

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

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<b>I.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-1065</b>
	)	<b>Issued: January 3, 2023</b>
<b>DEPARTMENT OF DEFENSE, DEFENSE</b>	)	
<b>COMMISSARY AGENCY, CHERRY POINT</b>	)	
<b>COMMISSARY, Cherry Hill, NC, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 11, 2022 appellant filed a timely appeal from a March 23, 2022 merit decision and a July 5, 2022 nonmerit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>2</sup>

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof to establish a diagnosed medical condition in connection with the accepted November 18, 2021 employment incident; and

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that following the July 5, 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.*

(2) 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 November 30, 2021 appellant, then a 63-year-old store worker, filed a traumatic injury claim (Form CA-1), alleging that on November 18, 2021 she pulled a cart into the chill freezer to process items from an online order and ran into a pallet hand jack that had been stored improperly at the entrance to the freezer while in the performance of duty. She stated that she was "jerked hard" and experienced the onset of back pain. M.O., appellant's supervisor, controverted the claim in a December 1, 2021 statement. She acknowledged that a pallet jack had been left by the chill freezer door and that appellant had pulled items from a cart and scanned them for bagging. However, M.O. alleged that appellant had not reported a back injury at that time.

In support of her claim, appellant provided a November 29, 2021 report of a November 18, 2021 examination by Dr. Douglas DeSantis, a Board-certified anesthesiologist. Dr. DeSantis recounted the November 18, 2021 employment incident when she "walked into something that was out of its normal position" and experienced the onset of back pain. On examination, he observed left-sided sacroiliac tenderness to palpation, and left-sided sacroiliac pain when rising from a flexed position to standing upright. Dr. DeSantis provided an assessment of "[s]acro ilial pain" and prescribed medication. He noted that appellant had been under work restrictions at the time of the November 18, 2021 employment incident.

In a development letter dated February 11, 2022, OWCP notified appellant of the deficiencies of her claim. It advised her of the type of evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a report dated February 17, 2022, Dr. DeSantis noted the November 18, 2021 employment incident and that appellant had sustained chronic sciatica from a prior occupational injury. He explained that, during the November 29, 2021 examination, she "was found to have sacroiliac discomfort related to trauma at work." Dr. DeSantis did not obtain x-rays. He prescribed anti-inflammatory medication and recommended physical therapy. Dr. DeSantis concluded that the mechanism of injury appellant had described "correlated with the physical exam[ination] findings."

Appellant submitted a February 18, 2022 statement recounting that on November 18, 2021 she pushed a grocery cart into the freezer and struck a pallet jack, causing jerking forces to her back and the onset of severe pain. She noted that, at the time of the injury, she had been on work restrictions from an April 23, 2019 employment injury when she had been kicked in the back by a customer. Appellant also provided two coworker witness statements who corroborated the November 18, 2021 employment incident and a November 20, 2021 employing establishment accident report confirming that a pallet jack had been improperly stored at the cooler entrance.

By decision dated March 23, 2022, OWCP accepted that appellant struck a pallet jack at the entrance to a chill freezer in the performance of duty on November 18, 2021 as alleged. However, it denied her claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted November 18, 2021 employment

incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 12, 2022 appellant requested reconsideration. In supporting statements dated April 7, 2022, she contended that she had submitted additional information that was not included in the case record, and that her supervisor saw the pallet jack on November 18, 2021 and realized that appellant had been injured.

On April 12, 2022 OWCP received an April 4, 2022 report by Dr. DeSantis noting the November 18, 2021 employment injury. Dr. DeSantis explained that, during his November 29, 2021 examination, he observed “inflammation of [appellant’s] sacroiliac joint and evidence of piriformis spasm on the left side related to the trauma.” He prescribed anti-inflammatory medication and recommended physical therapy. Dr. DeSantis opined that the mechanism of injury appellant described correlated with the findings on physical examination.

Appellant also submitted documents previously of record.

By decision dated July 5, 2022, OWCP denied appellant’s request for reconsideration of her claim under 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,<sup>4</sup> that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.<sup>7</sup> Fact of injury consists of two components that must be considered in conjunction with one another. The first

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<sup>3</sup> 20 C.F.R. § 10.607(a).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (September 2020).

