

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

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<b>T.E., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0575</b>
	)	<b>Issued: July 31, 2024</b>
<b>U.S. POSTAL SERVICE, RIVERSIDE- RUBIDOUX POST OFFICE, Riverside, CA, Employer</b>	)	
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<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant<sup>1</sup></i>	
<i>Office of Solicitor, for the Director</i>	

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On May 7, 2024 appellant, through counsel, filed a timely appeal from an April 8, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 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

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 27, 1987 appellant, then a 25-year-old letter carrier, filed a traumatic injury claim (Form CA- 1) alleging that on May 15, 1987 she sustained injury when the postal vehicle she was operating was rear-ended while in the performance of duty. She did not stop work. OWCP initially accepted appellant's claim for sprain of neck, sprain of the right shoulder/upper arm (acromioclavicular region), lesion of the right ulnar nerve, and adhesive capsulitis of the right shoulder. Appellant later stopped work and OWCP paid her wage-loss compensation on the supplemental rolls, beginning November 15, 2011, and on the periodic rolls, beginning April 8, 2012.

Appellant requested authorization for a left shoulder acromioclavicular joint repair with arthroscopy, and cervical spine fusion procedure at C4 and C5. She also claimed that her accepted conditions should be expanded to include additional cervical and left shoulder conditions she believed were related to the accepted May 15, 1987 employment injury.

On January 3, 2019 OWCP referred appellant and the case record, along with a series of questions and a statement of accepted facts (SOAF), for a second opinion examination and evaluation with Dr. Michael J. Einbund, a Board-certified orthopedic surgeon. It requested that Dr. Einbund provide an opinion regarding whether appellant sustained any further medical conditions due to the accepted May 15, 1987 employment injury other than those already accepted, and whether the requested left shoulder and cervical spine procedures should be authorized.

In a January 24, 2019 report, Dr. Einbund discussed appellant's factual and medical history and detailed findings of his physical examination. He concluded that appellant did not sustain any medical conditions due to the accepted May 15, 1987 employment injury other than those already accepted. Dr. Einbund opined that appellant's claimed work-related left shoulder and degenerative cervical conditions developed too remote in time from the May 15, 1987 employment injury to be related to that injury. He also found that the requested left shoulder and cervical spine surgeries were not necessitated by the May 15, 1987 employment injury. Dr. Einbund explained that the conditions were degenerative in nature as they were "associated with natural aging process."

In August 15 and 28, 2019 reports, Dr. Hamid Rahman, an attending Board-certified orthopedic surgeon, provided an opinion that appellant sustained several neck, and left upper

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<sup>3</sup> Docket No. 22-0429 (issued September 1, 2023).

extremity conditions due to the accepted May 15, 1987 employment injury. He diagnosed several conditions he believed were work related, including left shoulder impingement syndrome with bursitis and tendinitis, osteoarthritis of the left acromioclavicular joint, and multi-level disc disease/herniation at C3-4 and C5-6. Dr. Rahman recommended that appellant undergo left shoulder and cervical spine surgeries to treat these work-related conditions.

OWCP determined that there was a conflict in the medical opinion between Dr. Einbund and Dr. Rahman on the issues of whether appellant sustained any medical conditions due to the accepted May 15, 1987 employment injury other than those already accepted, and whether the requested left shoulder and cervical spine surgeries should be authorized. On December 16, 2020 it referred appellant, pursuant to section 8123(a) of FECA, to Dr. James M. Fait, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation to resolve the conflict. OWCP provided Dr. Fait with a series of questions and a current SOAF, and requested that he provide an opinion regarding whether appellant sustained any additional medical conditions due to the accepted May 15, 1987 employment injury, and whether the left shoulder and cervical spine surgeries should be authorized.

In a February 11, 2021 report, Dr. Fait discussed appellant's factual and medical history and detailed findings of his physical examination. He diagnosed cubital tunnel syndrome of the right elbow, left shoulder mild acromioclavicular osteoarthritis with tendinitis/bursitis, and cervical spine degenerative disc disease at C2-3 through C6-7. Dr. Fait determined that appellant did not sustain any medical conditions due to the accepted May 15, 1987 employment injury other than those already accepted. He opined that the degenerative processes in appellant's cervical spine and left shoulder were due to her age rather than any work-related cause. Dr. Fait also opined that the requested left shoulder and cervical spine surgeries should not be authorized because they were not necessitated by conditions related to the accepted May 15, 1987 employment injury.

By decision dated April 15, 2021, OWCP denied appellant's request to expand the acceptance of her claim to include additional medical conditions, finding that appellant had not shown that her claimed conditions of left shoulder impingement syndrome with bursitis and tendinitis, osteoarthritis of the acromioclavicular joint of the left shoulder, and disc disease/herniation at C3-4 and C5-6 were related to the accepted May 15, 1987 employment injury. In addition, it denied authorization for left shoulder surgery and cervical spine surgeries. OWCP determined that the special weight of the medical opinion evidence regarding appellant's expansion claim and her surgery requests rested with the well-rationalized opinion of the impartial medical examiner (IME), Dr. Fait.

By decision dated April 16, 2021, OWCP expanded appellant's accepted conditions to include right cubital tunnel syndrome, myofascial injury to the cervical spine, calcific tendinitis of the right shoulder, impingement syndrome of the right shoulder and right elbow chronic nerve irritation.

