

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

M.S., Appellant)	
)	
and)	Docket No. 22-0363
)	Issued: July 8, 2022
DEPARTMENT OF THE INTERIOR,)	
IROQUOIS NATIONAL WILDLIFE REFUGE,)	
Basom, NY, 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
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 13, 2022 appellant filed a timely appeal from an August 17, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated July 12, 2021, 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 April 13, 2021 appellant, then a 40-year-old laborer, filed an occupational disease claim (Form CA-2) alleging that he injured his left elbow due to overuse and a strenuous maintenance

¹ 5 U.S.C. § 8101 *et seq.*

workload. He noted that he first became aware of his condition on March 2, 2021 and realized its relation to his federal employment on March 23, 2021.

In support of his claim, appellant submitted a statement wherein he further alleged that on March 2, 2021 he began experiencing soreness and aching in his left elbow, which gradually worsened. He explained that, due to lack of strength and mobility in his right elbow, he used his left elbow for everyday activities. Appellant stated that factors of federal employment causing his condition included grasping hand tools; hammering; moving metal; sweeping shop areas; power washing; repairing the heating, ventilation, and air conditioning; moving lumber; plowing snow; raking stones; picking up brush and parts; and picking up trash and recycling.

In a development letter dated April 14, 2021, OWCP informed appellant of the deficiencies of 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.

In response, appellant submitted an April 15, 2021 report from Natalie L. Appleton, a physician assistant, wherein she related that appellant was seen for left elbow pain, which began a month prior at work. Ms. Appleton stated that appellant's job required him to perform heavy lifting and wrench work. She diagnosed left elbow lateral epicondylitis and cervical radiculopathy. Ms. Appleton indicated that the work events appellant described were the competent medical cause of the injury and she provided a work excuse.

In a letter dated May 12, 2021, the employing establishment related that appellant injured his right elbow in December 2020 and, thus, utilized his left elbow more than he normally would. It also confirmed that appellant's allegations were accurate and that many of his employment activities required physical exertion. Appellant was provided with modifications at work including more frequent breaks and he was restricted from picking up heavier items. The employing establishment also included a position description for a maintenance worker.

Appellant submitted a medical report dated May 27, 2021 from Dr. Nicholas D. Valente, an orthopedic surgeon. Dr. Valente reported that appellant was seen for left elbow pain and diagnosed with bilateral lateral elbow epicondylitis. He related that appellant's job required him to perform a lot of heavy lifting and wrench work and indicated that he believed that the work events appellant described were the competent medical cause of the injury.

By decision dated July 12, 2021, OWCP accepted that the employment factors occurred, as alleged, but denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted employment factors. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 9, 2021 appellant requested reconsideration of OWCP's July 12, 2021 decision. In support of his request, he resubmitted the May 27, 2021 report from Dr. Valente.

By decision dated August 17, 2021, 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

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. 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. Appellant submitted a duplicate copy of Dr. Valente's report dated May 27, 2021. Evidence which repeats or duplicates evidence already in the case record has

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).

⁷ *C.B.*, Docket No. 18-1198 (issued January 22, 2019).

no evidentiary value and does not constitute a basis for reopening a case.⁸ As appellant did not provide relevant and pertinent new evidence, he is 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).

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 8, 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

⁸ *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).

⁹ *See T.W.*, Docket No. 18-0821 (issued January 13, 2020).

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