

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

_____)	
B.A., Appellant)	
)	
and)	Docket No. 24-0622
)	Issued: August 2, 2024
U.S. POSTAL SERVICE, DETROIT NETWORK)	
DISTRIBUTION CENTER, Allen Park, MI,)	
Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 22, 2024 appellant, through counsel, filed a timely appeal from a February 28, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated November 29, 2023, which became final after 30 days of issuance, and is not subject to further review.² As there was no merit decision by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees' Compensation

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 20 C.F.R. § 501.6(d). *See R.S.*, Docket No. 23-1041 (issued February 9, 2024); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

Act³ (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

This case was previously before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 3, 2016 appellant, then a 54-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 29, 2016 when dumping sacks of mail onto a belt he felt a sharp pain in the lower right side of his stomach while in the performance of duty. He stopped work on March 30, 2016. OWCP accepted the claim for unilateral inguinal hernia without obstruction or gangrene. It paid wage-loss compensation on the supplemental rolls beginning June 23, 2016. Appellant returned to light-duty work on July 11, 2016.

In an authorization for examination and/or treatment (Form CA-16) and notes dated April 3, 2016, Dr. Tyra McKinney, a family practitioner, recounted appellant's history of pain in the right lower stomach and diagnosed unilateral inguinal hernia. On April 11, 2016 he sought treatment from William Rogers, a physician assistant.

In an April 13, 2016 report, Dr. Patrick A. Herek, an emergency medicine specialist, recounted appellant's assertion that heavy lifting at work caused his diagnosed unilateral right-sided inguinal hernia. He further noted reports of worsening pain and diagnosed bilateral hernias in the inguinal area without obstruction or gangrene.

On April 28, 2016 Dr. Robert M. Elkus, a general surgeon, examined appellant due to bilateral inguinal hernias and recounted that appellant's right groin pain first occurred at work on March 27, 2016. He related that appellant was experiencing pain on the right inguinal area, but not on the left. Dr. Elkus diagnosed reducible bilateral inguinal hernias and indicated that he would proceed with repair of only the right inguinal hernia. On June 20, 2016 Dr. Elkus performed a right inguinal hernia repair with mesh.

Dr. Marianne Franco, a general surgeon, completed an attending physician's report (Form CA-20) on July 8, 2016 diagnosing bilateral inguinal hernias without obstruction. She provided appellant's history of lifting heavy bags while at work and experiencing sharp pain in his right groin. Dr. Franco did not indicate the cause of his diagnosed conditions. On November 7, 2016 she reported that appellant had an inguinal hernia that he needed to have repaired. In a February 6, 2017 note, Dr. Franco recounted the diagnosis of bilateral inguinal hernias and his surgical history

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 23-0422 (issued November 29, 2023).

of right hernia repair. She noted that appellant was not interested in surgical repair of his left inguinal hernia. Dr. Franco denied knowledge of the March 29, 2016 employment injury.

On September 5, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that he stopped work on April 2, 2016 due to disability resulting from his March 29, 2016 employment injury. He further noted that his second hernia had never been repaired and that he still experienced symptoms from the original incident.

In a September 19, 2017 report, Dr. Elkus diagnosed symptomatic left inguinal hernia. He noted that appellant wanted an additional hernia repair. On September 27, 2017 Dr. Elkus again reported that appellant wanted an additional inguinal hernia repair as he experienced pain with prolonged periods of standing.

On October 17, 2017 appellant filed an additional Form CA-2a alleging a recurrence of disability on August 25, 2017 due to a symptomatic left inguinal hernia.

By decision dated December 4, 2017, OWCP denied appellant's recurrence claim. It noted that Dr. Franco failed to indicate that the left inguinal hernia was related to his accepted employment injury, and it determined that the left inguinal hernia was a secondary incidental diagnosis with no evidence that it was related to the events of March 29, 2016.

On December 13, 2017 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The oral hearing took place on May 31, 2018. By decision dated July 5, 2018, OWCP's hearing representative affirmed OWCP's December 4, 2017 decision.

In a July 26, 2018 note, Dr. Elkus related appellant's history of bilateral inguinal hernias, with the right initially symptomatic and resulting in repair on June 20, 2016. He reported that the left hernia had increased in size and was currently symptomatic.

On August 3, 2018 Dr. Elkus performed an unauthorized left inguinal hernia repair. In August 16, 2018 notes and narrative report, he reviewed Dr. Herek's April 13, 2018 note and repeated the history of injury provided. Dr. Elkus related that there were bilateral hernias present at the time of his initial evaluation, but only the right side was symptomatic. He determined that appellant later developed left-sided hernia pain and underwent repair.

On September 10, 2020 appellant, through counsel, requested to expand the acceptance of his claim to include left inguinal hernia. He resubmitted reports from Dr. Elkus dated September 27, 2017 through August 16, 2018.

By decision dated March 17, 2022, OWCP denied expansion of the acceptance of appellant's claim to include left inguinal hernia.

On March 30, 2022 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The oral hearing took place on July 8, 2022.

Appellant provided duplicative reports from Mr. Rogers.

By decision dated September 22, 2022, OWCP's hearing representative affirmed the March 17, 2022 decision.

On January 6, 2023 appellant, through counsel requested reconsideration. He resubmitted the notes from Mr. Rogers and Dr. McKinney.

By decision dated January 25, 2023, OWCP denied modification. On February 2, 2023 appellant, through counsel, appealed this decision to the Board. The Board, by decision dated November 29, 2023, affirmed OWCP's January 25, 2023 decision.⁵

On February 22, 2024 appellant, through counsel, requested reconsideration. In support of this request, he resubmitted the April 11, 2016 note from Mr. Rogers with addenda dated November 17 and December 23, 2022.

By decision dated February 28, 2024, OWCP denied appellant's request for reconsideration of the merits of his 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.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.⁷

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

⁵ *Id.*

⁶ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁷ 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).

⁸ *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.

⁹ *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration,¹⁰ OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹¹

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).

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).¹²

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his February 11, 2024 request for reconsideration. The underlying issue in this case is whether appellant established that the acceptance of his claim should include the additional condition of left inguinal hernia as causally related to the accepted March 29, 2016 employment injury. This is a medical question that requires rationalized medical opinion evidence to resolve the issue.¹³ On reconsideration, appellant submitted addenda notes, dated November 17 and December 23, 2022, from Mr. Rogers, a physician assistant. However, while this evidence is new, it is not relevant or pertinent to the underlying issue as the Board has held that certain healthcare providers, such as physician assistants, are not considered physicians as defined under FECA.¹⁴ Consequently, their medical findings and/or opinion will not suffice for purposes of establishing entitlement to FECA benefits.¹⁵ Because appellant did not provide any relevant and pertinent new evidence, he is not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).

The Board, therefore, finds that appellant has not met 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 *G.M.*, Docket No. 17-0345 (issued May 1, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹¹ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² *J.H.*, Docket No. 23-0485 (issued November 13, 2023); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹³ *A.B.*, Docket No. 23-0919 (issued March 26, 2024); *R.M.*, Docket No. 21-0963 (issued April 19, 2023).

¹⁴ Section 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(2); 20 C.F.R. § 10.5(t). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, 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 S.S.*, Docket No. 21-1140 (issued June 29, 2022) (physician assistants are not considered physicians under FECA and are not competent to provide medical opinions); *George H. Clark*, 56 ECAB 162 (2004) (physician assistants are not considered physicians under FECA).

¹⁵ *Id.*

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 February 28, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board