On April 21, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review with respect to the April 15, 2021 decision. A hearing was held on July 8, 2021. Appellant submitted a July 9, 2021 report of Dr. Rahman who continued to opine that appellant developed additional left shoulder and

cervical conditions causally related to the accepted May 15, 1987 employment injury, and that these conditions necessitated left shoulder and cervical spine surgeries.

By decision dated September 22, 2021, OWCP's hearing representative affirmed the April 15, 2021 decision.

On October 11, 2021 appellant, through counsel, requested reconsideration of the September 22, 2021 decision. Appellant resubmitted the July 9, 2021 report of Dr. Rahman.

By decision dated January 5, 2022, OWCP denied modification of its September 22, 2021 decision.

On January 10, 2022 OWCP received a December 8, 2021 report from Dr. Rahman who indicated that appellant continued to complain of pain in her cervical spine, shoulders, and elbows. Dr. Rahman advised that on physical examination appellant exhibited positive spasms and paraspinal muscle tenderness upon palpation of the cervical spine, 4/5 strength of the muscle groups of both shoulders, lack of tenderness upon palpation of the right shoulder, and tenderness upon palpation over the cubital tunnel regions of both elbows. He diagnosed right elbow cubital tunnel syndrome, myofascial injury to the cervical spine, status post right shoulder arthroscopic surgery with rotator cuff repair, right ulnar nerve neuritis irritation, history of right ulnar anterior transposition, left elbow ulnar nerve neuritis, and right shoulder mild adhesive capsulitis. Dr. Rahman indicated that appellant was totally disabled and requested authorization for eight sessions of acupuncture therapy. He noted that she needed to undergo left ulnar nerve transposition.

Appellant appealed to the Board and, by decision dated September 1, 2023, the Board affirmed OWCP's January 5, 2022 decision.

Appellant subsequently submitted a February 16, 2024 report from Dr. Rahman who reported physical examination findings including, weakness in the right shoulder, tenderness upon palpation of the left shoulder and elbows, as well as positive spasms and paraspinal muscle tenderness upon palpation of the cervical spine. He diagnosed right elbow cubital tunnel syndrome, myofascial injury to the cervical spine, status post right shoulder arthroscopic surgery with rotator cuff repair, right ulnar nerve neuritis irritation, history of right ulnar anterior transposition, left elbow ulnar nerve neuritis, and right shoulder mild adhesive capsulitis. Dr. Rahman advised that appellant was totally disabled and requested authorization for additional diagnostic testing and psychiatric evaluation/treatment for anxiety.

In a February 16, 2024 work capacity evaluation (Form OWCP-5c), Dr. Rahman indicated that appellant was totally disabled from all work. He noted that she had loss of function of her right arm and advised that she could not perform various activities, including lifting/pushing/pulling, reaching, reaching above shoulder, bending, stooping, twisting, and operating a motor vehicle.

On April 2, 2024 appellant, through counsel, requested reconsideration of OWCP's denial of her request to expand the acceptance of her claim to include additional medical conditions, and her request for authorization of left shoulder and cervical spine surgeries. Counsel indicated that new medical evidence had been submitted.

By decision dated April 8, 2024, 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.<sup>4</sup>

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.<sup>5</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>6</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

### **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).

On April 2, 2024 appellant filed a timely request for reconsideration of OWCP's denial of her request to expand the acceptance of her claim to include additional medical conditions,

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<sup>4</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>6</sup> 20 C.F.R. § 10.607(a). According to OWCP's procedures, the one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). The right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. *Id.* at Chapter 2.1602.4a (September 2020).

<sup>7</sup> *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>8</sup> *Id.* at § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>9</sup> *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*; 31 ECAB 224, 225 (1979).

and her request for authorization of left shoulder and cervical spine surgeries.<sup>10</sup> The Board finds, however, that she neither established that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP. Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second requirement under 20 C.F.R. § 10.606(b)(3).

On reconsideration appellant submitted additional medical evidence. In a December 8, 2021 report, Dr. Rahman reported physical examination findings and diagnosed right elbow cubital tunnel syndrome, myofascial injury to the cervical spine, status post right shoulder arthroscopic surgery with rotator cuff repair, right ulnar nerve neuritis irritation, history of right ulnar anterior transposition, left elbow ulnar nerve neuritis, and right shoulder mild adhesive capsulitis. He indicated that appellant was totally disabled and noted that she needed to undergo left ulnar nerve transposition. In a February 16, 2024 report, Dr. Rahman provided the same diagnoses as contained in his December 8, 2021 report. He advised that appellant was totally disabled and requested authorization for additional diagnostic testing and psychiatric evaluation/treatment for anxiety. In a February 16, 2024 Form OWCP-5c, Dr. Rahman indicated that appellant was totally disabled from all work. He noted that she had loss of function of her right arm and advised that she could not perform various activities, including lifting/pushing/pulling, reaching, bending, twisting, and operating a motor vehicle.

While this medical evidence is new, it is not relevant because Dr. Rahman's reports do not directly address the underlying issues of the present case, *i.e.*, whether appellant submitted sufficient evidence to establish that the acceptance of her claim should be expanded to include additional work-related medical conditions, and whether she submitted sufficient evidence to establish that she needed left shoulder and cervical spine surgeries due to a work-related condition. The submission of this medical evidence does not warrant a review of appellant's claim on the merits because 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.<sup>11</sup> Therefore, appellant is not entitled to further review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, accordingly, 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.

### **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).

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<sup>10</sup> See *J.F.*, Docket No. 16-1233 (issued November 23, 2016).

<sup>11</sup> See *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 8, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 31, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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