

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

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J.D., Appellant )

and )

DEPARTMENT OF THE INTERIOR, )  
NATIONAL PARK SERVICE, Frederick, MD, )  
Employer )  
\_\_\_\_\_ )

**Docket No. 23-0489**  
**Issued: November 17, 2023**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On February 25, 2023 appellant filed a timely appeal from a January 5, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated December 21, 2021, 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 over the merits of this case.<sup>2</sup>

**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.*

<sup>2</sup> The Board notes that, following the January 5, 2023 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 July 14, 2020 appellant, then a 39-year-old exhibits specialist, filed a traumatic injury claim (Form CA-1) alleging that on June 29, 2020 he injured his neck and shoulder when he carried a stone and lost his footing while in the performance of duty. He stopped work on July 22, 2020 and returned to modified-duty work with restrictions, effective August 25, 2020.

In a report dated July 6, 2020, Nilima Shrestha, a nurse practitioner, indicated that appellant related complaints of neck, left shoulder, and upper back pain, which he attributed to lifting a heavy stone at work. She noted that he lost his footing and jerked forward with the heavy weight. Ms. Shrestha performed a physical examination, which revealed decreased range of motion and pain with left lateral rotation and flexion of the neck and decreased range of motion and tenderness to palpation of the thoracic paraspinal muscles. She obtained an x-ray of appellant's cervical spine, which revealed degenerative changes. Ms. Shrestha diagnosed cervicgia and muscle strain, and recommended medication and no heavy lifting for one week.

In an emergency room report dated July 15, 2020, Dr. Danielle C. Belser, a Board-certified emergency medicine specialist, noted that appellant related complaints of worsening pain across the left trapezius into the left posterior shoulder and radiating down the left arm, which he attributed to a work-related injury on June 29, 2020. She performed a physical examination, which revealed tenderness over the left paraspinal cervical muscle, left trapezius, and left posterior shoulder. Dr. Belser diagnosed cervical radiculopathy and muscle spasms of the neck.

In a July 22, 2020 medical report, Dr. Laura S. Copaken a Board-certified orthopedic surgeon, noted that appellant related complaints of neck pain radiating down his left arm with occasional numbness and tingling in the left fingertips, which he attributed to lifting a heavy stone at work. She performed a physical examination, and documented spasm and reduced range of motion in the neck, decreased sensation on the left in the C7 dermatomal distribution, and a positive Spurling's maneuver on the left. Dr. Copaken diagnosed cervical radiculopathy, degeneration of cervical intervertebral disc, muscle spasm of cervical muscle, and muscle atrophy. She recommended that appellant remain out of work for two weeks due to the side effects of medication, and referred him for magnetic resonance imaging (MRI) scan of the cervical spine.

A July 27, 2020 report of MRI scan of the cervical spine revealed disc protrusions at C3 through C7, anterior cord compression at C3-4 and C5-6, an annular tear at C5-6, and findings consistent with left-sided radiculopathy at C5 and C7.

In a July 28, 2020 follow-up report, Dr. Copaken reviewed appellant's MRI scan results and diagnosed cervical muscle spasm, cervical intervertebral disc degeneration, and cervical radiculopathy. She recommended physical therapy and pain management.

In an August 24, 2020 report, Dr. Mark D. Chilton, a Board-certified orthopedic surgeon, noted that appellant related his symptoms had improved with at-home cervical traction and physical therapy. He performed a physical examination and diagnosed a resolving C6 radiculopathy on the left.

OWCP also received physical therapy records for dates of service from August 4 through 20, 2020.

In a September 10, 2020 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence necessary and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested information.

OWCP thereafter received an attending physician's report, Part B of an Authorization for Examination and/or Treatment (Form CA-16), dated July 7, 2020 by Ms. Shrestha, who diagnosed neck and upper back pain after lifting a heavy object. Ms. Shrestha checked a box indicating that there was doubt whether appellant's condition was caused by an injury sustained in the performance of duty or was otherwise related to employment.

A July 7, 2020 report of x-rays of the cervical spine revealed endplate and facet joint degenerative changes and disc degeneration at C4-5.

In a July 17, 2020 work note, Ms. Shrestha released appellant to return to work light duty, with no lifting over five pounds until July 28, 2020.

In a July 22, 2020 visit summary, Dr. Isaac Samuel Bruck, an emergency medicine specialist, diagnosed hypertension and trapezius muscle spasm.

OWCP also received a July 30, 2020 initial evaluation physical therapy report.

In an August 24, 2020 form report, Dr. Chilton diagnosed left C6 radiculopathy and checked a box marked "Yes" indicating that the condition was a work-related injury. He released appellant to return to work with no climbing and no lifting over 10 pounds and no repetitive activity with the left upper extremity.

In an October 13, 2020 response to OWCP's development questionnaire, appellant indicated that on June 29, 2020 he laid stones that weighed approximately 175 pounds. While doing so, he lost his footing and jerked his neck. Appellant related that he experienced immediate pain in the left side of his back.

In an October 19, 2020 witness statement, E.A., appellant's coworker, indicated that he observed appellant lift pieces of flagstone pavers and that he appeared to be in obvious pain.

Dr. Chilton, in an October 20, 2020 follow-up report, noted appellant's complaints and examination findings. He diagnosed resolved C6 radiculopathy and opined that the work injury was consistent with the early clinical examination findings. Dr. Chilton further opined that appellant had reached maximum medical improvement, released appellant to full duty, and discharged him from care. In a form report of even date, he diagnosed left C6 radiculopathy and checked a box marked "Yes" indicating that the diagnosed condition was a work-related injury.

