

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

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**D.B., Appellant** )

**and** )

**DEPARTMENT OF JUSTICE, FEDERAL** )  
**BUREAU OF PRISONS, FEDERAL** )  
**CORRECTIONAL INSTITUTION MILAN,** )  
**Milan, MI, Employer** )  
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**Docket No. 22-0502**  
**Issued: September 21, 2023**

*Appearances:*  
*Haley Kozuch, Esq., for the appellant*<sup>1</sup>  
*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  
JANICE B. ASKIN, Judge

**JURISDICTION**

On February 16, 2022 appellant, through counsel, filed a timely appeal from an August 25, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days has elapsed from the last merit decision dated June 5, 2020 to the filing of this

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<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 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.

<sup>2</sup> The Board notes that during the pendency of this appeal, OWCP issued a March 24, 2022 nonmerit decision denying appellant's December 28, 2021 request for reconsideration. OWCP's March 24, 2022 decision is null and void as the Board and OWCP may not simultaneously exercise jurisdiction over the same underlying issue in a case on appeal. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see e.g., M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004); *Douglas E. Billings*, 41 ECAB 880 (1990).

appeal, pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

### **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 April 20, 2018 appellant, then a 56-year-old cook supervisor, filed an occupational disease claim (Form CA-2) alleging that she developed injuries to her feet, legs, hips, and back due to factors of her federal employment, including loading and pushing heavy duty food carts, prolonged standing, walking, running, and emptying trash. She noted that she first became aware of her condition on June 1, 2000 and realized its relationship to her federal employment on July 1, 2014. Appellant did not stop work.

On June 21, 2018 OWCP accepted appellant's claim for an aggravation of osteoarthritis of the right and left feet.

Appellant subsequently filed claims for compensation (Form CA-7) for disability from work during the period July 31 through August 29, 2018.

On August 27, 2018 Dr. James Robert Holmes, a Board-certified orthopedic surgeon, ordered custom bilateral orthotics for a diagnosis of midfoot arthritis.

On August 29, 2018 Dr. Renee C. Armstead, Board-certified in family medicine, indicated that appellant was disabled from work from July 30 through August 30, 2018, and could return to work effective August 31, 2018 with restrictions of no lifting over 20 pounds, no standing longer than 30 minutes at a time during an eight-hour workday, no more than 300 feet walking at a time, and no participation in self-defense or firearms training.

On September 6, 2018 appellant filed a Form CA-7 for disability from work commencing August 29, 2018.

In a September 14, 2018 development letter, OWCP advised appellant that it had not received sufficient evidence to support her claim for wage-loss compensation. It informed her of the type of evidence needed to establish her disability claim and afforded her 30 days to submit the necessary evidence.

In a September 5, 2018 report, Dr. Armstead again noted that she recommended appellant remain off work from July 30 through August 30, 2018 due to pain and discomfort as a result of her bilateral midfoot osteoarthritis and calcaneal enthesophytes. She opined that appellant's work

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

duties had aggravated and exacerbated her conditions permanently and would cause her arthritic condition to accelerate if she continued to work.

In an unsigned report dated October 22, 2018, Dr. Kevin Bohnsack, Board-certified in family medicine, diagnosed chronic left-sided low back pain without sciatica, osteoarthritis of the left knee, and a bone spur of the foot. He recommended work restrictions of no lifting more than 20 pounds, no bending, no walking more than 300 feet, and no standing longer than 30 minutes. In a form report of even date, Dr. Bohnsack indicated that appellant should be exempted from annual self-defense and firearms training through September 30, 2019. He diagnosed bone spurs, low back pain, and left knee pain and provided work restrictions.

In a statement dated October 31, 2018, appellant indicated that her feet, ankles, and shins were inflamed, swollen, and weak, and that it was difficult for her to walk. She noted that bone spurs on the top of her feet were growing, making it difficult for her to wear shoes, and that her condition was worsening. Appellant related that her feet throbbed when she sat or reclined and that she also had complaints in the left knee, low back, and hips.

By decision dated November 7, 2018, OWCP denied appellant's claims for disability from work commencing July 31, 2018. It found that the medical evidence of record was insufficient to establish that she was disabled from work during the claimed period due to her accepted employment injury.

OWCP subsequently received a November 15, 2018 report, wherein Dr. Armstead diagnosed bilateral bone spurs in the feet and pain in the low back, left knee, and feet. She opined that appellant was unable to perform her job as a cook supervisor or perform appropriate self-defense movements, noting that her medical conditions impaired her ability to walk. Dr. Armstead found that appellant was incapacitated and had permanent restrictions.

On December 27, 2018 appellant requested reconsideration of the November 7, 2018 decision and submitted additional evidence. In a December 13, 2018 report, Dr. Armstead repeated her findings and added a diagnosis of primary arthritis of the bilateral feet and ankles.

In a memorandum dated December 17, 2018, D.S., an employing establishment safety manager, noted that the employing establishment was not able to accommodate appellant's restrictions due to her accepted employment injuries, and therefore, no light-duty assignment had been offered.

In a memorandum dated December 20, 2018, S.C., the employing establishment's chief of occupational and employee health, advised that based upon a review of Dr. Armstead's November 15, 2018 report, appellant was not fit for duty as a correctional worker and would be unable to hold any position at the employing establishment's institutions.

