

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

C.B., Appellant)	
)	
and)	Docket No. 22-0144
)	Issued: March 16, 2023
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL SHIPYARD, Portsmouth, VA, Employer)	
)	

Appearances:

Daniel M. Goodkin, Esq., for the appellant¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 5, 2021 appellant, through counsel, filed a timely appeal from a June 29, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated April 30, 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 May 19, 2005 appellant, then a 54-year-old painter, filed a notice of traumatic injury (Form CA-1) alleging that on April 29, 2005 she injured her hand, fingers, shoulder, and back when removing paint from the deck of a ship with a hand scraper and a needle gun while in the performance of duty. She stopped work on May 13, 2005, returned to light-duty work on June 6, 2005, and returned to full duty on February 1, 2006. OWCP accepted the claim for carpal tunnel syndrome.

On July 3, 2007 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of a medical condition on March 27, 2007 causally related to her accepted April 29, 2005 employment injury.

By decision dated July 31, 2007, OWCP accepted that appellant sustained a recurrence of a medical condition on March 27, 2007 causally related to her accepted April 29, 2005 employment injuries. It authorized wage-loss compensation on the supplemental rolls beginning November 7, 2007. Appellant underwent right carpal tunnel release on January 21, 2008 and returned to light-duty work on May 12, 2008.

On March 9, 2009 OWCP expanded the acceptance of appellant's claim to include right wrist scar from carpal tunnel release. On March 16, 2009 appellant underwent surgical excision of a cystic lesion of the right wrist. She returned to work on March 30, 2009 with restrictions. In notes dated June 3, October 8 and 22, 2009, Dr. Richard D. Knauft, a Board-certified orthopedic surgeon, indicated that appellant had reached maximum medical improvement and would seek treatment as needed.

On March 8, 2011 OWCP reopened appellant's claim for medical treatment.

On March 14, 2011 appellant filed a Form CA-2a alleging a recurrence of a medical condition on February 28, 2011 causally related to her April 29, 2005 employment injury. She noted that she was not employed.

In a July 7, 2011 note, Dr. Knauft noted that the appellant had numbness and tingling in both hands and diagnosed median nerve neuropathy in the right hand with recurrence of carpal tunnel syndrome postoperatively. He recommended additional surgery. On February 23, 2012, Dr. Knauft diagnosed stenosing tenosynovitis of the flexor tendon sheath of the right thumb.

On November 28, 2016 the employing establishment requested that OWCP administratively close the case as there had been no medical activity for more than two years.

On May 8, 2018 appellant filed a Form CA-2a alleging a recurrence of a medical condition causally related to her April 29, 2005 employment injury.

In a June 8, 2018 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of medical evidence needed to establish her recurrence claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In a July 30, 2018 report, Dr. Arthur W. Wardell, a Board-certified orthopedic surgeon, noted his examination of appellant due to carpal tunnel syndrome. He found positive Tinel's tests bilaterally. Dr. Wardell diagnosed bilateral carpal tunnel syndrome.

On August 10, 2018 appellant completed the development questionnaire and asserted that she was experiencing the same symptoms as prior to her carpal tunnel surgery. She also provided an August 7, 2018 electromyogram (EMG) testing which demonstrated bilateral mild carpal tunnel syndrome and bilateral C7 radiculopathy, mild on the right and moderate on the left.

By decision dated August 15, 2018, OWCP denied appellant's claim for a recurrence of a medical condition causally related to her accepted May 16, 2005 employment injury.

On August 26, 2018, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on January 16, 2019.

OWCP received an August 21, 2018 report wherein Dr. Wardell opined that appellant's work-related carpal tunnel syndrome had progressed with no intervening injury. Dr. Wardell reviewed the August 7, 2018 EMG test and diagnosed bilateral carpal tunnel syndrome. In treatment notes dated August 27, 2018 through January 31, 2019, He repeated his findings and diagnoses.

By decision dated February 25, 2019, OWCP's hearing representative affirmed the August 15, 2018 decision, finding that the medical evidence of record was insufficient to establish a recurrence of a medical condition.

Dr. Wardell continued to submit treatment notes from April 18 through May 30, 2019 diagnosing bilateral carpal tunnel syndrome. On June 4, 2019 he performed a left carpal tunnel release.

On August 26, 2019 appellant requested reconsideration and submitted additional medical evidence.

In an August 16, 2019 report, Dr. Wardell noted that appellant's claim had been accepted for bilateral carpal tunnel syndrome and that she received treatment for this condition through 2012. He opined with a reasonable degree of medical certainty that appellant's left carpal tunnel syndrome and surgical release were due to her accepted employment injury.

By decision dated September 19, 2019, OWCP denied modification of its prior decisions.

On October 30, 2019 appellant requested reconsideration. She alleged that her current condition was the result of her accepted employment injury and submitted additional medical evidence.

