

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

C.C., Appellant)	
)	
and)	Docket No. 21-0900
)	Issued: April 6, 2022
SOCIAL SECURITY ADMINISTRATION,)	
Albuquerque, NM, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 25, 2021 appellant, through counsel, filed a timely appeal from a May 3, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated January 15, 2020, to the filing of this

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.

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.³

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

This case has previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On May 18, 1994 appellant, then a 28-year-old contact representative, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she slipped on the restroom floor, hit her left arm and landed on her tail bone, while in the performance of duty. OWCP accepted the claim for lumbar sprain, right knee and leg sprain, left wrist sprain, recurrent dislocation of the left forearm, lumbosacral spondylosis, and right knee medial meniscus tear. Appellant stopped work on May 18, 1994 was referred to vocational rehabilitation on August 31, 1995 and eventually secured employment on her own. The record reflects that OWCP paid appellant wage-loss compensation on the periodic rolls based upon her wage-earning capacity as of June 16, 2002. Appellant stopped work on August 24, 2005 and did not return.

In a December 15, 2014 report, Dr. Andrew Paterson, an orthopedic surgeon, noted that appellant was seen for follow up of chronic low back pain from her work-related injury in 1994. He related that she indicated that 90 percent of her pain was related to her back and 10 percent to her legs. Dr. Paterson examined appellant and provided physical examination findings. He reviewed x-rays, which demonstrated a presence of L5 on S1 spondylolisthesis with some associated degenerative changes, largely unchanged from prior images. Dr. Paterson related that appellant was planning to see a pain management specialist to wean her from narcotic medication and opined that thereafter she might be a surgical candidate, and noted that she could continue with activities as tolerated and had no restrictions.

Appellant's treating physician, Dr. Kira A. Paisley, a Board-certified family practitioner, treated appellant and submitted medical reports to OWCP. In a report dated September 24, 2019, she related that appellant was seen for lumbosacral spondylosis, without myelopathy, which caused pain and limited appellant's ability to sit, stand for long periods of time, or walk for more than a few blocks. Dr. Paisley also diagnosed sprain and strain of the lumbosacral joint/ligament,

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 3, 2021 decision, appellant submitted additional evidence to OWCP. 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.*

⁴ *Order Remanding Case*, Docket No. 20-1323 (issued March 2, 2021).

tear of the medial meniscus of the knee which was chronic and likely to deteriorate, chronic left wrist sprain which was not likely to improve, and recurrent joint dislocation of the forearm.

On October 8, 2019 OWCP referred appellant, along with a statement of accepted facts, a copy of the case record, and a series of questions to Dr. Adam J. Farber, a Board-certified orthopedic surgeon, for a second opinion examination to assess her work-related conditions. In a report dated November 8, 2019, Dr. Farber related that her accepted employment-related conditions included lumbar, right knee, and left wrist sprains, as well as lumbosacral spondylosis and status post right knee partial medial and lateral meniscectomy and chondroplasty. He concluded that appellant's lumbar, right knee and left wrist sprains had resolved. Dr. Farber also noted that she appeared to be suffering residual symptoms related to the accepted diagnosis of lumbar spondylosis, based upon her pain complaints as well as x-ray and magnetic resonance imaging scan findings. He further noted that appellant's lumbar spine pathology did not require work restrictions and that her treating orthopedic surgeon had not provided work restrictions when he last saw her on December 15, 2014. In a supplemental report dated November 22, 2019, Dr. Farber repeated his previous conclusions.

In a November 8, 2019 report, Dr. Paisley noted that appellant had persistent ongoing pain in her lumbar back radiating to the right leg. She referred appellant for a functional capacity evaluation (FCE).

In a December 16, 2019 report, Dr. Paisley noted that appellant continued to have work-related symptoms and required physical therapy for appellant's pain, but that physical therapy was not improving her function or ability to return to work.

In a January 7, 2020 report, Dr. Paisley diagnosed lumbosacral spondylosis without myelopathy, tear of the medial meniscus of the right knee, and left wrist sprain and lumbar sprain. She noted that she had reviewed Dr. Farber's report and that appellant had experienced ongoing right buttock and radiating leg pain since her injury in 1994.

