

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

R.S., Appellant)	
)	
and)	Docket No. 23-0624
)	Issued: August 22, 2023
U.S. POSTAL SERVICE, POST OFFICE, Virginia Beach, VA, Employer)	
)	

Appearances: *Case Submitted on the Record*
James D. Muirhead, 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 March 23, 2023 appellant, through counsel, filed a timely appeal from a December 8, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated December 10, 2021, 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 lacks jurisdiction over the merits of this case.³

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 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.*

³ The Board notes that, following the December 8, 2022 decision, OWCP received additional evidence. 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. 20 C.F.R. § 501.2(c)(1). Evidence not before OWCP will not be considered by the Board 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 April 22, 2017 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 21, 2017 she exacerbated a left elbow condition lifting a tray of mail while in the performance of duty. OWCP accepted the claim for a temporary aggravation of lateral epicondylitis of the left elbow and a temporary aggravation of cervical spinal stenosis. It paid appellant wage-loss compensation on the supplemental rolls for intermittent disability from work effective November 6, 2017.

On March 13, 2018 Dr. Grant A. Skidmore, a Board-certified neurosurgeon, advised that appellant required a cervical discectomy and fusion and two levels. He noted that she had sustained an injury on April 21, 2017 and that diagnostic testing showed moderate-to-severe spinal stenosis and severe foraminal compromise at C5-6 and C6-7. Dr. Skidmore indicated that appellant had no history of prior problems with her neck and opined that her "need for surgery is directly related to the incident of April 21, 2017."

On March 13, 2018 OWCP referred appellant to Dr. James Schwartz, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated April 21, 2018, Dr. Schwartz discussed appellant's history of injury and provided his review of the medical evidence of record. On examination he found diffuse weakness in the left upper extremity and a positive left Phalen's test. Dr. Schwartz opined that appellant had sustained an "acute lateral epicondylitis/common extensor origin strain at the left elbow." He noted that diagnostic studies showed preexisting cervical spondylosis, but that she had no significant symptoms in her cervical spine until weeks after the April 21, 2017 employment injury. Dr. Schwartz thus found no causation between appellant's cervical symptoms and her accepted employment injury. He advised that the proposed surgery was reasonable, but unrelated to her employment injury. Dr. Schwartz provided work restrictions.

On May 11, 2018 appellant accepted a modified-duty assignment at the employing establishment.

By decision dated June 11, 2018, OWCP denied appellant's request for authorization for a cervical fusion.

In a progress report dated June 7, 2018, Dr. Skidmore discussed appellant's complaints of neck pain radiating into her upper extremities with weakness. He noted that she had been scheduled for a fusion. Dr. Skidmore diagnosed cervical stenosis and radiculopathy and recommended a cervical discectomy and fusion. In a progress report dated June 25, 2018, he again discussed appellant's history of injury, reviewed the results of an April 21, 2017 cervical magnetic resonance imaging (MRI) scan, and attributed her severe C4-5 foraminal stenosis and moderate severe cervical stenosis at C5-6 and C6-7 to the accepted April 21, 2017 employment injury. Dr. Skidmore diagnosed foraminal stenosis of the cervical region and recommended surgery.

On June 27, 2018 appellant requested reconsideration.

By decision dated July 11, 2018, OWCP denied modification of its June 11, 2018 decision.

On June 19, 2019 appellant, through counsel, requested reconsideration. Counsel asserted that Dr. Schwartz failed to discuss Dr. Skidmore's opinion that appellant's cervical discectomy and fusion was necessary due to the April 21, 2017 employment injury. He noted that OWCP had accepted the claim for a temporary aggravation of spinal stenosis, but failed to indicate when or if the condition had ceased.

Counsel submitted a December 20, 2018 report from Dr. Skidmore, who discussed appellant's history of immediately experiencing left forearm and hand pain after an April 21, 2017 employment injury. He related that after the employment injury she had "a fairly rapid onset of left arm pain and then neck and further left arm pain evolving over the next few weeks and months. This is typical for cervical radiculopathy." Dr. Skidmore noted that appellant had preexisting degenerative cervical changes, but no symptoms of radiculopathy prior to the incident. He advised that she had been successfully treated with surgery. Dr. Skidmore attributed appellant's need for treatment in 2017 and surgery in 2018 to her cervical radiculopathy.

In an April 22, 2019 report, Dr. Steven L. Gershon, a Board-certified physiatrist, opined that appellant's employment injury caused her cervical radiculopathy and spinal stenosis "to become symptomatic." He related that the findings on the June 26, 2017 MRI scan showed multiple level preexisting stenosis particularly at C5-6 and C6-7 and a spinal cord deformity at C6-7 caused by central and neuroforaminal stenosis. Dr. Gershon further found that electrodiagnostic testing revealed brachial plexopathy that was "caused by the industrial-related injury." He opined that it was usual for symptoms of cervical disc herniations or cervical stenosis to begin days to weeks after the "inciting event." Dr. Gershon noted that appellant initially complained of left upper extremity pain and "over the next 10 to 13 days began developing pain in the cervical spine segment." He asserted that the cervical conditions that necessitated surgery were directly related to the accepted employment injury.

