

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

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<b>M.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-0166</b>
	)	<b>Issued: May 14, 2021</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Clifton Park, NY, Employer</b>	)	
_____	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On October 16, 2019 appellant filed a timely appeal from May 28 and September 16, 2019 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated October 22, 2018, 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>

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<sup>1</sup> U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that appellant submitted additional evidence on appeal. 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. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On August 31, 2001 appellant, then a 54-year-old postal carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 30, 2001 he sustained injuries to his left arm, chest, lower side of his abdomen, right knee, and both legs when another vehicle struck the front left side of his work vehicle while in the performance of duty. He did not stop work. OWCP accepted the claim for abdominal contusion and abdominal strain. It paid appellant wage-loss compensation on the supplemental rolls as of February 13, 2002 and on the periodic rolls as of November 18, 2012.

OWCP referred appellant for a second opinion evaluation on July 5, 2007 to determine the status of his accepted conditions. In a July 24, 2007 report, Dr. Patrick J. Hughes, a Board-certified neurologist, OWCP's second opinion physician, noted that appellant continued to experience headaches and dizziness, which had not resolved. He opined that appellant was not fit for regular duty as a rural carrier and that appellant's disability was due to the work injury of August 30, 2001. Dr. Hughes noted that appellant had reached maximum medical improvement (MMI) and opined that, because appellant continued with headaches and dizziness over the course of five years, the symptoms would persist.<sup>3</sup>

On September 4, 2008 OWCP expanded the acceptance of the claim to include lumbar radiculopathy and on September 30, 2010 OWCP expanded the acceptance of the claim to include post-traumatic headache due to a fall.

In an October 7, 2016 report, Dr. Surinder Jindal, a clinical neurophysiologist and treating physician, related that appellant had history of post-traumatic headaches, head trauma, and subdural evacuation. He noted that appellant's current neurologic examination was within normal limits. Dr. Jindal provided a duty status report (Form CA-17) advising that appellant could not perform regular work due to headaches, and recommended restrictions of no more than 5 pounds continuous lifting or 10 pounds intermittent lifting, no climbing and limited hours of standing, walking, kneeling, bending/stooping, twisting, pulling/pushing, reaching above the shoulder, and driving.

In a January 31, 2017 second opinion report, Dr. Hughes reviewed an updated statement of accepted facts and appellant's medical record. He examined appellant and opined that the accepted work-related conditions of abdominal contusion, abdominal strain, lumbar radiculopathy, and post-traumatic headache were no longer active, based on a normal examination. Dr. Hughes explained that there were "no objective findings on neurological examination to substantiate continuing complaints of headaches and back pain" and "no objective findings of radiculopathy." He advised that no further testing or treatment was necessary and there was no disability due to

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<sup>3</sup> On June 18, 2008 appellant accepted a modified job offer. He stopped work again in November 2011.

the work injury of August 30, 2001. Dr. Hughes completed a work capacity evaluation (Form OWCP-5c) and opined that appellant could perform his usual job without restriction.

OWCP continued to receive progress reports from Dr. Jindal. In a report dated July 20, 2017, Dr. Jindal noted that appellant had a history of closed-head trauma, with headaches, and dizziness. He related that appellant had a normal neurologic examination, except that sensory examination revealed decreased sensation in the C5-6 distribution. Dr. Jindal related a clinical impression of head trauma with post-traumatic headaches, and status post craniotomy. He recommended pain medication as needed for headaches. Dr. Jindal completed another duty status report (Form CA-17) on July 21, 2017 wherein he continued appellant's work restrictions due to headaches.

On August 30, 2017 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits, finding that the weight of the medical evidence of record established that he no longer suffered from any residuals or continuing disability as a result of his August 30, 2001 employment injury. It afforded him 30 days to submit additional evidence to refute the proposed termination of benefits.

In a report dated September 28, 2017, Dr. Jindal repeated appellant's history of headaches and back pain. He related that on neurologic examination appellant had reduced motor strength in the left leg, compared to the right leg, decreased sensation in the L5-S1 distribution, tenderness and spasm in the paraspinal lumbosacral muscles, and reduced left leg raising. Dr. Jindal again related a clinical impression of head trauma, post-traumatic headaches, and craniotomy. He recommended pain medication as needed and restricted activity. In a report dated October 11, 2017, Dr. Jindal again repeated appellant's history of injury and his clinical impression. He further related that appellant continued treatment for chronic headaches and dizziness, which were causally related to appellant's August 30, 2001 employment injury, and that his prognosis was poor. On October 11, 2017 Dr. Jindal again completed a duty status report (Form CA 17) wherein he continued appellant's work restrictions due to post-traumatic headaches.

By decision dated October 26, 2017, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date, based on Dr. Hughes' opinion that the accepted conditions had resolved.

On November 14, 2017 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated March 15, 2018, an OWCP hearing representative affirmed the October 26, 2017 termination decision.

