



## 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 July 29, 2019 appellant, then a 52-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on July 26, 2019 she sustained a contusion to her right shoulder when she flipped her postal vehicle in a ditch while in the performance of duty. She stopped work on July 26, 2019. OWCP accepted the claim for laceration of the right forearm, muscle spasm, cervical spine sprain, and cervicgia. It paid appellant wage-loss compensation on the periodic rolls beginning September 10, 2019.

Appellant's attending physician, Dr. Ernest L. Howard, a Board-certified physiatrist, completed reports dated April 16 through July 15, 2020 and diagnosed cervicgia, muscle spasm and cervical spine sprain. He reviewed a September 19, 2019 magnetic resonance imaging (MRI) scan which demonstrated bulging discs at C4-5 and C5-6, and posterior paracentral disc herniation with superior disc migration at C6-7. Dr. Howard recommended physical therapy, medication, and injections.

On May 14, 2020 Dr. Mark Feeman, an osteopath, completed a work capacity evaluation (Form OWCP-5c) and advised that appellant could return to work with restrictions of occasional pushing, pulling, and lifting up to 10 pounds, and occasional twisting, bending, stooping, squatting, kneeling, and climbing. He indicated that she could operate a motor vehicle at work for 4 hours and that she needs a 30-minute break every hour. Dr. Feeman based his work restrictions on appellant's May 12, 2020 functional capacity evaluation.

On July 13, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions to Dr. John G. Keating, an orthopedic surgeon, for a second opinion examination to determine whether appellant continued to have residuals or disability causally related to her July 26, 2019 employment injury. In his August 10, 2020 report, Dr. Keating reviewed the SOAF and medical history. He performed a physical examination and diagnosed cervicgia, laceration right forearm, and cervical sprain. Dr. Keating responded to OWCP's questions and reported no objective findings supporting ongoing medical conditions. He found no evidence of cervical radiculopathy, cervical spondylosis, and neck arthritis. Dr. Keating noted that appellant's MRI scan demonstrated degenerative cervical changes and opined that these degenerative changes in her neck were possibly aggravated by the employment incident, but determined that appellant had sufficient treatment and time for her conditions to resolve. He further opined that there was nothing to indicate that the conditions had not resolved, and that there were no ongoing signs of disability. Dr. Keating concluded that she had no ongoing residuals of her July 26, 2019 employment injury and that she could return to her date-of-injury position.

By notice dated August 19, 2020, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on Dr. Keating's opinion that the accepted conditions had ceased without residuals and that she was not disabled from work due to the accepted conditions. It afforded her 30 days to submit additional evidence or argument challenging the proposed action.

In an August 12, 2020 report, Dr. Howard diagnosed cervicalgia, chronic pain syndrome, and muscle spasms. He performed an injection of the tendon sheath and recommended continued medication.

By decision dated September 23, 2020, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective September 28, 2020. It found that appellant no longer had employment-related disability or residuals and that the weight of the medical evidence rested with the August 10, 2020 report of Dr. Keating.

On October 1, 2020 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP continued to receive medical evidence. On September 30, 2020 appellant was transported to the local hospital by ambulance due to right-side neck and shoulder pain. She recounted that her return to work caused her injury to "flare." Dr. Stuart B. Resnick, a radiologist, performed computerized tomography (CT) scans of appellant's thoracic and cervical spine and found disc protrusion at C6-7 and right paracentral disc osteophyte complex at T7-8. He also reported degenerative changes at C5-6 and C6-7.

In a report dated October 7, 2020, Dr. Howard noted appellant's increased neck pain following her return to work on September 26, 2020 and requested electromyogram (EMG) studies due to pain and weakness in the C5-6 nerve distribution.

Dr. Ki-Hon Lin, an orthopedic surgeon, examined appellant on October 23, 2020 and recounted her symptoms of neck pain and the inability to turn her neck. On November 20, 2020 appellant underwent a second cervical MRI scan which demonstrated mild facet arthropathy and disc osteophyte formation at C4-5, C5-6, and C6-7.

