

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

E.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 21-0829
Issued: January 18, 2022**

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 May 10, 2021 appellant filed a timely appeal from a November 16, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated January 20, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (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 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 20, 2017 appellant, then a 66-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on July 20, 2017 he was trying to push an all-purpose container into the

¹ 5 U.S.C. § 8101 *et seq.*

elevator and sustained injury. On the reverse side of the claim form appellant's supervisor acknowledged that appellant was injured in the performance of duty. Appellant stopped work on July 21, 2017.

In a development letter dated July 24, 2017, OWCP advised appellant that additional factual and medical evidence was necessary to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Appellant submitted medical reports dated July 24 and August 10, 2017 from Dr. Craig Antell, an osteopath Board-certified in physical medicine and rehabilitation. Dr. Antell related that appellant was seen for lower back, hand, and neck pain. He diagnosed lumbar facet arthropathy, degenerative disc disease, lumbar, cervical disc disorder, cervical radicular pain, ulnar neuritis, arthritis of knee, and chondromalacia.

OWCP received an undated attending physician's report (Form CA-20) from Dr. Antell. Dr. Antell noted that appellant's date of injury was July 20, 2017 and indicated by checking a box marked "Yes" that he believed that appellant's condition was caused or aggravated by his employment activity.

By decision dated August 28, 2017, OWCP denied appellant's claim, finding that he had not established that the incident occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In a December 14, 2017 report, Dr. Antell related that appellant's job, which entailed pushing, pulling, and twisting heavy equipment, persistently exacerbated his underlying lumbar disc disorder, lumbar for set arthrosis, and lumbar radiculitis.

On August 28, 2018 appellant requested reconsideration of OWCP's August 28, 2017 decision.

Appellant submitted a response to OWCP's questionnaire. He attested that he was "turning" a heavy mail container, into the elevator, which aggravated his injuries. Appellant related that, prior to the accident, he had the following conditions: chronic metatarsalgia; dorsal tendinitis; and bilateral lower back pain.

By decision dated October 29, 2018, OWCP modified its August 28, 2017 decision to find that appellant had established that the incident occurred as alleged; however, the claim remained denied as causal relationship had not been established.

On October 22, 2019 appellant requested reconsideration of OWCP's October 29, 2018 decision. He submitted a report dated October 10, 2019 from Dr. Antell, who related that appellant injured his lower back at work on September 24, 2016 while pushing a heavy rolling cart into the elevator. Dr. Antell indicated that appellant had difficulty turning the cart and overexerted himself, causing immediate left-sided low back pain with radiation into the left leg. He related appellant's diagnoses as subtle degenerative anterolisthesis of L3 on L4, associated with moderate severe left facet arthropathy and moderate left L3-L4 foraminal narrowing.

By decision dated January 20, 2020, OWCP denied modification of its August 28, 2017 decision, finding that appellant has not established that his diagnosed conditions were causally related to the accepted July 20, 2017 employment incident.

On November 9, 2020 appellant again requested reconsideration of OWCP's decision. He submitted an excuse slip from Scott A. Samson, a chiropractor. Mr. Samson related that appellant suffers from an L4-5 and L5-S1 disc bulge and protrusion, which was verified by a magnetic resonance imaging (MRI) scan report.

By decision dated November 16, 2020, OWCP denied appellant's request for reconsideration.

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.²

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.³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁴ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁵ 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.⁶

² 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).

³ 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).

⁴ *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). Chapter 2.1602.4b.

⁵ *Id.* at § 10.608(a); *see also A.F.*, Docket No. 19-1832 (issued July 21, 2020); *M.S.*, 59 ECAB 231 (2007).

⁶ *Id.* at § 10.608(b); *J.B.*, Docket No. 20-0145 (issued September 8, 2020); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

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

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁷

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. The underlying issue in this case is causal relationship. Appellant submitted an excuse slip from his chiropractor. Under section 8101(2) of FECA, the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. Dr. Samson is a chiropractor who did not diagnose a spinal subluxation based on the results of an x-ray, his reports, therefore, do not constitute probative medical evidence.⁸ As the underlying issue is medical in nature, the evidence submitted on reconsideration is not relevant evidence, thus, the Board finds that appellant was not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).⁹

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁰

CONCLUSION

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

⁷ *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

⁸ *R.P.*, Docket No. 20-0661 (April 14, 2021).

⁹ *R.L.*, Docket No. 20-1403 (issued July 21, 2021).

¹⁰ *J.B.*, *supra* note 6; *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 18, 2022
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