

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

_____	)	
<b>J.C., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 23-0755</b>
	)	<b>Issued: October 2, 2023</b>
<b>U.S. POSTAL SERVICE, U.S. POSTAL INSPECTION SERVICE, Cleveland, OH, Employer</b>	)	
_____	)	

*Appearances:* *Case Submitted on the Record*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

**DECISION AND ORDER**

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

**JURISDICTION**

On May 1, 2023 appellant, through counsel, filed a timely appeal from a February 1, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

---

<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that counsel only appealed from OWCP's February 1, 2023 nonmerit decision. Although OWCP's January 9, 2023 merit decision is within the Board's jurisdiction, counsel did not appeal from that decision. Therefore, the Board will not address the January 9, 2023 merit decision in this appeal. 20 C.F.R. § 501.3(c)(4); *see D.K.*, Docket No. 22-0111 (issued February 8, 2023); *E.R.*, Docket No. 20-1110 (issued December 23, 2020).

## 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).

## FACTUAL HISTORY

On May 10, 2022 appellant, then a 51-year-old postal police officer, filed an occupational disease claim (Form CA-2) alleging that he sustained lower back and left leg conditions due to factors of his federal employment, including wearing heavy gear/equipment, and vibrations from driving a patrol vehicle. He noted that he first became aware of his condition on April 15, 2016 and realized its relation to factors of his federal employment on April 11, 2022.

OWCP received appellant's April 30, 2022 narrative statement. Appellant related that in 2013 he transitioned to a police officer position from his prior 17-year position as a sales and service distribution associate. He further related that he underwent an unsuccessful lumbar surgical procedure in 2016. By 2019 appellant indicated that he experienced debilitating pain after driving a patrol response vehicle and wearing duty gear.

In an undated report, Dr. Eugene Mennow, a chiropractor, reported that appellant had been a patient for lower back pain since January 14, 2021 and that he had a history of lumbar surgery in 2016. He noted appellant's treatments and that working caused an increase in appellant's left leg pain symptoms. Dr. Mennow opined that it was likely that carrying extra weight around the trunk caused an increased strain in the lumbar spine and contributed to further deterioration of appellant's previous lumbar condition.

In an April 11, 2022 report, Dr. Gabriel A. Smith, a Board-certified neurosurgeon, provided a history of appellant's lumbar condition and medical course. He noted a prior L5-S1 laminectomy. Based on his examination and a review of a magnetic resonance imaging (MRI) scan, Dr. Smith assessed left lumbar radiculopathy.

In a development letter dated May 18, 2022, OWCP informed appellant of the deficiencies in his claim. It informed him of the type of additional factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In an undated report, Dr. Kyle J. Wear, an internist, provided a timeline of appellant's visits for complaints of back pain. He indicated that appellant currently worked as a police officer and was required to wear 26 pounds of equipment/protective gear daily for his job. Dr. Wear opined that the strain from the weight of that equipment had likely contributed to/exacerbated appellant's chronic low back pain.

By decision dated July 14, 2022, OWCP denied appellant's occupational disease claim, finding that he had not established that a medical condition was diagnosed in connection with the claimed work factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 5, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on December 8, 2022. OWCP received a November 3, 2022 report, wherein Dr. Wear addressed

appellant's diagnosed lumbar radiculopathy. He indicated that he first examined appellant on March 1, 2019. Dr. Wear noted that appellant's work as a police officer required him to wear approximately 26 pounds of gear daily. He opined that the daily weight of this gear caused an exacerbation of appellant's radicular symptoms.

By decision dated January 9, 2023, OWCP's hearing representative modified the July 14, 2022 decision finding that appellant had established a medical diagnosis. However, the claim remained denied, as the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed medical condition and the accepted employment factors. The hearing representative noted that no additional evidence had been received.

On January 23, 2023 appellant, through counsel, requested reconsideration.

Appellant resubmitted a copy of Dr. Wear's November 3, 2022 report.

By decision dated February 1, 2023, OWCP denied appellant's request for reconsideration, of the merits of his claim, pursuant to 5 U.S.C. § 8128(a). It found Dr. Wear's November 3, 2022 report to be repetitious because it "was previously received on December 6, 2022, prior the January 9, 2023 decision."

### **LEGAL PRECEDENT**

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>4</sup>

Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>5</sup> This section provides that the request for reconsideration must be submitted in writing and set forth arguments and contain evidence that: (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> Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>7</sup>

---

<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.608(a).

<sup>6</sup> *Id.* at § 10.606(b)(3); *see R.T.*, Docket No. 22-1305 (issued April 5, 2023); *L.D.*, Docket No. 18-1468 (issued February 11, 2019).

<sup>7</sup> *Id.* at § 10.608(b); *J.B.*, Docket No. 20-0145 (issued September 8, 2020); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>9</sup> 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.<sup>10</sup>

### ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

On reconsideration, appellant resubmitted the November 3, 2022 report of Dr. Weaver. While this evidence was previously of record, it was not previously considered or addressed by the hearing representative in the January 9, 2023 decision. The Board has held that to support a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>11</sup> He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.<sup>12</sup> The Board finds that Dr. Wear's November 3, 2022 report constitutes relevant and pertinent new evidence not previously considered by OWCP. Therefore, the Board finds that appellant is entitled to a review of the merits based on the third requirement of 20 C.F.R. § 10.606(b)(3).<sup>13</sup> Accordingly, the Board will set aside OWCP's February 1, 2023 decision, and remand the case for an appropriate merit decision.

### CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

---

<sup>8</sup> *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 (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>9</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>10</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>11</sup> *See L.W.*, Docket No. 22-0546 (issued January 20, 2023); *L.O.*, Docket No. 21-0030 (issued May 19, 2022); *Annette Louise*, 54 ECAB 783 (2003).

<sup>12</sup> *Id.*

<sup>13</sup> 20 C.F.R. § 10.606(b)(3); *see I.V.*, Docket No. 21-1356 (issued February 9, 2023); *L.D.*, Docket No. 22-0214 (issued September 21, 2022); *M.N.*, Docket No. 22-0243 (issued June 28, 2022); *see also S.C.*, Docket No. 20-1661 (issued May 6, 2022); *J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 1, 2023 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 2, 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