

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

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**M.G., Appellant** )

**and** )

**DEPARTMENT OF HOMELAND SECURITY,** )  
**U.S. CUSTOMS & BORDER PROTECTION,** )  
**U.S. BORDER PATROL, Rio Grande City, TX,** )  
**Employer** )

**Docket No. 23-0200**  
**Issued: July 17, 2023**

*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 November 7, 2022 appellant filed a timely appeal from a July 26, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated April 21, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

**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).

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

## **FACTUAL HISTORY**

On February 14, 2022 appellant, then a 38-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a left-side low back injury when he stepped incorrectly on a broken tree branch, while in the performance of duty. Appellant's supervisor acknowledged on the claim form that appellant was injured in the performance of duty. Appellant stopped work on February 14, 2022.

In support of his claim, appellant submitted reports dated February 15, 2022 from Sardar Ali, a physician assistant. Mr. Ali noted that appellant was at work, and he was walking through dry brush in Roma, Texas, when he "took a wrong step" over fallen tree branches and immediately felt discomfort to the left region of his lumbar spine. He related that, despite the discomfort, appellant continued to work; however, 30 minutes later, the drive back was "bumpy" and aggravated his lumbar injury and his lumbar discomfort continued to increase after completing his shift. Mr. Ali completed a duty status report (Form CA-17) of even date in which he diagnosed lumbar sprain and placed appellant off work. He repeated his findings in CA-17 forms dated February 22, March 1 and 15, 2022.

In a February 18, 2022 report, Dr. Viraf Cooper, a Board-certified neurosurgeon, noted appellant's history of injury and treatment. He diagnosed lumbar sprain secondary to a February 14, 2022 work-related injury. Dr. Cooper opined that the mechanism of stepping wrong over fallen tree branches after appellant stepped wide when walking through dry brush directly caused appellant's diagnosed condition.

In a development letter dated March 17, 2022, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to provide the necessary evidence.

OWCP continued to receive evidence including March 22, 29, April 5, 12, and 19, 2022 CA-17 forms from Mr. Ali.

Appellant completed the OWCP questionnaire on March 22, 2022. He noted that his injury occurred by "overextending a step across a broken tree branch and stepping into uneven ground." He denied lumbar pain prior to the claimed February 14, 2022 incident. Appellant noted that he had a preexisting lumbar condition from 2015, for which he had last received medical treatment in 2015.

A February 16, 2022 magnetic resonance imaging (MRI) scan read by Dr. Rafath Qurasishi, a diagnostic radiologist, revealed L5-S1 spondylolisthesis (Grade I); disc herniation measuring 3 millimeters with left S1 nerve root and exiting nerve root impingement; L4-L5 disc herniation measuring 2.5 millimeters, encroaching on the neural foramen bilaterally; and facet effusions identified at L4-5 bilaterally and at L5-S1 on the left side, suggesting sequelae of acute acceleration deceleration injury, with clinical correlation to rule out facet syndrome.

In a March 23, 2022 report, Dr. Cooper repeated his earlier findings. He further explained that appellant's lumbar strain and disc displacement were causally related to the February 14, 2022 incident when appellant was walking through dry brush, took a wide step over fallen tree branches, and stepped wrong, causing immediate onset of discomfort to the left region of his lumbar spine. Dr. Copper opined, "it is within reasonable medical certainty that [appellant's] low back condition and diagnoses of [l]umbar [s]prain and [l]umbar [d]isc [d]isplacement are directly attributed to the injury that occurred on February 14, 2022 during his Federal employment and this injury will require ongoing medical care." He further opined that it was his "medical opinion the mechanism of sudden strain/extension of his low back when stepping wide when walking through brush while stepping wrong over fallen tree branches directly caused the current condition and diagnosis that he has developed."

OWCP also received a March 29, 2022 report of work status (Form CA-3) which indicated that appellant would return to full-time modified duty on March 30, 2022. A March 30, 2022 memorandum from the employing establishment indicated that appellant was offered an alternate-duty sedentary-duty position, which was temporary. OWCP also received an April 21, 2022 request for extension of alternate duty.

By decision dated April 21, 2022, OWCP denied appellant's traumatic injury claim finding that he failed to establish that the incident occurred on February 14, 2022, as alleged.

On May 17, 2022 appellant requested reconsideration of OWCP's April 21, 2022 decision.

Appellant submitted a May 2, 2022 Form CA-17 report from Mr. Ali. In response to question 5, requesting a description of how the injury occurred, Mr. Ali left the form blank. Appellant also submitted a Form CA-3 report which indicated that he returned to full-time work on May 2, 2022 with no restrictions. OWCP also received a copy of the previously submitted February 16, 2022 MRI scan.

By decision dated July 26, 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.<sup>2</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

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<sup>2</sup> 5 U.S.C. § 8128(a); *see A.G.*, Docket No. 22-1052 (issued December 14, 2022); *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).

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>3</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>4</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>5</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 without reopening the case for review on the merits.<sup>6</sup>

### 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 May 17, 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. Consequently, appellant 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).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. The underlying issue in this case is whether appellant established a traumatic incident in the performance of duty on February 14, 2022, as alleged. In support of his reconsideration request, appellant submitted a May 2, 2022 Form CA-17 report from Mr. Ali, a copy of the previously submitted February 16, 2022 MRI scan; and a Form CA-3 indicating that appellant returned to work on May 2, 2022.

While the May 2, 2022 Form CA-17 report from Mr. Ali is new evidence, it is irrelevant, as the underlying issue in this case is whether appellant established a traumatic injury in the performance of duty on February 14, 2022, as alleged. This report did not respond to the question regarding the alleged injury. The Board has held that the submission of evidence that does not

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<sup>3</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>4</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 (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>5</sup> *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>6</sup> *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).

address the particular issue involved does not constitute a basis for reopening a case.<sup>7</sup> The Board further notes that physician assistants are not considered physicians as defined under FECA.<sup>8</sup>

The MRI scan was previously submitted and considered and does not constitute new evidence. The Board has held that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>9</sup>

The Form CA-3 indicating that appellant returned to work on May 2, 2022 is not relevant to the underlying issue.<sup>10</sup> As such, appellant did not submit relevant and pertinent new evidence and is 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).<sup>11</sup>

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.

### 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).

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<sup>7</sup> See *F.H.*, Docket 20-0309 (issued January 26, 2021); *T.T.*, Docket No. 19-0319 (issued October 26, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>8</sup> Section 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(2); 20 C.F.R. § 10.5(t). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); see also *K.C.*, Docket No. 19-0834 (issued October 28, 2019) (physician assistants are not considered physicians as defined under FECA); *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

<sup>9</sup> *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>10</sup> *Supra* note 8.

<sup>11</sup> See *supra* note 4.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 26, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 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