By decision dated October 21, 2020, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed neck and left upper extremity conditions and the accepted June 29, 2020 employment incident. Consequently, it found that the requirements had not been met to establish an injury.

OWCP continued to receive evidence. In a July 22, 2020 medical report, Dr. Bruck noted the history of the June 29, 2020 employment injury, appellant's subjective complaints, and his physical examination findings. He diagnosed trapezius muscle strain and hypertension.

On September 23, 2021 appellant, through counsel, requested reconsideration of OWCP's October 21, 2020 decision. In support of the request, appellant submitted a September 8, 2021 report by Dr. Brian R. Subach, a Board-certified neurosurgeon. Dr. Subach noted that appellant began experiencing pain in his neck, upper back, and left upper extremity after appellant lost his footing while carrying a 175-pound stone, which caused a forceful jerk on his neck. He reviewed his medical records and diagnostic testing. Dr. Subach diagnosed strain and muscle spasm of the neck, muscle spasm of the trapezius muscle, muscle atrophy, and cervical disc protrusion, radiculopathy, degeneration, and stenosis. He opined that the June 29, 2020 employment incident caused the diagnosed conditions. Dr. Subach explained that the muscles and tendons in the neck were stretched, which caused tearing and strain, and that the forceful jerking of appellant's neck caused a whiplash motion that placed an unnatural amount of force on the discs in his neck, causing compression in the spinal canal and disc protrusion. He further explained that the disc protrusion resulted in compression and irritation of the cervical nerve roots, which resulted in cervical radiculopathy. Dr. Subach recommended that appellant continue physical therapy and other conservative treatment, and released him to return to work with no lifting or carrying greater than 20 pounds and minimal bending and twisting motions of the neck.

By decision dated December 21, 2021, OWCP denied modification of its October 21, 2020 decision.

On December 20, 2022 appellant, through counsel, requested reconsideration. In support thereof, appellant submitted a physical therapy report dated April 11, 2022 and a June 3, 2022 report of electromyography and nerve conduction (EMG/NCV) study of the upper extremities, which revealed evidence of possible chronic left C5 and C6 polyradiculopathies. He also submitted a June 24, 2022 report by Dr. Jonathan H. Sherman, a Board-certified neurosurgeon, who noted that appellant related complaints of left upper extremity pain and radicular symptoms. Dr. Sherman documented his physical examination findings and reviewed the MRI scan and EMG/NCV results. He diagnosed left C5 and C7 radiculopathies and ordered an epidural interlaminar C6-7 injection.

By decision dated January 5, 2023, 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 does not entitle a claimant the review of an OWCP decision as a matter of right.<sup>3</sup> OWCP has discretionary authority in this regard and has imposed certain

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<sup>3</sup> 5 U.S.C. § 8128(a).

limitations in exercising its authority.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</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 has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>8</sup>

Appellant also did not submit any relevant and pertinent new evidence with his December 20, 2022 request for reconsideration. In support of his timely request, he submitted a June 24, 2022 report, wherein Dr. Sherman diagnosed left C5 and C7 radiculopathies and ordered an epidural interlaminar C6-7 injection. However, Dr. Sherman did not provide an opinion on causal relationship. The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>9</sup> Appellant also submitted a report of EMG/NCV and physical therapy records. The Board has held, however, that diagnostic studies, standing alone, and lack probative value and are insufficient to establish the claim.<sup>10</sup> In addition, certain health care providers, such as physical therapists, are not considered physicians

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<sup>4</sup> 20 C.F.R. § 10.607.

<sup>5</sup> *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 (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>6</sup> *Id.* at § 10.606(b)(3); *see R.M.*, Docket No. 23-0748 (issued October 30, 2023); *L.F.*, Docket No. 20-1371 (issued March 12, 2021); *B.R.*, Docket No. 19-0372 (issued February 20, 2020).

<sup>7</sup> *Id.* at § 10.608.

<sup>8</sup> *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>9</sup> *C.C.*, Docket No. 22-1064 (issued February 14, 2023); *L.W.*, Docket No. 21-0942 (issued May 11, 2022); *see F.H.*, Docket No. 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 ECB 140(2000); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>10</sup> *J.K.*, Docket No. 20-0591 (issued August 12, 2020); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

under FECA<sup>11</sup> and, therefore, their opinions on causal relationship do not constitute rationalized medical opinions and are of no probative value.<sup>12</sup> Therefore, although the evidence submitted on reconsideration is new, it does not constitute relevant medical evidence warranting a review of the merits of appellant's claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3). Consequently, appellant is not entitled to further review of the merits of his claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).<sup>13</sup>

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.<sup>14</sup>

### 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>11</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. § 8101(2); 20 C.F.R. § 10.5(t). *See also supra* note 5 at Chapter 2.805.3a(1) (January 2013); *A.M.*, Docket No. 20-1575 (issued May 24, 2021) (physical therapists are not physicians as defined by FECA); *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).

<sup>12</sup> *See J.F.*, Docket No. 19-1694 (issued March 18, 2020); *A.A.*, Docket No. 19-0957 (issued October 22, 2019); *Jane A. White*, 34 ECAB 515, 518 (1983).

<sup>13</sup> 20 C.F.R. § 10.606(b)(3); *see also supra* note 9.

<sup>14</sup> *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 5, 2023 decision of the Office of Workers' Compensation Programs is affirmed.<sup>15</sup>

Issued: November 17, 2023  
Washington, DC

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

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

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

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<sup>15</sup> The Board notes that a completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *V.S.*, Docket No. 20-1034 (issued November 25, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).