By decision dated January 15, 2020, OWCP terminated appellant's wage-loss compensation, effective that date. It relied upon the report of the second opinion physician, Dr. Farber, a Board-certified orthopedic surgeon. OWCP found that the reports from the treating physician, Dr. Paisley, a Board-certified family practitioner, failed to provide a clear and well-reasoned explanation, supported by objective findings, as to how the accepted conditions hindered appellant from performing her date-of-injury position. It explained that the reports from Dr. Paisley did not explain how the lumbar sprain, right knee sprain, and left wrist sprain had not resolved within six months.

OWCP continued to receive evidence, including a copy of Dr. Farber's November 8, 2019 report, February 14 and March 10, 2020 reports from Dr. Paisley documenting appellant's evaluations for prescription renewals, and a February 17, 2020 request from Dr. Paterson for medical equipment for pain management related to appellant's LS-S1 spondylosis.

On April 20, 2020 appellant, through counsel, requested reconsideration. Counsel argued that Dr. Farber was under the impression that the claim was only approved for lumbar sprain, right wrist sprain, and left wrist sprain. He argued that Dr. Farber failed to address the approved condition of lumbosacral spondylosis and his report therefore was of limited probative value.

Counsel argued that the January 15, 2020 decision should be vacated and appellant's benefits restored.

By decision dated April 28, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On June 23, 2020 appellant, through counsel, filed a timely appeal from the April 28, 2020 nonmerit decision. By decision dated March 2, 2021, the Board issued an order remanding case.⁵ The Board found that the case was not in posture for decision, as OWCP did not reference or discuss the evidence and argument submitted after the January 15, 2020 merit decision. The Board remanded the case to OWCP for an appropriate decision on appellant's reconsideration request that described the evidence submitted on reconsideration and provided the reasons for accepting or rejecting the reconsideration request.

Following OWCP's April 28, 2020 decision, it continued to receive medical evidence. A February 17, 2020 report from a nurse noted that appellant was seen for chronic low back pain with radicular symptoms in her right lower extremity. A June 12, 2020 FCE from a physical therapist, indicated that appellant was capable of working a sedentary position.

In a February 14, 2020 report, Dr. Paisley noted that appellant lost her OWCP wage-loss benefits recently and was seeking a second opinion. She noted that appellant had chronic lumbar back pain, lumbar radiculopathy, left wrist pain, and was feeling "very depressed and sad" about the FCE. Dr. Paisley noted that appellant tried to volunteer as an usher to see if she could work, but appellant was only able to stand for one hour and then had to sit. She diagnosed lumbosacral spondylosis without myelopathy, prescribed a refill of appellant's opioid prescription, and referred her for aquatic therapy.

In a report dated March 10, 2020, Dr. Paisley discussed appellant's ongoing need for opioid medication. In an April 13, 2020 report, she conducted a telephone appointment with appellant and discussed appellant's chronic lumbar back pain and lumbar radiculopathy and left wrist pain.

In a July 22, 2020 report, Dr. Paisley noted that appellant was seen for left shoulder and upper back complaints. She noted that appellant had a motor vehicle accident three years prior and reported ongoing pain in her axillary area where she had a lymph node dissection. Dr. Paisley also noted that appellant reported aching/tightness in her neck on the left side, radiating to the shoulder and up the scalp. She assessed muscle spasm and myofascial pain.

In a September 18, 2020 report, Dr. Paisley noted that appellant was seen for follow up involving a car accident in 2018. She related that appellant had chronic lumbar back pain, left wrist pain, right toe pain, left lateral foot pain, and left shoulder anterior chest pain. Dr. Paisley diagnosed chronic pain and lumbosacral spondylosis without myelopathy.

In reports dated January 15 and February 15, 2021, Dr. Paisley noted ongoing left shoulder pain and prescribed physical therapy. She also noted ongoing back pain and bilateral foot pain and neuropathy. Dr. Paisley indicated that appellant had multiple conditions including chronic lumbosacral spondylosis without myelopathy, right medial meniscus tear, left shoulder pain,

⁵ *Id.*

bilateral neuropathic foot pain, anxiety, depression, and fibromyalgia. She indicated that appellant was applying for Social Security disability benefits due to her lumbar condition.

OWCP also received surgical notes from Dr. Kathryn Helmig, an orthopedic surgeon, dated July 20, 2020, who noted that appellant returned for chronic low back pain that appellant had experienced since a 1994 work-related incident when she slipped on cement and fell. Dr. Helmig advised that appellant had received nonsurgical treatment and despite being a surgical candidate, appellant preferred to continue with nonsurgical treatment.