In a note dated December 16, 2020, Dr. Elmore Alexander, an osteopath, noted appellant's history of injury on July 26, 2019 and reviewed her medical history. He performed a physical examination and diagnosed shoulder and cervical injury. Appellant underwent an additional cervical MRI scan on December 16, 2020 which demonstrated spurring and bony foraminal stenosis at C4-5 and C5-6 and small midline protrusion at C6-7 and spurring with bilateral bony foraminal stenoses.

By decision dated January 22, 2021, OWCP's hearing representative found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits based on Dr. Keating's August 10, 2020 report. He further found that appellant had not established any additional conditions.

OWCP continued to receive evidence. Appellant completed an additional narrative statement disagreeing with findings and conclusions in Dr. Keating's August 10, 2020 report. She asserted that he did not complete a physical examination or testing.

On April 2, 2021 appellant requested reconsideration. By decision dated May 27, 2021, OWCP denied modification of its prior decisions.

On July 7, 2021 appellant requested reconsideration. She provided a June 29, 2021 narrative statement alleging that Dr. Keating's report was inaccurate as he did not examine her and

did not have or review her medical records. By decision dated October 4, 2021, OWCP denied modification.

On February 24, 2022 appellant again requested reconsideration. In a May 11, 2022 attending physician's report (Form CA-20), Dr. Howard indicated that appellant was partially disabled. By decision dated May 25, 2022, OWCP denied modification.

On June 10, 2022 appellant requested reconsideration. She provided a narrative statement alleging that Dr. Keating's report was not based on a physical examination and therefore was not factually accurate. She submitted an additional narrative statement on August 31, 2022 asserting that Dr. Keating did not rely on the SOAF as he reported no findings of cervical radiculopathy. Appellant noted that he had opined that it was "possible" that her cervical degenerative changes were aggravated by the employment incident. She asserted that Dr. Keating's report lacked the necessary explanation of the pathophysiological process to establish that her medical conditions had resolved. Appellant alleged that he concluded that all conditions had resolved with no explanation. She concluded that Dr. Keating's report was insufficient.

By decision dated September 8, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), finding that her arguments were repetitive.

### **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.<sup>4</sup>

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 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>5</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>6</sup> If the request is timely, but fails to meet at least

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<sup>4</sup> 5 U.S.C. § 8128(a); *M.F.*, Docket No. 21-1221 (issued March 28, 2022); *T.T.*, Docket No. 19-0319 (issued October 26, 2020); *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).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3); *see V.D.*, Docket No. 20-0569 (issued December 7, 2020); *B.R.*, Docket No. 19-0372 (issued February 20, 2020); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>6</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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 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.

one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>7</sup>

### ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

In her reconsideration request, appellant argued that OWCP improperly terminated her wage-loss compensation and medical benefits effective September 28, 2020 based on Dr. Keating's August 10, 2020 second opinion report. She alleged that his report did not provide medical rationale in support of his opinion that the accepted conditions had resolved without residuals or disability. Appellant further noted that Dr. Keating did not explain how or why the "possible" employment-related aggravation of her underlying cervical degenerative changes had ceased. The Board finds that this constitutes a new and relevant legal argument not previously considered. Therefore, appellant is entitled to a review of the merits based on the second above-noted requirement under section 10.606(b)(3).<sup>8</sup> Accordingly, the Board will set aside OWCP's September 8, 2022 decision and remand the case for an appropriate merit decision.

### CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

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<sup>7</sup> *Id.* at § 10.608(b); *see M.E.*, Docket No. 20-0067 (issued October 15, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>8</sup> *See P.B.*, Docket No. 22-0544 (issued October 17, 2022); *P.G.*, Docket No. 20-0235 (issued July 13, 2020); *T.B.*, Docket No. 18-1214 (issued January 29, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 8, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 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