United States Department of Labor
Employees' Compensation Appeals Board

W.B., Appellant	)	
and	)	**Docket No. 21-0131**
	)	**Issued: April 7, 2022**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 21, 2020[1] appellant filed a timely appeal from an April 27, 2020 nonmerit decision and a September 23, 2020 merit decision of the Office of Workers' Compensation

[1] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of an OWCP final 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 April 27, 2020, the date of OWCP's decision, was October 24, 2020. Because this fell on a Saturday, appellant had until Monday, October 26, 2020 to file the appeal. Since using November 2, 2020, 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 October 21, 2020, which renders the appeal timely filed from the April 27, 2020 decision. *See* 20 C.F.R. § 501.3(f)(1).

Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration of the merits of her schedule award claim pursuant to 5 U.S.C. § 8128(a); and (2) whether appellant met her burden of proof to expand the acceptance of her claim to include a cervical condition.

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On March 18, 2003 appellant, then a 49-year-old human resources specialist, filed a traumatic injury claim (Form CA-1) alleging that, on February 14, 2003, she sustained bilateral knee injuries when loading case files onto library carts while in the performance of duty. OWCP accepted the claim for: bilateral tears of the medial and lateral menisci; chondromalacia of both knees; other tear of medial meniscus of both knees; bilateral localized primary osteoarthritis of lower leg; mechanical failure of prosthetic joint implant, right; mechanical loosening of prosthetic joint, right; contracture of tendon (sheath), right; other synovitis and tenosynovitis, right; bilateral edema; bilateral causalgia of lower limb; bilateral pin in joint, lower leg; bilateral pain in limb; and bilateral local superficial swelling, mass or lump. Appellant underwent an OWCP-approved arthroscopy to her right knee on April 24, 2003 and to her left knee on October 14, 2004, as well as subsequent total knee replacements and revision surgeries. OWCP paid her compensation for lost wages following the surgical procedures. Since early January 2013, appellant has worked on a full-time basis as a Human Resources specialist with the employing establishment in Las Vegas, Nevada.

On April 25, 2007 appellant filed a claim for compensation (Form CA-7) for a schedule award. By decision dated July 31, 2007, OWCP granted her a schedule award for 14 percent permanent impairment of the right lower extremity and 4 percent permanent impairment of the left

[2] The Board notes that, by decision dated December 17, 2020, OWCP affirmed its September 23, 2020 decision. However, appellant had filed the current appeal to the Board on October 21, 2020, prior to the issuance of the December 17, 2020 decision. The Board notes that, as OWCP issued its December 17, 2020 decision during the pendency of this appeal that decision is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. *See L.F.*, Docket No. 19-1275 (issued October 29, 2020); *Terry L. Smith*, 51 ECAB 182 (1999); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

[3] 5 U.S.C. § 8101 *et seq*.

[4] The Board notes that, following the September 23, 2020 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. 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*.

[5] Docket No. 12-1896 (issued March 26, 2013).

lower extremity. The award ran for 51.84 weeks of compensation for the period May 31, 2007 through May 27, 2008.

In a May 4, 2010 letter, appellant indicated that she believed her upper and lower back conditions, for which she underwent several thoracic and lumbar epidural steroid injections, were consequential to her accepted knee conditions. Numerous medical reports were submitted.

By decisions dated June 8 and 10, 2010, OWCP denied appellant's claim for consequential upper and lower back conditions as causal relationship had not been established.

On February 21, 2011 and May 24, 2012 appellant requested reconsideration of OWCP's denial of her consequential conditions and submitted new medical evidence.

By decisions dated May 25, 2011 and August 22, 2012, OWCP denied modification of its prior decisions, finding that the medical evidence of record was insufficient to establish a consequential injury of back condition causally related to the February 14, 2003 employment injury.

Thereafter, appellant appealed to the Board. By decision dated March 26, 2013, the Board set aside OWCP's August 22, 2012 decision, and remanded the case for further development.[6] The Board found that the reports of appellant's treating physicians raised an uncontroverted inference of causal relationship between her accepted knee conditions and her diagnosed back conditions, which were sufficient to require further development of the medical evidence.

On July 22, 2013 appellant filed a Form CA-7 for an increased schedule award and submitted additional medical evidence. By decisions dated August 13, 15, and 19,[7] 2013, OWCP granted appellant a schedule award for a total of 26 percent permanent impairment to the right lower extremity and a total of 26 percent permanent impairment to the left lower extremity, or 97.92 weeks of compensation, which ran from July 3 to May 19, 2015.

OWCP further developed the issue of whether appellant had any back or hip conditions consequential to the accepted knee injuries and multiple medical procedures. On October 11, 2013 it expanded the acceptance of the claim to include lumbar spondylosis without myelopathy, and right trochanteric bursitis.

