

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

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W.C., Appellant )

and )

DEPARTMENT OF DEFENSE, DEPARTMENT )  
OF DEFENSE EDUCATION ACTIVITY, )  
Fort Knox, KY, Employer )  
\_\_\_\_\_ )

**Docket No. 22-0938  
Issued: December 19, 2022**

*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

JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On June 1, 2022 appellant filed a timely appeal from a January 10, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision on this issue, dated February 26, 2021, 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 to review the merits of this case.<sup>2</sup>

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

<sup>2</sup> The Board notes that appellant submitted additional evidence to OWCP following the January 10, 2022 decision. 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 request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On October 21, 2019 appellant, then a 56-year-old moderate/severe special education teacher, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2019 she sustained a stress-related disorder, tremors, and migraine headaches causally related to being accused of committing child abuse while in the performance of duty. She stopped work on October 21, 2019. On the reverse of the form, L.G., appellant's supervisor, noted that appellant was not injured in the performance of duty and controverted the claim as appellant had not filed her claim within 30 days of the alleged date of injury.

In support of her claim, appellant submitted reports dated September 6 and 13, 2019 by Nancy Allen, an advanced practice registered nurse (APRN), finding that appellant qualified for disability retirement.

In a November 4, 2019 statement, L.G. recounted that appellant had been assigned to an elementary school effective July 25, 2019. Students arrived on August 5, 2019. On August 8, 2019 an accusation of child abuse was made against appellant. In accordance with standing policy, appellant was temporarily assigned to another school while an investigation took place. The employing establishment's investigation found that the allegation against appellant did not meet the threshold for abuse. L.G. then investigated and determined that there were insufficient grounds to move forward. Therefore, appellant was reassigned to her classroom effective October 21, 2019.<sup>3</sup>

In a statement dated November 14, 2019, the employing establishment controverted the claim, contending that it complied with established policies in investigating the child abuse allegation against appellant. It noted that the medical evidence indicated that she wished to pursue disability retirement.

In a development letter dated November 15, 2019, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In response, appellant submitted a December 10, 2019 statement addressing the November 15, 2019 development questionnaire. She asserted that she had not been informed who had accused her of child abuse and that she had been "automatically found guilty." Appellant explained that the allegation concerned an incident where a student was about to spit a mouthful of water on her and she raised her hand to block the spit. The spit landed on the student's face and on appellant. Appellant wiped the student's face with his shirt and put on a clean shirt. On August 9, 2019 L.G. removed appellant from her classroom, escorted her to L.G.'s office, and gave her a letter to read stating that she had been accused of inappropriate actions in front of a

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<sup>3</sup> On November 5, 2019 OWCP received appellant's official position description, dated August 31, 2017.

student. L.G. advised appellant that she would be reassigned to the district office until further notice and that Y.W., a supervisor at the district office, would explain the situation. However, Y.W. only advised appellant that she would be in a room until further notice. She alleged that the room was in “complete isolation,” past the offices of the four other employees in the building. Appellant asserted that this incident aggravated conditions caused by a 2015 traumatic brain injury sustained while teaching for the employing establishment in Germany, with severe anxiety disorder, migraines, nausea, tremors, fatigue, left-sided weakness, blurred vision, dizziness, stuttering, memory loss, and insomnia. She contended that the August 2019 incident also caused post-traumatic stress disorder (PTSD). Appellant contended that she required daily support in activities of daily living and at times could not leave her bed.

On December 14, 2019 OWCP received reports by Ms. Allen dated September 6 and December 9 and 11, 2019.

On December 14, 2019 OWCP also received an October 18, 2019 report signed by Ms. Allen and countersigned by a physician whose signature is illegible, recommending appellant for disability retirement due to a history of three pulmonary embolisms, chronic migraine headaches, tremors, and anxiety. The physician opined that appellant’s anxiety, migraine headaches, and tremors had been exacerbated by “recent work[-]related events causing emotional lability.”

By decision dated December 18, 2019, OWCP accepted that the identified employment incidents had occurred as alleged. However, it denied appellant’s emotional condition claim as she had not provided rationalized medical evidence signed by a physician supporting a causal relationship between those events and the claimed emotional condition.<sup>4</sup> OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 2, 2020 appellant requested reconsideration. In support of her request, she submitted a November 3, 2020 statement alleging that the August 9, 2019 employment incident had caused a severe exacerbation of preexisting anxiety disorder, PTSD, and a mental breakdown. Appellant contended that she had been totally disabled from work and had difficulty with daily tasks.

