

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

E.S., Appellant)	
)	
and)	Docket No. 23-0698
)	Issued: November 6, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
DURHAM VA MEDICAL CENTER,)	
Durham, NC, Employer)	

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 April 19, 2023 appellant filed a timely appeal from a January 3, 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 January 28, 2022, 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 this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 3, 2023 decision, appellant submitted additional evidence to OWCP. However, 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 October 5, 2021 appellant, then a 49-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on September 24, 2021 he sustained an injury to his back when assisting in repositioning a patient while in the performance of duty. He did not immediately stop work.

On October 11, 2021 Dr. Trevor Carroll, a Board-certified orthopedist, treated appellant for lumbar and thoracic spine pain. Appellant reported that on September 24, 2021 while assisting with repositioning a patient he experienced low back, upper back, neck, and arm pain, numbness and tingling in his arms and neck, and weakness in his thighs. Dr. Carroll observed findings on physical examination of left paraspinal tenderness in the lumbar spine. An x-ray of the lumbar spine of even date revealed retrolisthesis of L4-5. Dr. Carroll diagnosed thoracic back pain and lumbar radiculopathy and opined that appellant sustained a work injury on September 24, 2021 while lifting a patient. He returned appellant to light-duty work. On November 22, 2021 Dr. Carroll treated appellant in follow up for low back pain and scapulalgia. Appellant reported attending physical therapy and continued to have significant low back and leg pain. Dr. Carroll diagnosed scapulalgia and low back pain.) In a December 7, 2021 report, he related that appellant was still having back and shoulder pain and parasthesias. Dr. Carroll noted reviewing the magnetic resonance imaging (MRI) scan of the scapula and lumbar spine. He diagnosed lumbar radiculopathy and recommended a treatment plan of intra-articular injection and nerve root block.

An MRI scan of the lumbar spine dated November 30, 2021 demonstrated rightward mixed protrusion at L4-5, moderate right lateral recess, broad-based spondylotic protrusion, endplate ridging, facet hypertrophy, ligamentum flavum buckling and short pedicles at L4-5, concentric protrusion, endplate hypertrophy, facet hypertrophy, ligamentum flavum buckling at L3-4, edema changes in the superior aspect of L4 and right pedicle of L3 and L4, degenerative marrow changes, and stress or insufficiency injury present. An MRI scan of the left scapula of even date demonstrated no scapula fracture and no acute traumatic injury.

In a December 22, 2021 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of additional factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

By decision dated January 28, 2022, OWCP denied appellant's traumatic injury claim, finding that the medical evidence submitted was insufficient to establish a medical condition causally related to the accepted September 24, 2021 employment incident.

On December 19, 2022 appellant requested reconsideration and submitted additional evidence.

In an emergency department triage note, Summer Lillie, of unidentified specialty, treated appellant on September 25, 2021 for persistent back pain after a work injury.

Appellant submitted reports from Dr. Carroll dated October 11, November 22, and December 7, 2021; MRI scans dated November 30, 2021; and a copy of OWCP's January 28, 2022 decision, all previously of record.

On January 14, 2022 Dr. Deitra Williams-Toone, a Board-certified anesthesiologist, performed a lumbar intra-articular injection at L5-S1 and S1. She diagnosed lumbar radiculitis.

In a January 31, 2022 report, Dr. Carroll related that appellant's continued complaints of low back pain radiating down the right leg and scapulargia. He reported temporary relief in symptoms after the intra-articular injections at L5-S1. Dr. Carroll diagnosed right-sided L5-S1 disc herniation. He recommended physical therapy and medication, and released appellant to modified-duty work.

In a work status note dated August 3, 2022, Amanda Upchurch, a nurse practitioner, released appellant to work with restrictions.

In an undated statement, appellant indicated that he sustained a work-related injury and requested that his claim be reopened and accepted by OWCP.

By decision dated January 3, 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 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 or her 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

³ 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *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. 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 *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

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 his claim, pursuant to 5 U.S.C. § 8128(a).

With his timely request for reconsideration, appellant provided an undated statement, and indicated that he sustained a work-related injury and requested that his claim be reopened and accepted by OWCP. His reconsideration request does not advance a new legal argument not previously considered, nor show that OWCP erroneously applied or interpreted a specific point of law. The Board finds that the arguments made by appellant in his statement on reconsideration were cumulative, duplicative, or repetitive in nature and were insufficient to warrant reopening the claim for merit review.⁸ Thus, 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).⁹

In support of his request for reconsideration, appellant resubmitted reports from Dr. Carroll dated October 11, November 22, and December 7, 2021 and MRI scans dated November 30, 2021. The Board finds that submission of this evidence does not require reopening appellant's case for merit review, because it was previously considered by OWCP, and therefore does not constitute pertinent new and relevant evidence. As these reports repeat evidence already in the case record, it is cumulative, and does not constitute relevant and pertinent new evidence. The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the record does not constitute a basis for reopening a claim.¹⁰ Therefore, it is insufficient to require OWCP to reopen the claim for consideration of the merits. Appellant also submitted a report from Dr. Williams-Toone dated January 14, 2022, who performed a lumbar transforaminal epidural steroid injection at L5-S1 and S1 and diagnosed lumbar radiculitis. While this evidence is new, it is not relevant as it does not address the underlying issue of causal relationship between appellant's diagnosed medical conditions and the accepted September 24, 2021 employment incident. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ As such, this evidence is insufficient to warrant merit review. Appellant also submitted a January 31, 2022 report from Dr. Carroll. While this evidence is new, it is substantially similar to previous reports from Dr. Carroll dated October 11, November 22, and December 7, 2021, which were previously considered by OWCP in its January 28, 2022 decision. As noted above, the Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already

⁷ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *J.V.*, Docket No. 19-1554 (issued October 9, 2020); *see T.B.*, Docket No. 16-1130 (issued September 11, 2017); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁹ *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹¹ *J.R.*, Docket No. 19-1280 (issued December 4, 2019); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

in the record does not constitute a basis for reopening a claim.¹² As such, this evidence is insufficient to warrant merit review. Appellant also submitted a work status note from Ms. Upchurch, a nurse practitioner, and an emergency department triage note from Ms. Lillie, of unidentified specialty.¹³ This evidence is irrelevant to the underlying issue as the Board has held that treatment notes signed by a nurse practitioner¹⁴ or a provider of an unidentified healthcare specialty are not considered medical evidence as these providers are not physicians under FECA¹⁵ and are not competent to render a medical opinion under FECA. As such, this evidence is insufficient to warrant merit review. Because appellant has not provided relevant and pertinent new evidence, he was not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁶

The Board, accordingly, finds that appellant has not met any of the requirements under 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).

¹² *S.F.*, *supra* note 10.

¹³ *See R.M.*, 59 ECAB 690 (2008); *Bradford L. Sullivan*, 33 ECAB 1568(1982) (where the Board held that a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a "physician" as defined in FECA).

¹⁴ *J.D.*, Docket No. 16-1752 (issued March 1, 2017) (where the Board found that a nurse practitioner is not considered a physician under FECA, thus, her opinion is of no relevance to the issue of causal relationship).

¹⁵ Section 8102(2) of FECA provides as follows: (2) 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 supra* note 5 at 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 S.S.*, Docket No. 21-1140 (issued June 29, 2022) (physician assistants are not considered physicians under FECA and are not competent to provide medical opinions); *George H. Clark*, 56 ECAB 162 (2004) (physician assistants are not considered physicians under FECA).

¹⁶ *See* 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 6, 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