By decision dated May 3, 2021, 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 does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁸ A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁹ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

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).

On reconsideration, counsel argued that the report from Dr. Farber, the second opinion physician, failed to address the approved condition of lumbosacral spondylosis. He argued that Dr. Farber's report was of limited probative value and the January 15, 2020 decision should be vacated and her benefits restored. However, the Board notes that Dr. Farber did address

⁶ This section provides in pertinent part: "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁷ *Id.*

⁸ *Id.* at § 10.607(a). 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 (September 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.

⁹ *Id.* at § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(a), (b).

appellant's lumbosacral spondylosis, did not recommend restrictions from work, and also noted that her treating orthopedic physician did not require work restrictions. The Board finds that the arguments regarding his report do not show that OWCP erroneously applied or interpreted a specific point of law, nor do they advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of her claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹¹

On reconsideration, appellant also did not submit any relevant and pertinent new medical evidence regarding her ability to return to work. The underlying issue is medical in nature and she has not submitted pertinent new and relevant medical evidence in connection with her reconsideration request.¹² OWCP received additional reports from Dr. Paisley which repeated her prior findings regarding appellant's accepted conditions; however, Dr. Paisley did not offer an opinion regarding appellant's ability to work and did not provide work restrictions. While Dr. Paisley noted in her February 14, 2020 report that appellant attempted to work as an usher and was only able to stand for an hour, she did not provide any work restrictions. She also noted that appellant had a motor vehicle accident in 2018, but did not explain how the accident related to her conditions. Likewise, in her March 10, 2020 report, Dr. Paisley merely addressed appellant's opioid medication and did not address appellant's ability to work. The Board finds that these reports do not address the issue of appellant's inability to work. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹³ The Board also notes that these reports are similar and cumulative to prior reports from Dr. Paisley. Evidence which repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁴

With regard to the other medical evidence, the February 17, 2020 request for medical equipment, and the July 20, 2020 surgical notes did not discuss appellant's work capacity. Therefore, this evidence is not relevant and is insufficient to require a merit review.¹⁵

¹¹ *Id.* at § 10.606(b)(3); *see T.B.*, Docket No. 21-0045 (issued June 2, 2021); *J.V.*, Docket No. 19-0990 (issued August 26, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹² *See R.M.*, Docket No. 21-0265 (issued June 23, 2021).

¹³ *See R.G.*, Docket No. 19-1889 (issued April 14, 2021); *Y.L.*, Docket No. 20-1025 (issued November 25, 2020); *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *R.R.*, Docket No. 18-1562 (issued February 22, 2019); *K.B.*, Docket No. 18-1392 (issued January 15, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹⁴ *See R.B.*, Docket No. 21-0035 (issued May 13, 2021); *V.L.*, Docket No. 19-0069 (issued February 10, 2020); *A.K.*, Docket No. 19-1210 (issued November 20, 2019); *R.S.*, Docket No. 19-0312 (issued June 18, 2019); *Richard Yadron*, 57 ECAB 207 (2005); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁵ *Supra* note 13.

OWCP also received a February 17, 2020 report from a nurse. This report, however, is irrelevant as does not constitute competent medical evidence. The Board has held that nurses are not considered a physician as defined under FECA.¹⁶

OWCP also received a June 12, 2020 FCE from a physical therapist. While this report addressed appellant's to work, this report also do not constitute competent medical evidence because physical therapists are not considered physicians as defined under FECA.¹⁷

As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁸

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3).¹⁹ Pursuant to 20 C.F.R. § 10.608, OWCP properly denied the request for reconsideration without reopening the case for review on the merits.²⁰

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).

¹⁶ Section 8101(2) of FECA provides that a 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 supra* note 8 at 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 D.C.*, Docket No. 19-0354 (issued May 27, 2020) (physician assistants are not physicians under FECA); *D.S.*, Docket No. 19-1657 (July 20, 2020) (registered nurses are not considered physicians under FECA); *D.S.*, Docket No. 18-0353 (issued February 18, 2020) (physical therapists are not considered physicians under FECA); *David P. Sachiko*, 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).

¹⁷ *Id.*

¹⁸ *See* 20 C.F.R. § 10.606(b)(3)(iii).

¹⁹ *Supra* note 10.

²⁰ *See G.M.*, Docket No. 20-1485 (issued March 22, 2021); *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Firkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 6, 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