By decision dated February 26, 2021, OWCP modified its prior decision to find that the December 14, 2019 medical report signed by Ms. Allen and the unidentified physician provided “valid diagnoses of anxiety and chronic migraines” in relation to the accepted employment incident. However, it denied the claim as appellant had not established any compensable factor of employment. OWCP found that the accusation of child abuse, removal from her classroom, reassignment to the district office, working in a room in the district office, and the investigation were administrative matters not considered to be in the performance of duty and that no error or abuse had been shown. It further found that appellant had not established as factual that she was “automatically found guilty” at the time of the accusation or was placed in isolation.

On October 12, 2021 appellant requested reconsideration. In support of her request, she submitted a September 28, 2021 statement alleging that on August 9, 2019 that she had been

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<sup>4</sup> On December 19, 2019 OWCP received appellant’s December 14, 2019 claim for compensation (Form CA-7) for disability for the period October 21 through December 14, 2019.

escorted to her classroom and out of the building by military police and was forced to work in isolation for the following three months. When instructed to return to the school on October 21, 2019 appellant could not as the thought of returning caused her to hyperventilate, stutter, and become physically ill. She recounted that, since she stopped work, she required assistance with activities of daily living, including personal hygiene, and dressing. Appellant alleged that she could no longer work as a teacher due to disorganized thoughts, impaired decision making, episodes of passing out, labile blood pressure, PTSD, severe anxiety, panic disorder, and migraine headaches.

On October 12, 2021 OWCP received March 29, 2020 registration and identification documents for an emotional support animal, and a January 22, 2021 determination from the Office of Personnel Management approving appellant's application for disability retirement. Appellant also submitted a January 10, 2020 report by Ms. Allen reports dated January 13 and April 16, 2021 by Erica Powell, a nurse practitioner, a June 14, 2021 prescription authorization signed by Dr. Joseph Bacani Oropilla, a Board-certified psychiatrist and neurologist, a June 17, 2021 report by Jesse Robinson, a nurse practitioner, a June 17, 2021 prescription authorization form.

On November 4, 2021 OWCP received duplicate copies of L.G.'s November 4, 2019 statement and the employing establishment's November 14, 2019 controversion letter.

By decision dated January 10, 2022, 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 or her own motion or on application.<sup>5</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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>6</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>7</sup> If it chooses to grant reconsideration, it reopens

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<sup>5</sup> 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

<sup>6</sup> 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).

<sup>7</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 (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.

and reviews the case on its merits.<sup>8</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.<sup>9</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).

In her October 12, 2021 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that she is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>10</sup>

In support of her reconsideration request, appellant submitted March 29, 2020 documents regarding an emotional support animal and a January 22, 2021 determination from the Office of Personnel Management approving her application for disability retirement. These documents, however, do not address the alleged employment incidents and are therefore irrelevant to the underlying issue in the claim.<sup>11</sup> The medical documents received by OWCP on October 12, 2021 are also irrelevant to the claim as the underlying issue of whether appellant has established a compensable employment factor is factual in nature.<sup>12</sup> 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.<sup>13</sup> Appellant also submitted her September 28, 2021 statement reiterating the allegations presented in her December 10, 2019 statement. Additionally, OWCP received duplicate copies of L.G.'s November 4, 2019 statement and the employing establishment's November 14, 2019 controversion letter, previously of record and considered when OWCP reviewed the merits of appellant's claim. The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already of record, does

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<sup>8</sup> *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *S.K.*, Docket No. 22-0248 (issued June 27, 2022); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>10</sup> *Supra* note 7.

<sup>11</sup> *B.T.*, Docket No. 18-1397 (issued January 15, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>12</sup> *See P.B.*, Docket No. 19-1673 (issued December 1, 2021); *R.B.*, Docket No. 19-0434 (issued November 22, 2019); *B.O.*, Docket No. 17-1986 (issued January 18, 2019) (finding that it is not necessary to consider the medical evidence of record if a claimant has not established any compensable employment factors). *See also Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

<sup>13</sup> *A.M.*, Docket No. 20-1417 (issued July 30, 2021); *E.J.*, Docket No. 19-1509 (issued January 9, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, *supra* note 15. (1979).

not constitute a basis for reopening a case.<sup>14</sup> Therefore, appellant is not entitled to a review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).<sup>15</sup>

Accordingly, the Board finds that appellant has not met any of the requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>16</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 January 10, 2022 decision of the Office of Worker's Compensation Programs is affirmed.

Issued: December 19, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> *C.K.*, Docket No. 20-1443 (issued February 2, 2022); *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>15</sup> *Supra* note 7; *see T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001).

<sup>16</sup> *See D.M.*, Docket No. 18-1003 (issued July 16, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).