

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

S.A., Appellant	)	
	)	
and	)	Docket No. 18-1481
	)	Issued: April 2, 2019
U.S. POSTAL SERVICE, POST OFFICE,	)	
Denver, CO, Employer	)	
	)	

*Appearances:*  
John S. Evangelisti, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 23, 2018 appellant, through counsel, filed a timely appeal from January 23 and June 27, 2018 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> The last merit decision of record was a Board decision dated November 24, 2017, which became

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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 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> Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's January 23, 2018 nonmerit decision was Sunday, July 22, 2018. As the last day of the 180-day filing period fell on a weekend, appellant had until the next business day, Monday, July 23, 2018 to timely file the appeal. 20 C.F.R. § 501.3(f)(2). Because using July 25, 2018, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is July 23, 2018, rendering the appeal timely filed. 20 C.F.R. § 501.3(f)(1).

final after 30 days of issuance and is not subject to further review.<sup>3</sup> As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>4</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 January 10 and April 25, 2018 requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).<sup>5</sup>

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>6</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 1, 2014 appellant, then a 54-year-old supervisor, filed an occupational disease claim (Form CA-2) alleging that she developed left plantar fasciitis, right soleus rupture, and right ankle tendinitis as a result of prolonged walking, bending, and squatting required in her job. She noted that she first became aware of her condition on January 15, 2013 and realized that it was causally related to her federal employment on March 11, 2014. Appellant was last exposed to the conditions alleged to have caused her illness on March 11, 2013. She was terminated from employment on June 4, 2013.

Appellant was treated by Dr. Jack L. Rook, a Board-certified physiatrist, on June 26, 2014 for bilateral foot, right calf, and right hip pain. He noted that appellant's work required prolonged walking, standing and pushing and pulling mail containers. Dr. Rook diagnosed: greater trochanteric bursitis; status post rupture of the right soleus muscle with chronic myofascial pain, pain related to scar tissue formation; bilateral Achilles tendinitis and bursitis; bilateral plantar fasciitis; and strain of the metatarsal phalangeal joints of the great toe, second toe, and third toe on the right. He opined that, based upon appellant's history and a review of her medical records, she developed an occupational disease involving her right hip approximately nine years earlier, an occupational disease involving her left foot in December 2013, and an acute occupational injury of her right calf on March 11, 2013. Dr. Rook noted that appellant was wearing a left leg surgical boot and had to excessively contract the right calf muscles to get her left leg over the curb to enter her workplace and ruptured her right soleus muscle. He believed the soleus rupture was an acute

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<sup>3</sup> 20 C.F.R. § 501.6(d); *see A.F.*, Docket No. 18-0645 (issued October 26, 2018); *T.B.*, Docket No. 15-0001 (issued July 1, 2015); *D.A.*, Docket No. 08-1217 (issued October 6, 2008).

<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> The Board notes that counsel also submitted a reconsideration request on March 19, 2018.

<sup>6</sup> Docket No. 16-1128 (issued November 24, 2017). Appellant, through counsel, appealed to the Board. The case was docketed as No. 18-0697. On March 27, 2018 appellant withdrew her appeal. In an order dated April 19, 2018, the Board dismissed the appeal.

injury that was related to the left foot injury. Dr. Rook opined that appellant's right great toe pain and right hip pain probably resulted from altered weight bearing and that all of her current right leg problems were indirectly related to the left foot occupational disease. He indicated that the right hip condition was aggravated because of the alteration of appellant's gait, which required her to bear most of her weight on her right leg. With regard to the left plantar fasciitis, appellant's job required standing on a hard floor all day long, walking on a hard floor, carrying heavy boxes while walking on a hard floor, and forcefully pushing and pulling heavy objects. He opined that it is more than likely that the plantar fasciitis in her left foot, Achilles bursitis, and tendinitis on the right side was caused by prolonged weight-bearing activities required of her job.

By decision dated January 30, 2015, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that her diagnosed medical conditions were causally related to the accepted factors of her federal employment.

