

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

<hr/>)	
B.T., Appellant)	
)	
and)	Docket No. 22-0838
)	Issued: August 4, 2023
)	
U.S. POSTAL SERVICE, MARTECH CARRIER)	
ANNEX, Atlanta, GA, Employer)	
<hr/>)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 2, 2022 appellant filed a timely appeal from a March 28, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 23, 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 her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 20, 2018 appellant, then a 56-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 11, 2018 she sustained a lower back injury as a result of pulling

¹ 5 U.S.C. § 8101 *et seq.*

a bucket of mail while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx046 and accepted it for strain of the muscle, fascia, and tendon of the lower back.

In a September 19, 2018 duty status report (Form CA-17), Dr. Eric I. Francke, an attending Board-certified orthopedic surgeon, diagnosed lumbar radiculopathy due to appellant's accepted April 11, 2018 employment injury. He advised that appellant could return to work for eight hours per day with restrictions that included no lifting more than 25 pounds and intermittent bending/stooping.

On August 4, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.² She submitted a note dated July 19, 2019 from an unknown provider with an illegible signature. The note indicated that appellant had not reached maximum medical improvement (MMI) and she had permanent impairment based on her diagnoses of lumbar radiculopathy and intervertebral disc degeneration.

In an August 21, 2019 report, Dr. Francke reported normal findings on physical examination and reviewed diagnostic test results. Additionally, he reported that a lumbar magnetic resonance imaging scan demonstrated a left-sided L1-2 disc protrusion causing mild left lateral recess stenosis with a facet effusion on the right side at L5-S1 with mild bilateral foraminal and lateral recess stenosis at that level.

On August 23, 2019 Dr. Francke requested that OWCP expand the acceptance of appellant's claim to include lumbar spondylosis and lumbar radiculopathy.

OWCP, in an August 28, 2019 development letter, informed appellant of the deficiencies of her schedule award claim and requested that she submit an impairment evaluation addressing whether she had reached MMI and provide an impairment rating using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment (A.M.A., Guides)*.³ It afforded her 30 days to submit the necessary evidence.

By decision dated October 3, 2019, OWCP denied appellant's claim for a schedule award, finding that the evidence of record was insufficient to establish permanent impairment of a scheduled member or function of the body due to her accepted employment injury. It noted that she had not responded to its August 28, 2019 development letter.

² By decision dated November 20, 2017, under OWCP File No. xxxxxx030, OWCP granted appellant a schedule award for 11 percent permanent impairment of the left upper extremity due to her accepted February 4, 2015 employment-related sprain and unspecified rotator cuff tear or rupture of the left shoulder. In a December 11, 2018 decision under the same file number, it granted her a schedule award for 6 percent permanent impairment of the right upper extremity and an additional 1 percent permanent impairment of the left upper extremity, for a total 12 percent left upper extremity permanent impairment due to her accepted bilateral shoulder conditions. By decision dated November 30, 2018, under OWCP File No. xxxxxx829, OWCP granted appellant a schedule award for one percent permanent impairment of each foot due to her accepted June 5, 1995 bilateral plantar fibromatosis. Appellant's claims have not been administratively combined by OWCP.

³ A.M.A., *Guides* (6th ed. 2009).

On October 18, 2019 appellant requested reconsideration of the October 3, 2019 schedule award decision.

Dr. Francke, in a November 2, 2019 report, noted that appellant had not reached MMI due to the persistence of her lumbar symptoms.⁴

On January 9 2020 OWCP expanded the acceptance of appellant's claim for lumbar spondylosis and lumbar radiculopathy.

By decision dated January 9, 2020, OWCP denied modification of its October 3, 2019 schedule award decision.

Dr. Francke, in a February 6, 2020 addendum report, referenced the sixth edition of the A.M.A., *Guides* and found that, under Table 17-4, page 570, Lumbar Regional Spine Grid, appellant had six percent whole person permanent impairment due to her work-related injury.

On January 8, 2021 appellant requested reconsideration of the January 9, 2020 schedule award decision.

On January 21, 2021 OWCP referred the case to Dr. Arthur S. Harris, a Board-certified orthopedic surgeon serving as an OWCP district medical adviser (DMA), to determine the extent of appellant's permanent impairment in accordance with the sixth edition of the A.M.A., *Guides* and the date of MMI. It noted that appellant had previously been awarded compensation for 1 percent permanent impairment of the right lower extremity, 1 percent permanent impairment of the left lower extremity, 6 percent permanent impairment of the right upper extremity, and 12 percent permanent impairment of the left upper extremity. OWCP requested that the DMA determine whether the current percentage of impairment included the prior percentage awarded or if it should be considered an addition to the prior percentage awarded.

