

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

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**B.P., Appellant**

**and**

**U.S. POSTAL SERVICE, GRETNA POST  
OFFICE, Gretna, LA, Employer**

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**Docket No. 24-0042  
Issued: March 6, 2024**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 24, 2023 appellant filed a timely appeal from a July 10, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated April 20, 2022, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

**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).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the July 10, 2023 decision, OWCP received additional evidence. 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. 20 C.F.R. § 501.2(c)(1). Evidence not before OWCP will not be considered by the Board for the first time on appeal." *Id.*

## **FACTUAL HISTORY**

On March 16, 2016 appellant, then a 54-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that she injured her neck and right shoulder causally related to repetitive factors of her federal employment. OWCP accepted the claim, assigned OWCP File No. xxxxxx215, for cervical sprain.<sup>3</sup>

A magnetic resonance (MRI) scan of the right shoulder dated June 28, 2016 demonstrated a small anterior full-thickness tear of the supraspinatus tendon with tendinosis, mild tendinosis of the infraspinatus tendon, and acromioclavicular (AC) joint hypertrophy and spurring. An MRI scan of the cervical spine of even date demonstrated mild degeneration and broad-based disc bulging throughout the cervical and thoracic spine without significant stenosis or bilateral foraminal narrowing.

On July 18, 2017 Dr. Simon Finger, a Board-certified orthopedic surgeon and OWCP referral physician, discussed appellant's history of a March 2016 neck injury and noted that she had not worked since 2015 due to an unrelated injury. He reviewed the medical evidence and the results of diagnostic studies. Dr. Finger opined that appellant had not sustained a consequential injury due to the accepted injury, but instead had neck and shoulder pain due to cervical degenerative disease, which he found was unrelated to the accepted employment injury.

A November 13, 2018 MRI scan of the right shoulder demonstrated AC osteoarthritis with possible subacromial impingement and supraspinatus tendinosis with a full-thickness tear of the anterior and mid fibers. A May 10, 2019 MRI scan of the cervical spine demonstrated straightening and reversal of the normal cervical lordosis, a central herniated nucleus pulposus at C3-4 contacting the ventral thecal sac, a herniated disc at C5-6 deforming the cord, and neural foraminal stenosis bilaterally at C5-6.

Appellant received treatment from Dr. Joseph F. Sejud, Board-certified in family medicine. On April 10, 2019 he opined that appellant's conditions should be expanded to include cervical disc disease, AC joint arthritis, right shoulder impingement syndrome, rotator cuff tendinopathy, and thoracic scoliosis and disc disease. In a report dated May 29, 2019, Dr. Sejud reviewed the results of the May 10, 2019 MRI scan of the cervical spine and noted examination findings that included pain with cervical flexion, bilateral paraspinal and right glenoid tenderness, and a positive Hawkin's impingement test. He again opined that the examination findings and diagnostic studies indicated that appellant's condition should be expanded to include cervical disc disease, AC joint arthritis, right shoulder impingement syndrome, rotator cuff tendinopathy, and thoracic scoliosis and disc disease. Dr. Sejud provided a similar report on September 24, 2019.

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<sup>3</sup> OWCP previously accepted appellant's April 2015 occupational disease claim for lumbar sprain, left chondromalacia patellae, and a left ulnar nerve lesion, assigned OWCP File No. xxxxxx016. Appellant stopped work on August 13, 2015 and did not return. OWCP paid her wage-loss compensation on the supplemental rolls effective April 20, 2015 and on the periodic rolls from September 20, 2015 until September 29, 2021 under OWCP File No. xxxxxx016. Appellant elected retirement benefits effective October 1, 2021. OWCP administratively combined OWCP File No. xxxxxx215 and OWCP File No. xxxxxx016, with the latter serving as the master file.

On November 18, 2020 appellant requested that OWCP expand the acceptance of her claim to include cervical disc disease, AC joint arthritis, rotator cuff tendinopathy, thoracic disc disorder, and thoracic scoliosis causally related to her accepted March 2016 employment injury.

In a development letter dated December 2, 2020, OWCP requested that appellant submit a detailed description of the development of the claimed conditions and a reasoned medical report from her physician explaining how the conditions resulted from the March 2016 employment injury or for conditions accepted as employment related. It afforded her 30 days to submit the requested information.

On January 5, 2021 Dr. Artemus Flagg, II, who specializes in pain management, evaluated appellant for neck pain. He noted that she sustained “cervical radiculopathy after sustaining a work[-]related injury.” Dr. Flagg related that appellant’s pain was stable until a motor vehicle accident in December 2020. He diagnosed cervical radiculopathy, cervicgia, and chronic pain syndrome.

On January 7, 2021 Dr. Sejud noted that appellant had an accepted diagnosis of cervical sprain, but found that her pathology was more severe.

