

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

D.B., Appellant

and

**U.S. POSTAL SERVICE, ADVANCE POST
OFFICE, Advance, NC, Employer**

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**Docket No. 23-0392
Issued: September 1, 2023**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 24, 2023 appellant filed a timely appeal from a January 17, 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 21, 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.

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 January 15, 2021 appellant, then a 45-year-old postal window servicer, filed an occupational disease claim (Form CA-2) alleging that she sustained a back injury when she had a

¹ 5 U.S.C. § 8101 *et seq.*

seizure while working at the window and fell onto her back. She noted that she first became aware of her condition and first realized its relationship to her federal employment on December 1, 2020. Appellant stopped work on December 2, 2020 and returned to modified-duty work on December 9, 2020.

In a January 22, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of medical and factual evidence needed and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information. It afforded both parties 30 days to respond.

In an after-visit summary note dated December 10, 2020, Dr. David J. Hart, a Board-certified neurological surgeon, indicated that appellant was evaluated for acute exacerbation of back and leg pain after a fall, which was caused by a seizure. He noted a diagnosis of spondylolysis with spondylolisthesis.

In a completed questionnaire dated January 28, 2021, appellant indicated that she was claiming a traumatic injury. She described that she was working at the retail counter when she had a seizure and fell flat on her back. Appellant noted that she was taken to the emergency room by an ambulance.

In a work status note dated February 5, 2021, Kathryn L. Hartgrove, a nurse practitioner, indicated that appellant could return to light-duty work.

By decision dated February 24, 2021, OWCP accepted that the December 1, 2020 employment incident occurred as alleged, but denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical diagnosis in connection with the accepted December 1, 2020 employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On May 11, 2021 appellant requested reconsideration of the February 24, 2021 decision.

In emergency room records dated December 1, 2020, Lauren Parker, a physician assistant, noted appellant's chief complaint of new onset of seizures. She conducted an examination, and indicated that a brain computerized tomography (CT) scan demonstrated no acute intracranial abnormality. Ms. Parker diagnosed seizure-like activity and hypophosphatemia.

Appellant submitted reports dated December 7, 2020 from Margaret M. Bovender, a nurse practitioner, who described the December 1, 2020 employment incident and diagnosed seizure-like activity, injury due to fall, spondylolisthesis and primary osteoarthritis of the right hip.

Appellant submitted additional progress notes dated December 10, 2020 through April 1, 2021 by Dr. Hart. Dr. Hart described that on December 1, 2020 appellant experienced acute exacerbation of back, neck, and leg pain after a fall, apparently caused by a seizure. He indicated that appellant complained of worsening low back pain since the fall. Dr. Hart provided examination findings, discussed diagnostic test findings, and diagnosed back pain, neck pain, and spondylolysis with spondylolisthesis at L5-S1.

OWCP also received a traumatic injury claim (Form CA-1) signed by appellant on December 16, 2020, which noted a December 1, 2020 date of injury.

By decision dated August 2, 2021, OWCP modified its February 24, 2021 decision to reflect that appellant submitted medical evidence establishing a medical diagnosis in connection with the accepted December 1, 2020 employment incident. The claim remained denied, however, because it found that the medical evidence of record was insufficient to establish causal relationship between her diagnosed condition and the accepted December 1, 2020 employment incident.

On October 12, 2021 appellant requested reconsideration of the August 2, 2021 decision.

A lumbar spine x-ray scan dated August 26, 2021 demonstrated disc degeneration at C4-5, C5-6, and C6-7, pedicle screw fusion of L4, L5, and S1, no evidence of significant degenerative changes of the non-fused lumbar spine, and cervical hypolordosis with good range of motion.

In a report dated August 23, 2021, Dr. James Patton, a Board-certified neurologist, recounted appellant's complaints of low back pain radiating to the legs, and described the December 1, 2020 employment incident. He discussed the subsequent medical treatment that appellant received, including diagnostic tests. On examination of appellant's lumbar spine, Dr. Patton observed mild-to-moderate pain on range of motion and positive Kemp, Nachlas, Iliac compression, and Patrick's tests. He opined that appellant's fall at work was caused by vertebrobasilar insufficiency related to hypolordosis of her cervical spine. Dr. Patton explained how appellant's hypolordotic cervical spine posture, weakened muscles, and decreased strength and stability in the atlas and the axial produced increased abnormal movements between these vertebrae, which caused temporary cervical artery impingement leading to the ischemia-induced syncopal episode on December 1, 2020. He reported that appellant fell on her back on the floor, and that her back pain was directly related to the fall and impact of her weight. Dr. Patton diagnosed aggravation of other intervertebral disc degeneration of the lumbar region, aggravation of spinal stenosis of the lumbosacral region, lumbar radiculopathy, syncope and collapse, other cervical disc degeneration at C3-4, C4-5, C5-6, and C6-7, vertebrae osteophyte and unspecified cervical kyphosis.

In a report dated January 15, 2022, Dr. Nizar Souayah, a Board-certified neurologist serving as OWCP's district medical adviser (DMA), described the December 1, 2020 employment incident and the subsequent medical treatment that appellant received. He noted that diagnostic imaging had shown grade II and III spondylolisthesis. Dr. Souayah indicated that he disagreed with Dr. Patton's opinion that appellant developed cervical hypolordosis as a result of her repetitive employment activities. He explained that there was no evidence that vertebrobasilar insufficiency induced appellant's seizure, and that the etiology of loss of consciousness was still unclear. Dr. Souayah opined that appellant did not develop cervical hypolordosis as a result of her repetitive employment activities.

By decision dated January 21, 2022, OWCP denied modification of its August 2, 2021 decision.

On March 24, 2022 appellant requested reconsideration of the January 21, 2022 decision.

Appellant submitted a March 24, 2022 report by Dr. Patton who described the December 1, 2020 employment incident and provided examination findings. Dr. Patton diagnosed aggravation of other intervertebral disc degeneration of the lumbar region, aggravation of spinal stenosis of the lumbosacral region, lumbar radiculopathy, syncope and collapse, other cervical disc degeneration at C3-4, C4-5, C5-6, and C6-7, vertebrae osteophyte and unspecified cervical kyphosis. He again opined that appellant's fall at work was caused by vertebrobasilar insufficiency related to hypolordosis of her cervical spine.

By decision dated June 22, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

On November 18, 2022 appellant requested reconsideration of the January 21, 2022 decision.

By decision dated January 17, 2023, 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.²

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.³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁵ If the request is timely, but fails to meet at least one of the

² 5 U.S.C. § 8128(a); *see A.N.*, Docket No. 20-1487 (issued March 19, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

³ 20 C.F.R. § 10.606(b)(3); *see S.K.*, Docket No. 22-0248 (issued June 27, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁴ *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.

⁵ *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.⁶

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).

In connection with her November 18, 2022 reconsideration request, appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, she did not advance a relevant legal argument not previously considered by OWCP. 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).⁷

Appellant did not submit any evidence to support her November 18, 2022 reconsideration request. Because she has not provided relevant and pertinent new evidence, she was not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).⁸

The Board, accordingly, 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).

⁶ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁷ *Id.* at § 10.606(b)(3); *M.L.*, Docket No. 22-0120 (issued May 12, 2022); *G.K.*, Docket No. 20-1026 (issued December 11, 2020).

⁸ *See D.H.*, Docket No. 22-0875 (issued December 5, 2022); *see also D.J.*, Docket No. 21-0371 (issued November 24, 2021).

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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