In an October 22, 2019 report, Dr. Wardell diagnosed left carpal tunnel syndrome due to appellant's employment injury, that she did not receive medical treatment after Dr. Knauff's retirement, and that she had continued to perform the work-related activities which caused her initial left carpal tunnel syndrome. He explained that the median nerve was sensitive to any pressure, and that pressure to this nerve was caused by the swelling of the tendons due to appellant's initial work activities. Dr. Wardell opined that the scarring of her median nerve due to the tendon swelling was a permanent condition causing chronic median nerve irritation. He found that appellant's initial work-related carpal tunnel syndrome had not resolved.

By decision dated December 19, 2019, OWCP denied modification of its prior decisions.

On March 3, 2020 appellant requested reconsideration and provided additional medical evidence. In a report dated February 3, 2020, Dr. Wardell opined that appellant did not experience a recurrence of her medical condition as there was never any symptomatic relief and that her current symptoms were a continuation of her accepted conditions.

By decision dated April 30, 2020, OWCP denied modification of its prior decisions.

OWCP continued to receive medical evidence. On May 19, 2020 appellant underwent an additional EMG test which demonstrated improved left carpal tunnel syndrome and progression of her right carpal tunnel syndrome. In a report dated May 13, 2020, Dr. Wardell opined that appellant had never been asymptomatic from her work-related carpal tunnel syndrome. He noted that she had developed right and left basal joint arthritis which could aggravate her preexisting median neuropathy. Dr. Wardell attributed appellant's current condition in part to her arthritis.

On October 19, 2020 appellant, through counsel, requested that OWCP reopen the administratively-closed claim. He asserted that there was no requirement that shifted the burden to a claimant to prove reentitlement to medical benefits after an administrative closure and contended that OWCP had the burden of proving that a claimant's medical condition had resolved prior to terminating medical benefits.

On April 23, 2021 appellant, through counsel, requested reconsideration. He again contended that there was no requirement that a claimant prove a material worsening of her condition in order to reopen her claim for medical care following the administrative closure of her claim. Counsel asserted that OWCP had not met its burden of proof to close her claim and that it had the burden of proving that a claimant's medical condition had resolved prior to terminating medical benefits. He asserted that there was no authority for the proposition that a lengthy gap in treatment provided a basis for denying medical care for an administratively closed claim and that the burden of proof did not shift to appellant.

In a March 3, 2021 report, Dr. Wardell opined that appellant's left carpal tunnel syndrome progressively worsened as a result of her original work injury of 2005 without any intervening event and resulted in the need for a left carpal tunnel release in 2019. He further noted that EMG testing demonstrated a progression of her right carpal tunnel syndrome which was a natural consequence of her work-related injury due to scarring and swelling causing nerve irritation without intervening injury.

By decision dated June 29, 2021, 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.³

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.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).

On reconsideration, counsel argued that OWCP improperly required appellant to establish a recurrence of a medical condition following the administrative closure of her claim. It is the

³ 5 U.S.C. § 8128(a); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

⁴ 20 C.F.R. § 10.606(b)(3); *see P.M., id., J.W.*, Docket No. 19-1795 (issued March 13, 2010); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *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.

⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

employee's burden of proof to establish that he or she sustained a recurrence of a medical condition that is causally related to his or her accepted employment injury without intervening cause.⁸ Thus, counsel's argument that OWCP had the burden of proof lacks merit. The Board therefore finds that the appellant's request for reconsideration does not show that OWCP erroneously applied or interpreted a specific point of law. Counsel also did not advance a relevant legal argument not previously considered by OWCP. Consequently, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).⁹

Appellant also failed to submit relevant and pertinent new evidence in support of her April 23, 2021 request for reconsideration. OWCP received May 13, 2020 and March 3, 2021 reports from Dr. Wardell which merely reaffirmed his earlier conclusions. While these reports are new, they are substantially similar to the prior evidence of record wherein Dr. Wardell opined that appellant's current conditions were causally related to her accepted employment injuries. As noted, medical evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.¹⁰ As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹¹

Accordingly, the Board 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.¹²

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 *A.M.*, Docket No. 22-0322 (issued November 17, 2022); *T.V.*, Docket No. 17-0581 (issued June 13, 2017) (the Board found that OWCP did not terminate medical benefits, but instead found that the claimant was not entitled to medical benefits due to a recurrence of a medical condition. It determined that the issue was whether the claimant had established a need for further medical treatment due to a recurrence of her accepted work injury and was medical in nature and can only be resolved through the submission of probative medical evidence from a physician.). *D.W.*, Docket No. 11-1499 (issued December 2, 2012).

⁹ 20 C.F.R. § 10.608(b)(3); see also *H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁰ See *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹¹ *S.H.*, Docket No. 19-1897 (issued April 21, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹² See *D.S.*, Docket No. 18-0353 (issued February 18, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2023
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board