

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

D.H., Appellant)	
)	
and)	Docket No. 23-0134
)	Issued: February 14, 2024
U.S. POSTAL SERVICE, POST OFFICE,)	
Silver Spring, MD, Employer)	
)	

Appearances:
Kristin Williams, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 8, 2022 appellant, through her representative, filed a timely appeal from an October 28, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated November 1, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

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 February 10, 2016 appellant, then a 51-year-old carrier technician/letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she cut her right little finger when her glove caught in a door handle while in the performance of duty. She stopped work on February 10, 2016. OWCP accepted the claim for contusion of the right little finger, with damage to the nail and an unspecified sprain of the right little finger. It subsequently expanded its acceptance of the claim to include laceration of the right little finger, without a foreign body or damage; boutonniere deformity of the right finger; lesion of the ulnar nerve of the right upper limb; lesion of the ulnar nerve at an unspecified upper limb; right elbow osteophyte; disorder of the ligament of the right elbow; injury of the cutaneous sensory nerve of the right shoulder and upper arm, initial and subsequent encounter; unspecified mononeuropathy of the right upper limb; unspecified upper limb phantom limb syndrome, with pain; laceration of the extensor muscle, fascia, and tendon of the right little finger at the forearm level; benign neoplasm of the peripheral nerves and autonomic nervous system of the upper limb, including the shoulder; and brachial plexus disorders. OWCP paid appellant wage-loss compensation on the supplemental rolls effective April 7, 2016, and on the periodic rolls effective September 18, 2016.

In a report dated November 1, 2017, Dr. Robert Allen Smith, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant had continued residuals of her lesion of the ulnar nerve in the right upper limb and laceration of the right little finger without nail damage but that the remaining conditions had resolved. He advised that she had no disability and required no further treatment. Dr. Smith further found that appellant had not sustained any conditions other than those already accepted.

In a December 11, 2017 report, Dr. S. Shar Hashemi, a Board-certified surgeon, found that appellant had complex regional pain syndrome with right ulnar submuscular transposition and medial antebrachial cutaneous nerve resection, possible right brachial plexus compression, and possible carpal tunnel syndrome. He diagnosed an injury to the cutaneous sensory nerve of the right shoulder and upper arm and thoracic outlet syndrome. Dr. Hashemi advised that appellant was disabled from work for six weeks.

On September 18, 2018 OWCP determined that a conflict in medical opinion existed between Dr. Hashemi and Dr. Smith. It referred appellant to Dr. Philip D. Bobrow, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 31, 2018, Dr. Bobrow, serving as the impartial medical examiner (IME), advised that a physical examination revealed "relatively minor residual findings" due to the accepted employment injury. He found mild cutaneous sensory changes and some contracture of the proximal interphalangeal joint without evidence of a boutonniere deformity. Dr. Bobrow determined that appellant had residuals of a lesion of the ulnar nerve, but that the remaining conditions had objectively resolved. He found no additional employment-related conditions and

no need for further medical treatment. Dr. Bobrow opined that appellant had no disability due to her employment injury, and could resume her usual work duties.

On December 4, 2019 OWCP advised appellant of its proposed termination of her wage-loss compensation and medical benefits. It afforded her 30 days to submit additional evidence or argument.

On January 10, 2020 Dr. Hashemi diagnosed brachial plexus disorder, and found that appellant had right neurogenic thoracic outlet syndrome and right hand tremors. He opined that she should not work for one month.

By decision dated April 2, 2020, OWCP terminated appellant's wage-loss compensation for all of her accepted conditions and terminated medical benefits for all of her accepted conditions except for lesion of the ulnar nerve of the right upper limb and lesion of the ulnar nerve of an unspecified upper limb.