Appellant requested an oral hearing before an OWCP hearing representative and submitted a March 5, 2015 report from Dr. Rook, who reviewed his June 26, 2014 evaluation. Dr. Rook indicated that, based upon reasonable medical probability, appellant's right hip condition, left plantar fasciitis, and right soleus muscle rupture were work-related conditions. On April 27, 2015 he reiterated his opinion that appellant's diagnosed conditions were employment related.

A telephonic hearing was held on September 17, 2015. By decision dated November 30, 2015, an OWCP hearing representative affirmed the January 30, 2015 decision.

Appellant appealed to the Board and by decision dated November 24, 2017, the Board affirmed the November 30, 2015 decision, finding that appellant had not established an occupational disease causally related to the accepted factors of her federal employment.

On January 10, 2018 appellant, through counsel, requested reconsideration. Counsel asserted that the Board improperly disregarded Dr. Rook's analysis supporting causal relationship. He indicated that in the absence of medical evidence to the contrary, OWCP should have further developed the medical evidence. Counsel further noted that proceedings under FECA were not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation OWCP shares the responsibility in the development of the evidence.

In a January 23, 2018 decision, OWCP denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

On March 19, 2018 appellant, through counsel, requested reconsideration of the prior OWCP decisions. Counsel indicated that on January 23, 2018 OWCP denied appellant's January 10, 2018 reconsideration request because she did not clearly identify the grounds upon which reconsideration was requested and did not submit new and relevant medical evidence not previously considered. He indicated that the reconsideration was based on a legal argument that was not considered by OWCP or the Board, specifically, whether uncontroverted medical evidence suggests a causal relationship that requires development.

In a decision dated June 27, 2018, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant a merit review.

### LEGAL PRECEDENT

Under section 8128(a) of FECA,<sup>7</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;  
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>8</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>9</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant’s January 10 and April 25, 2018 requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

OWCP denied appellant’s claim because appellant did not meet her burden of proof to establish an occupational disease causally related to factors of her federal employment. Thereafter, it denied appellant’s January 10 and April 25, 2018 reconsideration requests, without conducting a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim.

In her January 10, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Counsel asserted that the Board improperly disregarded Dr. Rook’s analysis supporting causal relationship and indicated that in the absence of medical evidence to the contrary, OWCP should have further developed the medical evidence. He further noted that proceedings under FECA were not adversarial in nature, and while the claimant has the burden OWCP shares the responsibility in the development of the evidence. However, this does not show a legal error by OWCP, nor does it provide a new and relevant legal argument. The underlying issue in this case is whether appellant submitted sufficient medical evidence establishing that she developed a medical condition causally related to factors of her

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<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3).

<sup>9</sup> *Id.* at § 10.608(b).

federal employment. That is a medical issue which must be addressed by relevant new medical evidence.<sup>10</sup> However, appellant did not submit any pertinent new and relevant medical evidence in support of her claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) with regard to her January 10, 2018 request for reconsideration. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review in its January 23, 2018 decision.

With regard to her April 25, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Counsel indicated that the January 10, 2018 reconsideration request was based on a legal argument that was not considered by OWCP or the Board, specifically, whether uncontroverted medical evidence suggests a causal relationship that requires development.

However, these statements do not show a legal error by OWCP, nor do they provide a new and relevant legal argument. Furthermore, appellant did not submit any pertinent new and relevant medical evidence in support of her April 25, 2018 reconsideration request.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) with regard to her April 25, 2018 request for reconsideration. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review in its June 27, 2018 decision.

On appeal appellant, through counsel, disagreed with OWCP's decision denying her claim for compensation. Counsel further indicated that OWCP abused its discretion by refusing to review the factual and medical evidence submitted by appellant. As explained, the Board lacks jurisdiction over the merits of the claim.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's January 10 and April 25, 2018 requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>10</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27 and January 23, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 2, 2019  
Washington, DC

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

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

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