

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

S.T., Appellant)	
)	
and)	Docket No. 23-0185
)	Issued: July 18, 2023
DEPARTMENT OF THE ARMY,)	
SAN ANTONIO MILITARY MEDICAL)	
CENTER, Fort Sam Houston, TX, Employer)	
)	

Appearances: *Case Submitted on the Record*
Brett E. Blumstein, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On November 21, 2022 appellant, through counsel, filed a timely appeal from a July 13, 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 10, 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 her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 20, 2010 appellant, then a 34-year-old vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left-sided lumbar injury with numbness and paresthesias into the left foot when a patient she was assisting became combative and pulled her down multiple times as he attempted to arise from bed while in the performance of duty.³ She stopped work on July 20, 2010 and returned to work on October 30, 2010. OWCP accepted the claim for lumbar sprain.⁴

On August 21, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In support of her claim, appellant submitted a March 14, 2019 report by Dr. Benjamin Burris, Board-certified in occupational medicine, who recounted a history of injury and treatment and reviewed her medical records. On examination, Dr. Burris observed exquisite tenderness to palpation of the cervical and thoracic paraspinous processes and left-sided paraspinals, and limited motion of the thoracic and lumbar spine. He opined that appellant had reached maximum medical improvement (MMI). Referring to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),⁵ and utilizing the diagnosis-based impairment (DBI) rating method for a documented history of lumbar sprain/strain with sacroiliac ligament sciatica and piriformis syndrome, Dr. Burris found a Class 1 impairment, with no applicable grade modifiers. He concluded that appellant had 9 percent whole person impairment, equivalent to 23 percent permanent impairment of the lower extremities, according to Table 17-4, page 570 (Lumbar Spine Regional Grid).

On August 28, 2019 OWCP routed Dr. Burris' March 14, 2019 report, a statement of accepted facts (SOAF), and the case record to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), for review and a determination of permanent impairment of the lower extremities in accordance with the A.M.A., *Guides*.

In a report dated August 30, 2019, Dr. Harris found zero percent permanent impairment of the bilateral lower extremities as there were no objective findings of neurologic deficit on clinical examination or diagnostic testing. He noted that Dr. Burris had misapplied the A.M.A., *Guides*

³ July 10, 2010 lumbar x-rays were within normal limits.

⁴ August 16, 2010 and March 11, 2011 magnetic resonance imaging (MRI) scans of the lumbar spine were within normal limits. A June 22, 2011 report by Dr. Donald F. Dutra, Jr., a Board-certified physiatrist, noted that electrodiagnostic studies were unremarkable. December 1, 2011 x-rays of the bilateral sacroiliac joints demonstrated mild degenerative changes.

⁵ A.M.A., *Guides* (6th ed. 2009).

by utilizing Table 17-4, which provided impairment for mechanical low back pain, and not for spinal pain as provided by FECA and OWCP's procedures.

In a development letter dated September 12, 2019, OWCP advised appellant that there was a difference in the impairment ratings provided by Dr. Burris and Dr. Harris. It requested that she share Dr. Harris' report with Dr. Burris, and obtain an updated impairment rating from Dr. Burris indicating any disagreement with Dr. Harris' findings. OWCP afforded appellant 30 days to respond. It did not receive additional medical evidence within the time allotted.

By decision dated January 22, 2020, OWCP denied appellant's schedule award claim as the medical evidence of record did not establish permanent impairment of a scheduled member of the body causally related to the accepted employment injury. It accorded the weight of the medical evidence to Dr. Harris.

On February 11, 2020 appellant, through counsel, requested reconsideration.

Appellant submitted a January 21, 2020 report by Dr. Burris in which he disagreed with Dr. Harris' opinion. Dr. Burris asserted that appellant had a Class 1 DBI of the lower extremities based on sciatica and piriformis syndrome with a history of a sprain-/strain-type injury and continued complaints of nonverifiable radicular symptoms. He reiterated his assessment of 23 percent permanent impairment of the lower extremities.

On June 17, 2020 OWCP found a conflict of medical opinion evidence between Dr. Harris, for the government, and Dr. Burris, for appellant, regarding the appropriate percentage of permanent impairment of the lower extremities. To resolve the conflict, OWCP referred appellant, the medical record, and a SOAF and a series of questions to Dr. James F. Hood, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a report dated December 7, 2020, Dr. Hood reviewed the medical record and SOAF. On examination he found no palpable lumbar spasm or tenderness, negative straight leg raising tests, normal neurologic findings in the lower extremities, normal strength throughout both lower extremities, and marked tenderness over the trochanteric bursae bilaterally. Prior to making a final determination, Dr. Hood requested an electromyogram/nerve conduction velocity (EMG/NCV) study of the lower extremities to evaluate appellant's subjective complaints of lower extremity numbness and non-dermatomal sensory testing.

In a December 18, 2020 report, Dr. Marc D. Pecha, Board-certified in electrodiagnostic medicine, opined that EMG/NCV studies of the bilateral lower extremities performed that day were normal, without evidence of radiculopathy, lumbosacral plexopathy, polyneuropathy, or myopathy.

In a report dated December 29, 2020, Dr. Hood opined that appellant had no permanent impairment of either lower extremity causally related to the accepted lumbar sprain, as there was no objective evidence of lumbar radiculopathy affecting the lower extremities.

By decision dated September 10, 2021, OWCP denied modification of its prior decision.

On April 26, 2022 appellant, through counsel, requested reconsideration. Appellant did not submit additional evidence or argument.

By decision dated April 27, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On May 25, 2022 OWCP received a duplicate copy of appellant's April 26, 2022 request for reconsideration. It interpreted the request as a new request for reconsideration. Appellant did not submit additional evidence or argument.

By decision dated July 13, 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.⁶

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.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely, but fails to meet at least one of the

⁶ 5 U.S.C. § 8128(a); *see L.M.*, Docket No. 22-0902 (issued September 19, 2022); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

⁷ 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).

⁸ *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.

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

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 timely request for reconsideration, appellant, through counsel, did not provide a legal argument, or otherwise identify or assert a legal error by OWCP. The request for reconsideration, in and of itself, does not demonstrate a legal error by OWCP.¹¹ Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Additionally, appellant has not submitted evidence in support of her reconsideration request. Consequently, she is not entitled to a review of the merits of the claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹²

On appeal counsel contends that the medical evidence of record establishes a permanent impairment of the bilateral lower extremities. This argument pertains to the merits of the claim, which are not before the Board on the present appeal. Counsel also referred to a legal argument presented in the April 26, 2022 request for reconsideration. The Board notes, however, that there was no legal argument of record in support of the April 26, 2022 request for reconsideration.

The Board, accordingly, finds that appellant has not met any of the requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹³

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).

¹⁰ *Id.* at § 10.608(b); *R.C.*, Docket No. 22-1118 (issued December 14, 2022); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *See S.E.*, Docket No. 17-0222 (issued December 21, 2018).

¹² *See R.C.*, *supra* note 10; *L.M.*, *supra* note 6; *W.C.*, Docket No. 20-0691 (issued July 19, 2022); *M.K.*, Docket No. 21-1399 (issued July 14, 2022); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹³ *D.G.*, Docket No. 19-1348 (issued December 2, 2019); *S.H.*, Docket No. 19-1115 (issued November 12, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 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