On April 15, 2020 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on August 13, 2020. Appellant related that a functional capacity evaluation (FCE) performed in January 2020 showed that she was unable to work as a letter carrier. She also advised that a nerve conduction velocity study performed May 13, 2020 revealed additional conditions other than those found by Dr. Bobrow. Appellant asserted that she had undergone OWCP-authorized surgery on July 15, 2020. Her representative indicated that the surgery was for thoracic outlet syndrome with medial cord neuropathy.

By decision dated October 28, 2020, OWCP's hearing representative affirmed the April 2, 2020 termination decision.

Subsequently, OWCP received a July 15, 2020 operative report from Dr. Hashemi, unsigned progress reports from Dr. Hashemi dated October 2020 through June 2021, a March 2021 FCE, and June 2021 duty status reports (Form CA-17). Appellant further submitted a June 18, 2021 report from Dr. David Itskevich, an osteopath, and a progress report from Dr. Hashemi dated June 24, 2021.

On October 26, 2021 appellant requested reconsideration.

By decision dated November 1, 2021, OWCP denied modification of its October 28, 2020 decision.

Thereafter, appellant resubmitted the June 18, 2021 report from Dr. Itskevich.

In reports dated October 28 and December 2, 2021, Dr. Adaku Nwachuku, an osteopath, noted that appellant had a history of closing a door on her right upper extremity at work. He discussed her current complaints of pain in her neck, left ankle, right hand, and bilateral shoulders, arms, elbows, hips, knees. On examination Dr. Nwachuku found tenderness to palpation of the right anterior shoulder, arm and upper arm with a mild-to-moderate decrease in range of motion. He diagnosed right arm and hand pain, unspecified neuralgia and neuritis, cervicgia, weakness,

and other chronic postprocedural pain. Dr. Nwachuku noted that appellant had been on disability for six years. In his December 2, 2021 report, he discussed her plans to resume work as a trainer.

On October 22, 2022 appellant, through her representative, requested reconsideration.

In support thereof, appellant submitted an impairment evaluation dated November 1, 2021 wherein Dr. Tobin T. Eckel, a Board-certified orthopedic surgeon, found that appellant had six percent permanent impairment of the right upper extremity.

By decision dated October 28, 2022, 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.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 requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

³ 5 U.S.C. § 8128(a); *see C.V.*, Docket No. 22-0078 (issued November 28, 2022); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see K.D.*, Docket No. 22-0756 (issued November 29, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *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. 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 (February 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 D.B.*, Docket No. 22-0518 (issued November 28, 2022); *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

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).

In support of her request, appellant submitted October 28 and December 2, 2021 reports from Dr. Nwachuku, who advised that appellant had a history of closing a door on her right upper extremity at work. He reviewed her complaints of pain extending from her neck to her knees. Dr. Nwachuku diagnosed right arm and hand pain, unspecified neuralgia and neuritis, cervicalgia, weakness, and other chronic postprocedural pain and noted that she had been disabled for six years.

The Board finds that the October 28 and December 2, 2021 progress reports from Dr. Nwachuku constitute relevant and pertinent new evidence, because they specifically address the underlying medical issue of whether appellant had further disability causally related to her accepted employment injury. 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)(3).⁸ Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his or her burden of proof.⁹ Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁰

The Board thus finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). The case shall be remanded for an appropriate merit decision.

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).

⁸ *L.B.*, Docket No. 23-0445 (issued August 2, 2023); *M.P.*, Docket No. 20-0948 (issued August 11, 2022); *M.R.*, Docket No. 19-1449 (issued March 11, 2020); *D.C.*, Docket No. 18-0082 (issued July 12, 2018).

⁹ *L.J.*, Docket No. 22-0348 (issued April 28, 2023); *F.F.*, Docket No. 20-1542 (issued April 9, 2021); *see C.H.*, Docket No. 17-1065 (issued December 14, 2017); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁰ *B.S.*, Docket No. 20-0555 (issued April 22, 2021); *P.M.*, Docket No. 19-1253 (issued January 23, 2020); *R.T.*, Docket No. 18-1263 (issued February 7, 2019).

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2022 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: February 14, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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