Appellant continued to undergo lumbar and cervical epidural steroid injections, which OWCP had authorized. In a July 23, 2014 report, Dr. Matthew H.C. Otten, an osteopath specializing in family medicine, provided an impression of cervical pain, cervical spine spondylolysis, multilevel degenerative disc disease, and moderate-to-severe spinal stenosis C3 through C6. He recommended C3-6 nerve root injections. Medical reports from Dr. Daniel L. Burkhead, a Board-certified anesthesiologist, from October 27, 2014 onward diagnosed lumbar disc desiccation, thoracic disc bulge, lumbar/thoracic radiculitis, lumbar disc bulge, thoracic spondylosis, lumbar degenerative disc disease, lumbar spondylosis, thoracic spine pain, cervicalgia, and sacroilitis and recommended lumbar and cervical epidural steroid injections

[6] *See supra* note 5.

[7] The August 15 and 19, 2013 decisions corrected the period of the award and the number of weeks, respectively.

On December 23, 2019 appellant filed a Form CA-7 requesting an increased schedule award.

In a December 3, 2019 report, Dr. Frank P. Silver, an obstetrics and gynecology specialist, reviewed appellant's medical record and opined that she was at maximum medical improvement (MMI). He indicated no surgery was under consideration and further diagnostic studies were not indicated or warranted. Appellant's right knee examination showed obvious joint replacement, motion of 0 to 100 degrees, without instability and with some numbness in the lateral femoral cutaneous nerve distribution, which had been resected during her last surgery on this extremity. Under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),[8] Dr. Silver opined that appellant had 21 percent permanent impairment of the right lower extremity for knee revision under the diagnosis-based impairment (DBI) method. As she had previously received a schedule award greater than the 21 percent permanent impairment found for the revision, he opined that no additional award was due appellant for her right lower extremity.

OWCP forwarded appellant's medical record to its District Medical Adviser (DMA). In a February 21, 2020 report, Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as OWCP's DMA, opined that the date of MMI for appellant's right knee was December 3, 2019, when appellant was evaluated by Dr. Silver. He agreed with Dr. Silver's 21 percent permanent impairment rating under the DBI impairment methodology and indicated that appellant's diagnosed condition did not meet any of the criteria discussed in Section 16.7, page 543 of the A.M.A., *Guides* to allow for impairment to be calculated under the range of motion (ROM) impairment methodology. The DMA further opined that as appellant had previously been awarded 26 percent right lower extremity permanent impairment, she was not entitled to an increased schedule award.

By decision dated March 23, 2020, OWCP denied appellant's claim for an increased schedule award.

On April 22, 2020 appellant requested reconsideration of the March 23, 2020 schedule award decision. In an April 22, 2020 letter, her disagreed with Dr. Silver's findings that no additional award should be added to her previous right lower extremity award of 26 percent. Appellant contended that the medical evidence supported that she continued to suffer with swelling, stiffness, numbness, and discomfort with pro longed weight bearing activities. She also indicated that it had been over a year since her second right knee revision and she was still unable to go up and down stairs, and the recovery period was longer than she anticipated.

OWCP received a March 9, 2020 report by Michael J. Eastman, a physician assistant, which noted a number of cervical and lumbar diagnoses and outlined a treatment plan; a March 16, 2020 procedure note by Dr. Burkhead for authorized left C6 and C7 cervical transforaminal selective epidural steroid injections with fluoroscopic guidance, epidurography and intraveneous sedation; and registered nurse notes and physical therapy reports for the period March 13 through May 11, 2019.

[8] A.M.A., *Guides* (6th ed. 2009).

By decision dated April 27, 2020, OWCP denied appellant's request for reconsideration of the merits of the March 23, 2020 schedule award as she failed to show that OWCP erroneously applied or interpreted a point of law or provide relevant and pertinent new evidence.

On June 5, 16 and August 8, 2020 appellant's medical provider requested authorization for a bilateral/thoracic spine C4-5 epidural block, and left cervical blocks.

In an August 17, 2020 development letter, OWCP indicated that since appellant's claim had not been accepted for a cervical spinal condition, it could not authorize medical treatment for a cervical condition. It requested that she provide a comprehensive medical report from her treating condition, which explained how the requested procedures was medically necessary to treat the effects of her accepted employment-related conditions. OWCP afforded appellant 30 days to submit the requested information.

OWCP received treatment notes dated June 1 and August 31, 2020 signed by Mr. Eastman.

By decision dated September 23, 2020, OWCP denied the expansion of the acceptance of appellant's claim to include the additional diagnosis of cervical spine condition, finding that the evidence of record did not support that cervical spine condition was causally related to the February 14, 2003 employment injury.

LEGAL PRECEDENT -- ISSUE 1

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.[9]

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.[10]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[11] If it chooses to grant reconsideration, it reopens

[9] 5 U.S.C. § 8128(a); *see 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).