In a January 28, 2021 report, Dr. Harris noted that appellant did not have any neurologic deficit in the right or left lower extremity consistent with the accepted diagnosis of lumbar radiculopathy. He explained that this finding was consistent with severity 0 in Table 16-11, Sensory and Motor Severity, on page 533 of the sixth edition of the A.M.A., *Guides*, and a Class 0 impairment based on Proposed Table 2, Spinal Nerve Impairment: Lower Extremity Impairments, the sixth edition (July/August 2009) of *The Guides Newsletter*. The DMA opined that appellant had zero percent right and left lower extremity permanent impairment due to lumbar radiculopathy based on the diagnosis-based impairment (DBI) rating method. Regarding the range of motion (ROM) method, he explained that the A.M.A., *Guides* did not allow for an impairment rating to be calculated using the ROM method for appellant's diagnosed condition, as it did not contain an asterisk in the DBI grid. The DMA opined that appellant had sustained no additional permanent impairment of the right and left lower extremities and reiterated his opinion that she had zero percent impairment of the right lower extremity and zero percent impairment of the left lower extremity. He noted that his impairment rating represented her total current impairment of the affected member(s). The DMA further noted appellant's prior schedule awards for the bilateral

⁴ A notification of personnel action (PS Form 50) dated November 27, 2019 indicated that appellant voluntarily retired from the employing establishment, effective December 31, 2019.

upper and lower extremities as set forth in OWCP's January 21, 2021 memorandum and advised that his impairment ratings included any prior percentage awarded. He determined that she reached MMI on August 21, 2019, the date of Dr. Francke's impairment evaluation. The DMA noted that Dr. Francke calculated appellant's impairment under Table 17-4, pages 570-74 based on her spinal pain, however, he further noted that schedule awards were based on loss of use/impairments of the lower extremities, not the spine.

By decision dated March 23, 2021, OWCP denied modification of the January 9, 2020 schedule award decision, finding that the weight of the medical evidence rested with the opinion of Dr. Harris, the DMA.

OWCP subsequently received a progress note and visit status report dated April 29, 2021 from Dr. Francke who reiterated his diagnoses of lumbar radiculopathy and lumbar spondylosis, and his opinion that there were no changes in appellant's work restrictions.

In an undated letter, appellant questioned why her salary from November 2018 was repaid with her schedule award compensation for her lower back. She requested that OWCP review all the medical information in her case file under OWCP File No. xxxxxx046 as it had been overlooked.

On March 23, 2022 appellant requested reconsideration of the March 23, 2021 decision. (

By decision dated March 28, 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 own motion or on application.⁵

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.⁶

⁵ *Supra* note 1 at § 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).

⁶ 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).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.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).

Appellant's timely March 23, 2022 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP. On reconsideration appellant questioned why her salary from November 2018 was repaid with her schedule award compensation. She also requested that OWCP review all the medical information in her case file under OWCP File No. xxxxxx046 as it had been overlooked. The underlying issue in this case is whether appellant has submitted sufficient medical evidence to establish permanent impairment of a scheduled member or function of the body due to her accepted April 11, 2018 employment injury. 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.¹¹ Therefore, appellant's arguments do not require reopening her case for review

⁷ *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.

⁸ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *W.C.*, Docket No. 22-0938 (issued December 19, 2022); *G.T.*, Docket No. 21-1276 (September 8, 2022); *I.M.*, Docket No. 19-1189 (issued November 16, 2020); *G.H.*, Docket No. 22-1306 (issued January 11, 2023); *B.T.*, Docket No. 22-0006 (issued December 28, 2022); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹¹ *A.M.*, Docket No. 21-1413 (issued March 28, 2022); *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).

on the merits.¹² 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).

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. With her request for reconsideration, appellant submitted Dr. Francke's progress note and visit status report dated April 29, 2021. Dr. Francke restated his prior diagnoses of lumbar radiculopathy and lumbar spondylosis, and his opinion that there were no changes in appellant's work restrictions. However, this evidence is repetitive of the previously submitted reports from Dr. Francke. The submission of evidence or argument which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.¹³ As appellant failed to provide relevant and pertinent new evidence with her request for reconsideration, she is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁴

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.¹⁵

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).

¹² *Id.*

¹³ *J.L.*, Docket No. 21-0726 (issued January 19, 2023); *S.M.*, Docket No. 21-0392 (issued August 12, 2021); *E.R.*, Docket No. 18-1646 (issued May 17, 2019); *C.E.*, Docket No. 08-1521 (issued January 7, 2009); *Eugene F. Butler*, *supra* note 10.

¹⁴ *Id.*

¹⁵ *Supra* notes 6 and 9.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2023
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