In a December 21, 2018 report, Dr. Rothenberg indicated that appellant had significant arthritis in her feet, which caused symptoms that included burning, sharp pain, and intermittent swelling. He noted that activity and prolonged standing aggravated her symptoms and that her foot pain and swelling affected her ability to walk. Dr. Rothenberg further found that appellant's gait had changed and that x-rays showed worsening of bony deformities in her feet over the past year. He also indicated that conservative management failed to alleviate her symptoms.

By decision dated March 27, 2019, OWCP denied modification of its November 7, 2018 decision.

OWCP thereafter received a letter dated December 21, 2018, wherein S.F., an employing establishment human resources manager, informed appellant that she was unable to physically perform the law enforcement functions essential to all positions within the correctional facility. Attached to the letter was a portion of an April 13, 2018 report by Dr. Rothenberg, who diagnosed bilateral MTP osteoarthritis, moderate-to-severe midfoot arthrosis with dorsal soft tissue swelling, right foot pes planus deformity, and bilateral dorsal calcaneal enthesophytes. Dr. Rothberg opined that appellant's job duties and shoes had aggravated the conditions in her feet.

In a letter dated May 3, 2019, J.T., the employing establishment warden, indicated that there was no equivalent, vacant, funded, available position outside a correction institution for which appellant would qualify. Therefore, he denied her request for reasonable accommodation reassignment.

On March 16, 2020 appellant requested reconsideration of OWCP's March 27, 2019 decision.

OWCP thereafter received a July 30, 2018 report, wherein Dr. Armstead diagnosed bilateral foot arthritis and recommended appellant remain off work from July 30 through August 30, 2018. She related that prolonged standing worsened appellant's severe osteoarthritis and her ability to ambulate.

In a December 11, 2019 report, Dr. Rothenberg related that appellant's work duties included repetitive motion, pushing heavy carts, prolonged standing, and use of specific shoe gear. He indicated that she had been off work since July 31, 2018 at the recommendation of Dr. Armstead. Appellant's foot pain had lessened due to her reduced activity. Dr. Rothenberg opined that, given the reduction in her foot pain after being off work, her job was a "significant precipitating factor and aggravating factor to her condition."

By decision dated June 5, 2020, OWCP denied modification of its March 27, 2019 decision.

On May 28, 2021 appellant, through counsel, requested reconsideration of the June 5, 2020 decision. Counsel argued that her employment injury permanently prevented her from performing her work duties.

In support of her reconsideration request, appellant submitted a May 27, 2021 report, wherein Dr. Armstead opined that appellant's accepted conditions were permanent and caused severe bilateral foot and ankle pain. She noted that prolonged walking and standing aggravated appellant's foot and ankle pain, and significantly limited her ability to perform her work duties. Dr. Armstead opined that the pain and restrictions caused by her accepted conditions had prevented her from performing her work as a cook supervisor since July 30, 2018. She also noted that she released appellant to return to work as of August 31, 2018 with restrictions intended to prevent her from aggravating her accepted conditions. Dr. Armstead advised that, within reasonable medical certainty, appellant was disabled from work without restrictions from July 30, 2018 and continuing to [the] present."

By decision dated August 25, 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.<sup>4</sup>

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.<sup>5</sup>

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>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</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>8</sup>

### **ANALYSIS**

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

In her timely request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>9</sup>

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<sup>4</sup> 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).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.*; *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

<sup>6</sup> *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.

<sup>7</sup> *Id.* at § 10.608(a); *see also D.B.*, Docket No. 22-0518 (issued November 28, 2022); *Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

<sup>9</sup> 20 C.F.R. § 10.606(b)(3); *see K.F.*, Docket No. 19-1846 (issued November 3, 2020); *L.D., supra* note 4.

The underlying issue on reconsideration is whether appellant had met her burden of proof to establish disability from work for the period claimed causally related to her accepted work-related medical conditions. Along with her May 28, 2021 reconsideration request, she submitted a May 27, 2021 narrative report by Dr. Armstead, who noted that she had recommended appellant remain off work from July 30 through August 31, 2018 due to the accepted conditions of bilateral mid-foot primary osteoarthritis. Thereafter, she released her to return to work with restrictions that would prevent her from further aggravation of her accepted conditions. Dr. Armstead opined that appellant's accepted conditions were permanent and caused symptoms of severe bilateral foot and ankle pain that were aggravated by prolonged walking and standing and significantly limited appellant's ability to perform her duties. She further opined that appellant was disabled from work without restrictions commencing July 30, 2018.

The Board finds that Dr. Armstead's report specifically addressed the underlying issue of whether appellant was disabled from work during the claimed period causally related to the accepted employment injury. As such, the report constitutes relevant and pertinent new evidence not previously of record. Therefore, the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b).<sup>10</sup>

Consequently, the Board will set aside OWCP's August 25, 2021 decision and remand the case for a *de novo* merit decision regarding appellant's disability claim.

### CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>10</sup> See *L.M.*, Docket No. 20-1185 (issued January 13, 2021); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 25, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 21, 2023  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board