Appellant received treatment on January 14, 2021 from Dr. Joseph Boucree, a Board-certified orthopedic surgeon, for multiple cervical conditions. Dr. Boucree continued to submit progress reports.

By decision dated January 19, 2021, OWCP denied appellant’s request to expand the acceptance of her claim to include cervical disc disease, AC joint arthritis, rotator cuff tendinopathy, thoracic disc disorder, and thoracic scoliosis causally related to her accepted March 2016 employment injury.

A March 9, 2021 MRI scan of the cervical spine demonstrated a slightly larger disc herniation at C5-6 and a new disc bulge at C6-7 contacting the thecal sac and a stable disc bulge at C3-4. Electrodiagnostic testing of the upper extremities performed on July 14, 2021 revealed borderline mild bilateral carpal tunnel syndrome and mild ulnar neuropathy at the left elbow.

Appellant continued to submit progress reports from Dr. Sejud dated December 22, 2020 to April 13, 2022. On January 19, 2022 Dr. Sejud diagnosed cervical sprain and cervical and lumbar radiculopathy. He further opined that appellant required an expansion of her shoulder condition due to repetitive and chronic right upper extremity motion delivering mail for many years.

On January 23, 2022 appellant requested reconsideration.

By decision dated April 20, 2022, OWCP denied modification of its January 19, 2021 decision.

OWCP subsequently expanded its acceptance of the claim to include cervical and lumbar radiculopathy.

OWCP continued to receive progress reports from Dr. Sejud through March 29, 2023. In these notes, Dr. Sejud provided examination findings and diagnosed cervical sprain and cervical

and lumbar radiculopathy. OWCP also received reports from a chiropractor dated June 21, 2022 through March 7, 2023 and progress reports from Dr. Boucree. Dr. Boucree provided examination findings and diagnosed thoracic back pain, a thoracic disc herniation, and thoracic back strain.

On April 17, 2023 appellant requested reconsideration. In an accompanying statement of even date, she described her right shoulder pain and asserted that her condition developed as a result of her employment duties. Appellant related that her physicians agreed that she had sustained a work injury.

With her reconsideration request, appellant resubmitted MRI scans dated June 28, 2016 and November 13, 2018. She further submitted a November 30, 2021 MRI scan of the right shoulder. Appellant also provided a city carrier job description and resubmitted her Form CA-2 and accompanying statement. She further submitted reports dated August 4, 2022 through March 23, 2023 from Dr. Joseph L. Finstein, a Board-certified orthopedic surgeon, who provided findings on examination and diagnosed right shoulder conditions, including a right full-thickness supraspinatus tear, right subacromial bursitis, biceps tendinitis, and a superior labrum, anterior to posterior (SLAP) tear.

By decision dated July 10, 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.<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

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<sup>4</sup> 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).

<sup>5</sup> 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).

<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. 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.

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 properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. She maintained that her condition developed due to her employment duties and contended that the opinions of her physicians supported causation. The issue, however, is whether the acceptance of her claim should be expanded to include the additional conditions of cervical disc disease, AC joint arthritis, rotator cuff tendinopathy, thoracic disc disorder, and thoracic scoliosis causally related to her accepted March 2016 employment injury. This is a medical issue that can only be resolved through the submission of medical evidence. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>9</sup>

Moreover, appellant has not provided relevant and pertinent new evidence in support of her request for reconsideration. In support of her request, she resubmitted MRI scans dated June 28, 2016 and November 13, 2018, and November 30, 2021, and her Form CA-2 and statement. However, the Board has held that medical evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.<sup>10</sup>

The record contains an MRI scan of the right shoulder dated November 30, 2021, progress reports from Dr. Sejud and Dr. Boucree, and reports from a chiropractor. Appellant also submitted a position description and medical reports from Dr. Finstein dated August 4, 2022 through March 23, 2023 diagnosing a right full-thickness supraspinatus tear, right subacromial bursitis, biceps tendinitis, and a SLAP tear. None of these reports, however, address the relevant issue of claim expansion. The Board has held that the submission of evidence or argument which does not address the issue involved does not constitute a basis for reopening a case.<sup>11</sup> Therefore, these reports are insufficient to warrant reopening appellant's claim for further merit review.

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<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

<sup>10</sup> *See L.E.*, Docket No. 22-0004 (issued April 14, 2023); *C.B.*, Docket No. 22-0144 (issued March 16, 2023); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>11</sup> *See P.G.*, Docket No. 20-1419 (issued September 16, 2021); *C.C.*, Docket No. 20-0950 (issued October 29, 2020); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The Board, accordingly, finds that appellant did not meet 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.<sup>12</sup>

**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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 10, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 6, 2024  
Washington, DC

Alec J. Koromilas, 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

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<sup>12</sup> *D.A.*, Docket No. 22-0762 (issued September 30, 2022); *T.G.*, Docket No. 20-0329 (issued October 19, 2020); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).