulder, low back, thoracic spine, and right hip. She advised that appellant must take a rest break for five minutes every hour and could not lift more than 10 pounds. In a form report of even date, Ms. Hohenbrink provided the same information. In a work restriction note of even date, she provided the same diagnoses and work restrictions.

In an October 15, 2020 report, Dr. Kara Coleman, an osteopath specializing in family medicine, related appellant's history of injury and diagnosed pain in right shoulder, low back, and right hip. She advised that appellant could work up to 4 hours per day with stretch breaks for 10 minutes every 2 hours and no lifting over 10 pounds. An unsigned report of even date provided the same diagnoses and work restrictions.

OWCP also received an October 16, 2020 offer of modified-duty work by the employing establishment as a city carrier working 4 hours a day with no packages greater than 10 pounds and 10-minute breaks every 2 hours, which appellant accepted on that date.

In an October 21, 2020 report, Dr. Linda L. Smith, Board-certified in emergency, family, and internal medicine, related that appellant's symptoms had not improved and noted that he might be carrying bundles in excess of his 10-pound weight limit. Examination revealed antalgic gait and slightly decreased strength in the right shoulder. Dr. Smith diagnosed pain in the low back and right shoulder. She indicated that the injury was employment related and advised that appellant should not lift, carry, push, or pull more than 10 pounds and could stand and walk up to two hours a day. Dr. Smith provided the same information on a form report of even date. She also provided the same diagnoses and work restrictions in a work restriction note of even date.

In an October 29, 2020 report, Dr. Coleman noted normal gait on examination and diagnosed pain in low back, chest and right shoulder. In a November 2, 2020 narrative and form report, she reviewed a right shoulder x-ray taken that day, which demonstrated a chronic chip fracture to the acromion, and a lumbar spine x-ray, which showed no gross acute displaced fracture. Dr. Coleman diagnosed pain in right shoulder and low back. She advised that appellant could

continue working with the same restrictions. Dr. Coleman provided the same diagnoses and work restrictions in a work restriction note of even date.

Appellant underwent a right shoulder x-ray on February 27, 2021, which demonstrated a full-thickness tear at the anterior aspect supraspinatus tendon, mild atrophy of supraspinatus and infraspinatus muscles, and tear of the intracapsular portion of the long head of the biceps tendon. He also underwent a lumbar spine x-ray on the same date, which demonstrated L5-S1 disc height loss and posterior disc bulge causing narrowing of the left lateral recess with mild effacement of the transiting left S1 nerve, moderate bilateral neural foramina narrowing with mild effacement of the exiting bilateral L5 nerve, L4-5 disc bulge causing mild bilateral neural foramina narrowing with mild effacement of the exiting bilateral L4 nerves, and L3-4 mild posterior disc bulge causing mild bilateral neural foramen narrowing.

In a development letter dated March 22, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

Appellant subsequently submitted an April 1, 2021 report from Dr. Coleman, in which she reviewed a magnetic resonance imaging (MRI) scan of the lumbar spine, which showed L5-S1 disc height loss and posterior disc bulge causing narrowing of the left lateral recess, moderate bilateral neural foramina narrowing, L4-5 disc bulge with mild neural foramina narrowing, and L3-4 posterior disc bulge. She noted that he had also undergone a shoulder MRI scan. Dr. Coleman diagnosed pain in right shoulder and low back and advised that appellant could continue working with the same restrictions.

By decision dated April 28, 2021, OWCP denied appellant's traumatic injury claim. It accepted that the alleged incident occurred as alleged, but found that he had not submitted sufficient medical evidence containing a medical diagnosis in connection with the claimed injury. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 20, 2022 appellant requested reconsideration and resubmitted copies of Dr. Coleman's November 2, 2020 and April 1, 2021 reports.

By decision dated April 21, 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 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.³

³ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

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's April 20, 2022 request for reconsideration neither alleged, nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, it did not advance a relevant legal argument not previously considered by OWCP. Thus, appellant's reconsideration request did not raise a new and relevant legal argument not previously considered. Consequently, he is not entitled to further review of the merits of his claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

On reconsideration appellant resubmitted copies of Dr. Coleman's November 2, 2020 and April 1, 2021 reports, previously of record. However, medical evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.⁸ Therefore, appellant is also not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, 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.

⁴ 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).

⁵ *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 (February 2016). 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.

⁶ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *See B.S.*, *supra* note 7; *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

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 April 21, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 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