On June 13, 2018 appellant requested reconsideration. By decision dated June 19, 2018, OWCP denied modification of the October 26, 2017 decision.

On June 22 and July 24, 2018 appellant requested reconsideration. In letters dated July 24 and September 4 and 22, 2018, he continued to object to Dr. Hughes' findings and referenced reports from appellant's treating physician. In an October 9, 2018 letter to OWCP, appellant repeated his prior arguments and noted that an administrative law judge had declared him disabled

on June 1, 2005. By decision dated October 22, 2018, OWCP denied modification of the June 19, 2018 decision.

On November 5 and December 17, 2018 appellant requested reconsideration and again summarized medical reports from his treating physicians. In a letter dated January 26, 2019, he argued that the July 24, 2007 and January 31, 2017 reports from Dr. Hughes were contradictory as Dr. Hughes had opined in 2007 that appellant had reached MMI and that appellant's physical restrictions were "indefinite." By decision dated February 21, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim.

On April 11, 2019 appellant again requested reconsideration, arguing that Dr. Hughes' July 24, 2007 report supported that he was unable to return to full duty as a mail carrier. He resubmitted portions of Dr. Hughes' July 24, 2007 second opinion report.

By decision dated May 28, 2019, OWCP denied appellant's April 12, 2019 request for reconsideration of the merits of his claim.

On May 31, 2019 appellant again requested reconsideration. He repeated his arguments that Dr. Hughes' July 24, 2007 report was contradictory to his January 31, 2017 report, and other physicians had found that appellant was unable to perform his job duties. In a June 14, 2019 letter, appellant related that OPM had determined that he was disabled from work. He submitted a June 7, 2019 letter from OPM, which found him disabled from his position as a rural carrier. In a letter dated August 6, 2019, appellant again alleged that an administrative judge had found him disabled on June 1, 2005 and the employing establishment had accepted this decision.

By decision dated September 16, 2019, OWCP denied appellant's May 31, 2019 request for reconsideration of the merits of his claim. It found that he had not established that OWCP erroneously applied or interpreted a specific point of law and had not advanced a relevant legal argument not previously considered.

### **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

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<sup>4</sup> 5 U.S.C. § 8128(a); *see J.C.*, Docket No. 19-0640 (issued September 10, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

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

In his April 12 and May 31, 2019 requests for reconsideration, appellant argued that the July 24, 2007 and January 31, 2017 reports from Dr. Hughes were contradictory as he had opined in 2007 that appellant had reached MMI and that appellant's physical restrictions were "indefinite." He also argued again that his treating physicians concluded that he was unable to perform his job duties because of his accepted conditions. However, the Board notes that these arguments were considered by OWCP in prior merit reviews of the evidence. The Board has held that the submission of argument or evidence which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>9</sup> Thus, appellant is not entitled to a review of the merits based on the first and second requirements under 20 C.F.R. § 10.606(b)(3).<sup>10</sup>

In support of his April 12 and May 31, 2019 reconsideration requests, appellant resubmitted a copy of the July 24, 2007 report from Dr. Hughes. However, since this report was

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<sup>5</sup> 20 C.F.R. § 10.606(b)(3); *G.J.*, Docket No. 19-1652 (issued January 29, 2021); *see J.W.*, Docket No. 19-1795 (issued March 13, 2010); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010).

<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 2016). 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 F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *see C.L.*, Docket No. 20-0385 (issued August 5, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>9</sup> *See M.P.*, Docket No. 20-0814 (issued January 26, 2021); *A.M.*, Docket No. 17-1192 (issued September 19, 2018); *R.H.*, Docket No. 17-0876 (issued November 21, 2017); *Richard A. Neidert*, 57 ECAB 474 (2006).

<sup>10</sup> 20 C.F.R. § 10.606(b)(3); *P.W.*, Docket No. 20-0380 (issued November 23, 2020); *B.R.*, Docket No. 19-0372 (issued February 20, 2020); *L.G.*, Docket No. 09-1517 (issued March 3, 2010).

previously considered, it does not constitute a basis for reopening a case for merit review.<sup>11</sup> OWCP also received a letter from OPM dated June 7, 2019, which approved appellant's request for disability retirement. This document, however, is irrelevant to the underlying issue of whether appellant had ongoing residuals or disability due to his accepted conditions.<sup>12</sup> Because appellant has not provided relevant and pertinent new evidence, he was not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3).<sup>13</sup> Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>14</sup>

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 16 and May 28, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 14, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>11</sup> *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

<sup>12</sup> Furthermore, the Board has held that the findings of other government agencies are not dispositive with regard to questions arising under FECA. *See A.B.*, Docket No. 10-2108 (issued July 13, 2011); *Ernest J. Malagrada*, 51 ECAB 287, 291 (2000).

<sup>13</sup> *Supra* note 9.

<sup>14</sup> *See K.T.*, Docket No. 18-0927 (issued May 13, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020).