[10] 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[11] 20 C.F.R. § 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.

and reviews the case on its merits.[12] 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.[13]

ANALYSIS -- ISSUE 1

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

OWCP previously denied appellant's claim for an increased schedule award because she had been granted 26 percent impairment for her right lower extremity, which was greater than the 21 percent permanent impairment found for her right knee revision. Thus, the Board must determine if appellant presented sufficient evidence or argument regarding her schedule award claim to warrant a merit review pursuant to 5 U.S.C. § 8128(a).[14]

In her April 22, 2020 reconsideration request, appellant neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, she did not advance any relevant legal arguments not previously considered by OWCP. The Board thus finds that appellant is not entitled to a review of the merits based on the first or second requirements under 20 C.F.R. § 10.606(b)(3).[15]

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. In her letter dated April 22, 2020, appellant contended that the severity of her ongoing condition warranted an increased schedule award. A lay opinion, however, is not relevant medical evidence sufficient to warrant a higher rating of permanent impairment. It is appellant's burden to submit sufficient medical evidence to establish the extent of permanent impairment.[16] Her letter and the evidence submitted with her reconsideration request are irrelevant as there is no medical opinion, which addresses the underlying issue of permanent impairment to the right lower extremity. Thus, appellant is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).[17]

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of her schedule award claim pursuant to any of the three

[12] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[13] *Id.* at § 10.608(b); *J.K.*, Docket Nos. 19-1420 & 19-1422 (issued August 12, 2020); *D.L.*, Docket No. 18-0449 (issued October 23, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[14] *See S.M.*, Docket No. 21-0392 (issued August 12, 2021); *H.T.*, Docket No. 20-1318 (issued April 27, 2021).

[15] *Supra* note 10 at § 10.606(b)(3)(i) and (ii).

[16] *J.K., supra* note 13; *Annette M. Dent*, 44 ECAB 403 (1993).

[17] *Supra* note 10 at § 10.606(b)(3)(iii); *see T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001).

requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[18]

LEGAL PRECEDENT -- ISSUE 2

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[19] The medical evidence required to establish causal relationship between a specific condition and the employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[20]

When an injury arises in the course of employment, every natural consequence that flows from that injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to a claimant's own intentional misconduct.[21] Thus, a subsequent injury, be it an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural consequence of a compensable primary injury.[22]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include a cervical spine condition.

Preliminary, the Board notes that it is unnecessary for it to consider the evidence that was previously considered in its March 26, 2013 decision, regarding appellant's cervical condition. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[23] The Board, therefore, will not consider the evidence addressed in the prior appeal.[24]

OWCP received medical reports from Dr. Otten and Dr. Burkhead, which diagnosed several cervical spine conditions, many preexisting. These reports, however, did not offer any

[18] *H.T.*, Docket No. 20-0799 (issued November 6, 2020); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

[19] *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[20] *See C.Y.*, Docket No. 20-0144 (issued August 18, 2021); *E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[21] *See S.M.*, Docket No. 19-0397 (issued August 7, 2019); *Mary Poller*, 55 ECAB 483, 487 (2004).

[22] *A.T.*, Docket No. 18-1717 (issued May 10, 2019); *Susanne W. Underwood (Randall L. Underwood)*, 53 ECAB 139 (2001).

[23] *M.D.*, Docket No. 20-0007 (issued May 13, 2020); *D.B.*, Docket No. 17-1444 (issued January 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

[24] *B.R.*, Docket No. 20-0050 (issued March 4, 2021); *Clinton E. Anthony, Jr., id.*

opinion describing the February 14, 2003 employment injury and did not explain how appellant's diagnosed cervical spine conditions, were consequential to the accepted injury. A medical opinion that lacks an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[25] Additionally, the Board has held that a well-rationalized opinion is particularly warranted when there is a history of a preexisting condition, as in this case.[26] The reports from Dr. Otten and Dr. Burkhead are, therefore, of no probative value on the issue of causal relationship, and insufficient to meet appellant's burden of proof.[27]

Appellant also submitted reports from Mr. Eastman, a physician assistant. These reports are of no probative value as expert medical opinion evidence because a physician assistant is not a physician as defined under FECA.[28] Therefore, these reports were insufficient to establish that the diagnosed cervical conditions were causally related to the February 14, 2003 employment incident.

As the medical evidence of record is insufficient to establish that appellant's cervical conditions were causally related to her accepted February 14, 2003 employment injury, the Board finds that she has not met her burden of proof to establish expansion of the acceptance of her claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly denied her request for reconsideration of the merits of her schedule award claim pursuant to 5 U.S.C. § 8128(a). The Board further finds that appellant has not met her burden of proof to expand the acceptance of her claim to include a cervical condition.

[25] *M.K.*, Docket No. 21-0520 (issued August 23, 2021); *see E.B.*, Docket No. 18-1060 (issued November 1 2018); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018). *Leonard J. O'Keefe*, 14 ECAB 42 (1962).

[26] *J.C.*, Docket No. 20-1509 (issued May 25, 2021); *P.M.*, Docket No. 20-0114 (issued December 23, 2020).

[27] *Id*.

[28] Section § 8101(2); of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). *See also S.C.*, Docket No. 14-1026 (issued November 4, 2014); *Richard E. Simpson*, 57 ECAB 668 (2006); *Vickey C. Randall*, 51 ECAB 357 (2000).

ORDER

IT IS HEREBY ORDERED THAT the April 27 and September 23, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 7, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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