

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

_____)	
D.D., Appellant)	
)	
and)	Docket No. 22-0371
)	Issued: July 12, 2022
U.S. POSTAL SERVICE, SEMINOLE PROCESSING & DISTRIBUTION CENTER, Orlando, FL, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Wayne Johnson, Esq., for the Appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On January 14, 2022 appellant, through counsel, filed a timely appeal from a July 19, 2021 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days had elapsed from OWCP's last merit decision, dated July 2, 2020, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board therefore lacks jurisdiction over the merits of the claim.

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 an 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.

² 5 U.S.C. § 8101 *et seq.*

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 December 5, 2017 appellant, then a 65-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained neck and shoulder pain due to factors of her employment, including repeatedly lifting tubs and trays of heavy mail. She noted that she first became aware of her conditions and realized their relation to her federal employment on June 13, 2017. Appellant was last exposed to the alleged employment factors on December 5, 2017. OWCP received a position description in support of appellant's claim.

In a December 12, 2017 development letter, 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 attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested factual and medical evidence.

In response, OWCP received additional evidence, including a June 13, 2017 incident report wherein appellant reported lifting heavy tubs of mail.

In a June 22, 2017 report, Dr. Matthew D. Hurbanis, a Board-certified orthopedic surgeon, provided an assessment of appellant's condition as right shoulder bursitis.

In a June 22, 2017 report, Dr. Ken Schreiber, a Board-certified diagnostic radiologist, provided an assessment of left knee pain.

OWCP also received a December 1, 2017 right shoulder magnetic resonance imaging (MRI) scan, which noted a partial tear of appellant's far anterior lateral supraspinatus tendon.

On January 16, 2018 OWCP received an additional statement from appellant wherein she described her daily job duties.

By decision dated January 16, 2018, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish causal relationship between her diagnosed conditions and the accepted employment factors.

On January 15, 2019 appellant, through counsel, requested reconsideration. In reports dated June 19, November 30, December 4, 2017, and March 26, 2018, Dr. Hurbanis provided assessments of right shoulder bursitis, right shoulder impingement syndrome and acromioclavicular (AC) joint arthritis. In reports dated November 1 and 29, 2018, Dr. Mark A. Beckner, a Board-certified orthopedic surgeon, provided impressions of lumbalgia, right hip pain, right hip greater trochanteric bursitis, right lower extremity radiculopathy at L2-3, and spondylosis of the lumbar spine.

By decision dated April 3, 2019, OWCP denied modification of its January 16, 2018 decision. It found that while the medical evidence submitted contained diagnoses of right shoulder bursitis, right hip pain, right hip greater trochanteric bursitis, right lower extremity radiculopathy,

and spondylosis of the lumbar spine, no physician had provided medical rationale which explained how the medical conditions were caused or aggravated by the alleged employment factors.

On April 3, 2020 appellant requested reconsideration.

In a December 4, 2019 report, Dr. Brett Lewellyn, a Board-certified orthopedic surgeon, noted the history of appellant's right shoulder condition, relating that her shoulder pain had been ongoing for the last three years. He noted that appellant's constant lifting of heavy objects at work aggravated her right shoulder and that she denied any trauma or change in routine that may have caused the pain. Appellant also reported that physical therapy only provided mild relief for short periods of time. Dr. Lewellyn diagnosed right shoulder tendinitis for which he discussed operative and nonoperative treatment options.

In a February 10, 2020 report, Dr. Lewellyn noted appellant's right shoulder pain and that she had received two injections during her last office visit, one into the shoulder and another into the long head of the biceps, for which she indicated 50 percent relief. Dr. Lewellyn diagnosed internal impingement of right and left shoulders. He offered a plan to continue formal therapy and follow-up on an as needed basis.

By decision dated July 2, 2020, OWCP denied modification of its April 3, 2019 decision.

On July 2, 2021 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a June 3, 2020 progress report, Dr. Lewellyn diagnosed right shoulder tendinitis and right hand arthritis. The onset date of appellant's left shoulder impingement was February 13, 2020 and the onset date of internal impingement of right shoulder was December 4, 2019. He reported that she was last seen on February 10, 2020 and that she continued with both formal and home-self guided therapy exercises.

By decision dated July 19, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim under 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.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵

³ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* § 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 the OWCP decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 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.

A timely application 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.⁶ When a timely application 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.⁷

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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP. Consequently, she was 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).

In support of her reconsideration request, appellant submitted a June 3, 2020 progress report from Dr. Lewellyn. The underlying issue in this case is whether the medical evidence of record has established causal relationship between appellant's diagnosed conditions and her accepted employment factors. The June 3, 2020 progress report, while new, is not relevant to the underlying issue of causal relationship. Dr. Lewellyn failed to offer an opinion regarding the causal relationship between appellant's right shoulder tendinitis and her right hand arthritic conditions, for which appellant was seen, and her accepted employment factors. 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.⁸ This report is also substantially similar to Dr. Lewellyn's other reports of record in which he provided diagnoses, but failed to offer an opinion regarding causal relationship of such diagnosed conditions. Evidence which repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a case.⁹ Thus, this medical report does not constitute relevant and pertinent new evidence not previously considered by OWCP. Appellant, thus, was not entitled to a review of the merits of her claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* § 10.608(a), (b).

⁸ *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*, 31 ECAB 224-25 (1979).

⁹ *M.F.*, Docket No. 21-1221 (issued March 28, 2022); *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).

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 her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 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

¹⁰ 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).