By decision dated September 17, 2019, OWCP denied modification of its July 11, 2018 decision.

In a report dated September 11, 2020, Dr. Gershon related that he had treated appellant since June 19, 2017. He discussed her injury on April 21, 2017 lifting trays over her shoulder repetitively and rotating her upper body. Dr. Gershon advised that appellant's activities "caused an excessive amount of shearing forces across [appellant's] cervical spine which ultimately led to her radiculopathy." He opined that her employment injury caused her cervical radiculopathy and need for surgery.

On September 15, 2020 appellant requested reconsideration.

By decision dated December 7, 2020, OWCP denied modification of its September 17, 2019 decision.

On June 4, 2021 Dr. Olusola Kendra Onayemi, Board-certified in family practice, advised that her practice had treated appellant since the 1990s and that "the first time cervical radiculopathy was addressed for [appellant] was August of 2017" after an injury a few months earlier.

On September 14, 2021 appellant requested reconsideration.

By decision dated December 10, 2021, OWCP denied modification of its December 7, 2020 decision.

Appellant subsequently submitted reports dated March 22 and August 30, 2022 from a nurse practitioner.

On November 25, 2022 appellant requested and submitted additional medical evidence.

In a report dated November 16, 2022, Dr. Gershon reviewed appellant's history of lifting trays over her shoulder and rotating her body on April 21, 2017. He noted that she experienced left shoulder pain that subsequently radiated into her left upper extremity, causing "shearing forces in the cervical spine." Dr. Gershon diagnosed cervical radiculopathy and found that an MRI scan confirmed moderate central stenosis at C4-5 and moderate-to-severe central stenosis with severe bilateral neuroforaminal narrowing at C5-6. He related, "It is within a reasonable degree of medical probability that the industrial-related injury which caused a shearing force to the cervical spine segment is directly responsible for [appellant's] to go from an asymptomatic state to a symptomatic state. In the absence of this injury, [appellant] would have remained asymptomatic. Therefore, the injury ultimately caused the specific need for surgery rather than due to a preexisting condition."

By decision dated December 8, 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.⁴

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.⁵

⁴ 5 U.S.C. § 8128(a); *see C.V.*, Docket No. 22-0078 (issued November 28, 2022); *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).

⁵ 20 C.F.R. § 10.606(b)(3); *see K.D.*, Docket No. 22-0756 (issued November 29, 2022); *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.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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.⁸

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 has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).⁹

In support of her reconsideration request, appellant submitted a November 16, 2022 report from Dr. Gershon, who discussed her history of lifting trays over her shoulder and rotating her body on April 21, 2017. Dr. Gershon advised that her employment injury had resulted in shearing forces in the cervical spine causing her preexisting spinal condition to become symptomatic. He diagnosed cervical radiculopathy. Dr. Gershon attributed appellant's need for cervical surgery to her employment injury rather than a preexisting condition. However, he submitted substantially similar reports on April 22, 2019 and September 11, 2020. The Board has held that medical evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.¹⁰

Appellant further submitted March 22 and August 30, 2022 reports from a nurse practitioner. The Board finds, however, that submission of these reports did not require reopening her case for merit review, because they have no probative value on the underlying issue on reconsideration. These reports do not constitute competent medical evidence, because nurse

⁶ *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.

⁷ *Id.* at § 10.608(a); *see also D.B.*, Docket No. 22-0518 (issued November 28, 2022); *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

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

⁹ *Id.* at § 10.606(b)(3)(i) and (ii); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

¹⁰ *See L.E.*, Docket No. 22-0004 (issued April 14, 2023); *C.B.*, Docket No. 22-0144 (issued March 16, 2023); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

practitioners are not considered physicians as defined under FECA.¹¹ Therefore, this evidence is not relevant and is insufficient to require a merit review.¹²

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.¹³

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 December 8, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 2023
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

¹¹ Section 8101(2) provides that under FECA the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See supra* note 6 at Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *see also B.D.*, Docket No. 22-0503 (issued September 27, 2022) (nurse practitioners are not considered physicians as defined under FECA).

¹² *See T.T.*, Docket No. 19-0319 (issued October 26, 2020); *C.F.*, Docket No. 19-1495 (issued March 3, 2020).

¹³ *D.A.*, Docket No. 22-0762 (issued September 30, 2022); *T.G.*, Docket No. 20-0329 (issued October 19, 2020); *C.C.*, Docket No. 17-0043 (issued June 15, 2018).