

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

B.M., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Orlando, FL, Employer)
-----)

**Docket No. 22-1331
Issued: March 13, 2023**

Appearances:

Wayne Johnson, 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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 19, 2022 appellant, through counsel, filed a timely appeal from a March 23, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 18, 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 over the merits of this case.³

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 an 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.*

³ The Board notes that, following the March 23, 2022 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.*

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 February 20, 2019 appellant, then a 43-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on February 13, 2019 she injured her right arm from the wrist to the elbow when she was excessively lifting and pulling bags onto a search table while in the performance of duty. She did not stop work.

In a medical report dated February 14, 2019, Dr. German Calero, a family physician, noted that appellant related complaints of right wrist pain, which she attributed to a lifting injury at work on February 13, 2019. He performed a physical examination and noted pain in the right elbow and wrist, without deformity. Dr. Calero reviewed x-rays of the right wrist, which he found to be normal, and diagnosed sprains of the right wrist and elbow. He recommended a wrist brace and restrictions of no lifting, pushing, or pulling with the right hand. In a state workers' compensation form report of even date, Dr. Calero checked a box marked "Yes" indicating that the diagnosed conditions were work related, and checked a box marked "No" indicating that appellant did not have any preexisting conditions contributing to her current medical disorder.

In a report dated February 15, 2019, Dr. Mohammed Bawany, an internist, indicated that appellant related complaints of right wrist, neck, and back pain sustained during an accident.

In a form report dated February 22, 2019, Bettye Brown, a nurse, recommended ongoing restrictions for appellant's right hand.

In a report dated February 25, 2019, Dr. Bawany indicated that appellant related complaints of pain and swelling in the right wrist. He performed a physical examination and diagnosed an injury of the right wrist and swelling of the right hand. Dr. Bawany recommended that appellant remain out of work for seven days and referred her to an orthopedic specialist for evaluation of her right wrist complaints. In a state workers' compensation form report of even date, he checked a box marked "Yes" indicating that the diagnosed conditions were work related, and checked a box marked "No" indicating that she did not have any preexisting conditions contributing to her current medical disorder.

In a follow-up report dated March 5, 2019, Dr. Bawany diagnosed unspecified sprains of the right wrist and elbow, an unspecified injury of the right wrist, hand, and fingers, and localized swelling, mass, and lump of the right upper limb. He again recommended an orthopedic consultation.

OWCP also received documentation of pain medication injections dated February 15, 20, and 25, 2019 and a March 20, 2019 letter of controversion from the employing establishment.

In an April 2, 2019 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested information.

OWCP thereafter received a March 4, 2019 report by Dr. Bawany, who again diagnosed swelling of the right hand and an injury to the right wrist.

In a report dated March 18, 2019, Dr. Nathan Hill, Jr., a Board-certified orthopedic surgeon, noted that appellant related complaints of right forearm pain, which she attributed to lifting and pulling luggage on February 13, 2019. He performed an examination, which revealed mild tenderness over the medial and lateral epicondyles and olecranon at the right elbow and tenderness with forced extension of the right wrist. Dr. Hill diagnosed medial and lateral epicondylitis of the right elbow and pain in the right forearm. He administered an injection and referred appellant for physical therapy.

Appellant underwent physical therapy treatment to her right forearm on April 10, 2019.

By decision dated May 16, 2019, OWCP denied appellant's claim, finding that she had not submitted sufficient evidence to establish that the events occurred, as alleged. Consequently, it found that she had not met the requirements to establish an injury as defined by FECA.

OWCP continued to receive evidence, including a temporary modified-duty job offer for an exit lane assistant, which appellant accepted on March 20, 2019.

In a May 9, 2019 follow-up report, Dr. Hill noted that appellant related that the injection had not provided any relief. He performed a physical examination and diagnosed right lateral and medial epicondylitis and continued pain. Dr. Hill recommended ongoing physical therapy and a magnetic resonance imaging (MRI) scan of the right elbow.

On June 17, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a note dated September 17, 2019, Dr. Hill released appellant to return to work without restrictions.

A hearing was held telephonically on October 10, 2019. Appellant testified that on February 13, 2019 two conveyor belt machines had broken down, so she had to constantly move, lift, and pull bags from the belt to transfer them onto a table. She noticed pain in the right elbow and forearm at the end of the day and developed swelling the next day.

By decision dated December 23, 2019, OWCP's hearing representative modified the December 3, 2019 decision to find that appellant had established that she was lifting, pulling, and carrying bags on February 13, 2019 and that a medical condition had been diagnosed. However, the claim remained denied as the evidence of record was insufficient to establish causal relationship between appellant's diagnosed condition and the accepted February 13, 2019 employment incident.⁴

On December 23, 2020 appellant, through counsel, requested reconsideration of OWCP's December 23, 2019 decision. In support of the request, she submitted notes dated June 6 through

⁴ OWCP assigned the present claim OWCP File No. xxxxxx254. Appellant has a previously accepted May 2, 2016 traumatic injury claim for acute right wrist strain under OWCP File No. xxxxxx696. In the December 23, 2019 decision, OWCP's hearing representative recommended that OWCP File Nos. xxxxxx254 and xxxxxx696 be administratively combined. The claims have not been administratively combined by OWCP.

August 9, 2019 by Dr. Hill, who recommended ongoing physical therapy and work restrictions, and a September 13, 2019 follow-up report by him, which indicated that appellant reported no pain, popping, clicking, or weakness and released her to return to full-duty work.

By decision dated March 18, 2021, OWCP denied modification of its December 23, 2019 decision.

On March 18, 2022 appellant, through counsel, requested reconsideration of OWCP's March 18, 2021 decision.

By decision dated March 23, 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 request for reconsideration neither raised substantial legal questions, nor included new or relevant evidence.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ 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.⁷

A timely request for reconsideration, including all supporting documents, must set forth arguments, and contain evidence that either: (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.⁸ When a timely request 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.⁹

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 has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, she has not advanced a relevant legal argument not previously

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 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 (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.

⁸ *Id.* at § 10.606(b)(3); *see L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

⁹ *Id.* at § 10.608.

considered. 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).¹⁰

In support of her request for reconsideration, appellant also did not submit any new and relevant medical evidence. The underlying issue on reconsideration is whether she has met her burden of proof to establish a medical condition causally related to the accepted February 13, 2019 employment incident. This is a medical issue which can only be addressed by submission of rationalized medical evidence not previously considered.¹¹ Thus, appellant is not entitled to further review of the merits of her claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹²

The Board, therefore, 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 her claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹¹ *F.L.*, Docket No. 20-1288 (issued July 13, 2021); *D.P.*, Docket No. 20-1225 (issued January 8, 2021); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *T.B.*, Docket No. 18-1214 (issued January 29, 2019).

¹² *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 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