<sup>5</sup> *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>6</sup> *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

<sup>7</sup> *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 4 at Chapter 2.1602.5 (September 2020).

component is whether the employee actually experienced the employment incident that allegedly occurred.<sup>8</sup> The second component is whether the employment incident caused a personal injury.<sup>9</sup>

Rationalized medical opinion evidence is required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment incident.<sup>10</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>11</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish a diagnosed medical condition in connection with the accepted November 18, 2021 employment incident.

In a report dated November 29, 2021, Dr. DeSantis noted the November 18, 2021 employment incident, observed left-sided sacroiliac tenderness and pain on examination, and provided an assessment of sacroiliac pain. In a February 17, 2022 report, he opined that on November 29, 2021 appellant “was found to have sacroiliac discomfort related to trauma at work.” The Board has held that pain alone is a symptom, not a medical diagnosis, and that findings of pain or discomfort alone do not satisfy the medial aspect of the fact of injury medical determination.<sup>12</sup> Therefore, Dr. DeSantis’ reports are insufficient to establish a medical diagnosis in connection with the accepted employment incident.<sup>13</sup>

As the medical evidence of record does not contain a medical report relating a diagnosed medical condition in connection with the accepted November 18, 2021 employment incident, the Board finds that appellant has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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<sup>8</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>9</sup> *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 4 at Chapter 2.1602.5(a) (September 2020).

<sup>10</sup> *S.S.*, Docket No. 18-1488 (issued March 11, 2019).

<sup>11</sup> *T.M.*, Docket No. 22-0220 (issued July 29, 2022); *J.L.*, Docket No. 18-1804 (issued April 12, 2019).

<sup>12</sup> *See F.U.*, Docket No. 18-0078 (issued June 6, 2018); *supra* note 4 at Chapter 2.803.4a(6) (August 2012).

<sup>13</sup> *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *B.P.*, Docket No. 16-1549 (issued January 18, 2017); *John J. Carlone*, 41 ECAB 354 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

## LEGAL PRECEDENT -- ISSUE 2

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 or her own motion or on application.<sup>14</sup>

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.<sup>15</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>16</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>17</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration.<sup>18</sup>

## ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On reconsideration, appellant submitted an April 4, 2022 report by Dr. DeSantis, noting new findings based on his November 29, 2021 examination of "inflammation of [appellant's] sacroiliac joint and evidence of piriformis spasm on the left side related to the trauma." In its July 5, 2022 decision, OWCP found that Dr. DeSantis' April 4, 2022 report had merely reiterated his prior diagnosis of "sacroiliac discomfort." The Board finds, however, that he did not diagnose sacroiliac discomfort in his April 4, 2022 report. Instead, Dr. DeSantis noted new objective findings of sacroiliac joint inflammation and evidence of left-sided piriformis spasm. His April 4, 2022 report, therefore, constitutes relevant and pertinent new evidence that was not previously

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<sup>14</sup> 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).

<sup>15</sup> 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).

<sup>16</sup> *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. *Supra* note 4 at 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.

<sup>17</sup> *Supra* note 15 at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>18</sup> *Supra* note 15 at § 10.608(b); *S.K.*, Docket No. 22-0248 (issued June 27, 2022); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

considered. Therefore, the Board finds that the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).<sup>19</sup>

Consequently, the Board will set aside OWCP's July 5, 2022 decision and remand the case for an appropriate merit decision on appellant's claim.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish a diagnosed medical condition in connection with the accepted November 18, 2021 employment incident. The Board further finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 23, 2022 decision of the Office of Workers' Compensation Programs is affirmed. The July 5, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with the decision of the Board.<sup>21</sup>

Issued: January 3, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>19</sup> *Supra* note 15; *S.C.*, Docket No. 20-1661 (issued May 6, 2022); *see also J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).

<sup>20</sup> *S.C.*, *id.*; *F.K.*, Docket No. 21-0998 (issued December 29, 2021).

<sup>21</sup> On return of the case record, OWCP should consider combining all of appellant's relevant claim files.