

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

_____)
L.P., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Brooklyn, NY, Employer)
_____)

Docket No. 22-1275
Issued: June 16, 2023

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On August 29, 2022 appellant filed a timely appeal from a March 1, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 20, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 1, 2022 nonmerit decision, OWCP received additional evidence. 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.*

FACTUAL HISTORY

On June 23, 2021 appellant, then a 57-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 14, 2021 she injured her back lifting heavy boxes while in the performance of duty. On the reverse side of the claim form, her supervisor, J.B., acknowledged that she was injured in the performance of duty but controverted the claim, asserting that fact of injury had not been established, and that she was injured by her own willful misconduct because she picked up a heavy package despite having work restrictions in place of lifting no more than 20 pounds. Appellant stopped work on June 14, 2021.

In support of her claim, appellant submitted a June 14, 2021 letter from Jeannie Chen, a physician assistant, noting that she was treated in the emergency room that day and would require rest for one week, with no more than 20 minutes of standing at a time. OWCP also received an unsigned after visit summary of even date noting that appellant presented with back pain, and was diagnosed with a muscle spasm.

In a June 20, 2020 order, Alan Tang, a physician assistant, requested a comprehensive lumbosacral spine x-ray examination and noted a diagnosis of low back pain, unspecified back pain laterally, unspecified chronicity.

In a June 22, 2021 note, Dr. Arth Patel, a Board-certified sports medicine and family medicine practitioner, recommended that appellant be excused from work for two weeks. In an order of even date, Susana Chan, a physician assistant, recommended physical therapy, and noted a diagnosis of lumbar radiculopathy at L4-L5 and S1.

In a June 28, 2021 letter, appellant related that, on June 14, 2021, at approximately 10:10 a.m., she began loading her truck and lifted a box so heavy that it fell from her hands. She felt something pull in her back, causing pain, and reported the event to her supervisor so that she could go to the hospital. Appellant further explained that when the package dropped, a driver ran out of his truck and asked what had happened, and she replied that she did not know, and related that she had pain in her back.

In a June 29, 2021 statement, J.B., an employing establishment manager, controverted appellant's claim, and noted that she was assigned to limited duty with a work restriction of lifting up to 20 pounds. He asserted that while she claimed that another driver witnessed her drop a package, he was unable to identify the driver, or substantiate her account following an investigation. J.B. concluded that the incident did not occur as reported by appellant. In a separate letter of even date, the employing establishment reiterated that appellant was injured when she lifted a box that exceeded her work restrictions of no lifting more than 20 pounds. It further noted that she reported lifting a box so heavy that she dropped it, and a driver rushed out of his truck to inquire what she had dropped, but she failed to provide the name of the driver and no driver came forward to confirm witnessing the incident. The employing establishment concluded that fact of injury had not been established.

In a July 2, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim, and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, appellant submitted a July 8, 2021 note from Dr. Patel excusing her from work until August 3, 2021.

In a July 19, 2021 response to OWCP's development questionnaire, appellant related that around 8:45 a.m. she was loading a box weighing approximately 30 to 35 pounds into her truck when the package dropped out of her hands and she felt something pull in her back, causing pain. She noted that another driver, E.Y., ran out of his truck, and asked her what had happened. Appellant indicated that she subsequently reported the event to her supervisor. She asserted that while she is limited to lifting up to 20 pounds, her supervisors were aware that she lifted above her restrictions, and should instruct the employees who assign the packages to separate the heavy boxes. Appellant further alleged that she had provided the name of the driver who witnessed the incident, as well as medical evidence from the hospital.

On August 3, 2021 Dr. Patel held appellant off work pending completion of a magnetic resonance imaging (MRI) scan.

By decision dated August 20, 2021, OWCP denied appellant's traumatic injury claim, finding that she had not submitted sufficient evidence to establish that the employment events occurred as alleged. Consequently, it found that she had not met the requirements to establish an injury as defined by FECA.

Thereafter, OWCP received an August 26, 2021 e-mail from the employing establishment confirming that appellant was on part-time limited duty on June 14, 2021, the alleged date of injury.

On September 1, 2021 appellant requested reconsideration of the August 20, 2021 decision.

By decision dated September 13, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant continued to submit evidence, including a September 22, 2021 duty status report (Form CA-17) with an illegible signature noting a diagnosis of lumbar radiculopathy.

In an October 29, 2021 visit note, Dr. Lisa Corrente, a Board-certified diagnostic radiologist, noted that appellant reported that on June 14, 2021 at approximately 10:00 a.m. she was loading boxes into her truck while on a light-duty work restriction. She related that there was no sticker on the box to indicate that it was heavy, and she was unaware that it exceeded 25 pounds. Appellant recounted that after she lifted the box, she felt a sharp pain in the right side of her lower back, causing her to drop the box. Dr. Corrente diagnosed intervertebral disc disorder with radiculopathy, lumbar region, and muscle spasm of the back. She opined that appellant's lower back injury was sustained in the performance of duties on June 14, 2021, that appellant had no lower back pain prior to the injury, and that the injury occurred when a package exceeding 25 pounds was placed in her work area, and the force of trying to lift the box was too much for her back to sustain, causing multiple disc herniations. Dr. Corrente concluded that the L3-L4 and L4-L5 disc herniations caused compression on her nerve which radiated down her leg.

On December 1, 2021 appellant requested reconsideration of the August 20, 2021 decision and submitted additional evidence.

An October 29, 2021 x-ray report noting an impression of osteophyte formations located at the L2, L3, and L4 vertebral bodies, moderate hypertrophy and sclerosis at the facet joints of the L1-L2, L3-L4 and L4-L5 levels, L4-L5 grade 1 anterolisthesis, and disc height loss at the L3-L4 and L4-L5 level. In an attending physician's report (Form CA-20) of even date, Dr. Corrente diagnosed lumbar disc disorder with radiculopathy and a muscle spasm of the back. She checked a box marked "Yes" to indicate her belief that appellant's condition was caused or aggravated by employment activity. In a work capacity evaluation of even date, Dr. Corrente noted that she was unable to stand, bend, lift, push, pull, or twist. A prescription note of even date from Dr. Corrente reiterated her diagnoses and ordered therapeutic exercises, traction, ultrasound, and electrostimulation.

By decision dated March 1, 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 does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP.

³ This section provides in pertinent part: [t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application. 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* § 10.607(a). 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.

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of her reconsideration request, appellant submitted medical evidence, including a September 22, 2021 Form CA-17 with an illegible signature, and an October 29, 2021 x-ray report and form reports and notes from Dr. Corrente. As the underlying issue in the August 20, 2021 decision was factual in nature, the submission of this medical evidence which does not relate a history of injury is not relevant to the issue for which OWCP denied appellant's claim.⁸ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹ Thus, this evidence does not constitute relevant and pertinent new evidence not previously considered by OWCP and appellant was not entitled to a review of the merits of her claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁰

The Board, accordingly, finds that appellant did not meet 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.¹¹

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).

⁸ See *F.B.*, Docket No. 18-1039 (issued December 6, 2018); *M.M.*, Docket No. 15-1622 (issued September 27, 2016); *T.E.*, Docket No. 14-1047 (issued October 9, 2014); *Bonnie A. Contreras*, 57 ECAB 364 (2006) (where a claimant did not establish an employment incident alleged to have caused an injury, it was not necessary to consider any medical evidence).

⁹ *D.P.*, Docket No. 13-1849 (issued December 19, 2013).

¹⁰ *Supra* note 8.

¹¹ See *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2023
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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