

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

T.E., Appellant)	
)	
and)	Docket No. 23-0233
)	Issued: May 28, 2024
DEPARTMENT OF HEALTH & HUMAN SERVICES, THE NATIONAL INSTITUTES OF HEALTH, Bethesda, MD, Employer)	
)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 5, 2022 appellant, through counsel, filed a timely appeal from a June 7, 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 October 22, 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.

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.*

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 June 15, 1998 appellant, then a 30-year-old health technician, filed an occupational disease claim (Form CA-2) alleging that she sustained tendinitis of the right forearm and hand caused by factors of her federal employment including repetitive use of a computer mouse. She noted that she first became aware of her condition on May 19, 1998, and realized its relation to her federal employment on May 22, 1998. OWCP assigned the claim OWCP File No. xxxxxx382 and accepted it for right forearm tendinitis.³ Appellant stopped work on August 1, 2000, and did not return. On September 12, 2000 OWCP expanded the acceptance of appellant's claim to include right carpal tunnel syndrome and right lateral epicondylitis. It paid her wage-loss compensation on the supplemental rolls, effective August 1, 2000.

OWCP received periodic medical reports dated April 22, 2003 through May 21, 2019, wherein Dr. John P. Byrne, a Board-certified orthopedic surgeon, diagnosed ongoing right carpal tunnel syndrome and right de Quervain's tenosynovitis.

OWCP also received a February 18, 2004 electromyography/nerve conduction velocity (EMG/NCV) study by Dr. Arthur Barletta, a Board-certified physiatrist, who noted appellant's history of status post right tennis elbow and right carpal tunnel syndrome surgery with ongoing intermittent pain in the right elbow and the top of the right hand.

On August 6, 2020 OWCP referred appellant, the medical record, and a July 14, 2020 statement of accepted facts (SOAF) to Dr. John C. Barry, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether the accepted conditions remained active and disabling.

In a September 9, 2020 report, Dr. Barry reviewed the medical record and SOAF. He noted that appellant was not working, but performed volunteer work intermittently. On examination of the right upper extremity, Dr. Barry observed full range of motion of the elbow, mild tenderness over the lateral epicondyle, well-healed surgical scars over the lateral epicondyle and right carpal tunnel, negative Finkelstein's, Tinel's, and Phalen's signs, tenderness at the first carpometacarpal joint with some pain on grind test, and full, painless motion of all digits of the right hand. He opined that the accepted conditions had resolved completely as there were no objective findings of persistent lateral epicondylitis of the right elbow, de Quervain's tenosynovitis of the right first

³ Appellant has a prior Form CA-2, filed on March 21, 1996, alleging that she sustained de Quervain's tendinitis of the right wrist due to factors of her federal employment, including keyboarding and using a light pen. She noted that she first became aware of her condition and realized its relation to her federal employment on March 16, 1996. OWCP assigned that claim OWCP File No. xxxxxx284 and accepted it for right de Quervain's disease. In August 1998, it administratively combined OWCP File Nos. xxxxxx284 and xxxxxx382, with the latter serving as the master file.

dorsal compartment, or right carpal tunnel syndrome. Dr. Barry found appellant able to return to her date-of-injury position without restrictions.

On October 16, 2020 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits because she no longer had disability or residuals causally related to the accepted employment conditions. It found that the weight of the medical evidence rested with Dr. Barry, who opined that she no longer had any disability or residuals causally related to her accepted employment conditions. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

In a November 11, 2020 report, Dr. Byrne observed positive Tinel's and Phalen's signs in the right hand with exquisite tenderness over the dorsal aspect, exquisite tenderness over the right epicondyle, and tennis elbow. He diagnosed right lateral epicondylitis and right carpal tunnel syndrome. Dr. Byrne opined that Dr. Barry's report was incorrect as appellant had not performed any volunteer activities "because any slight increased activity causes significant symptoms." He advised that she was able to perform sedentary work with no lifting greater than five pounds, no repetitive upper extremity tasks, and no prolonged computer use. Dr. Byrne noted that appellant's condition had been ongoing for over 20 years and was considered permanent.

In a March 31, 2021 attending physician's report (Form CA-20), Dr. Byrne diagnosed carpal tunnel syndrome and lateral epicondylitis. He checked a box marked "Yes" indicating that the diagnosed conditions were caused or aggravated by an employment activity. Dr. Byrne noted that appellant could perform modified-duty work with lifting limited to up to five pounds, no repetitive use of the upper extremity, and no climbing, pulling, or pushing.

By decision dated April 8, 2021, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective April 9, 2021. It found that the weight of the medical evidence rested with Dr. Barry, the second opinion physician, who had determined in a September 9, 2020 report that appellant did not have disability or residuals due to the accepted employment conditions.

On April 13, 2021 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP thereafter received a March 31, 2021 report by Dr. Byrne, which reiterated the diagnoses and opinions presented in his November 11, 2020 report.

In a July 23, 2021 report, Dr. Byrne noted clinical findings of a positive Tinel's sign at the right wrist, mild thenar atrophy, tenderness over the right lateral epicondyle, a long history of numbness at the right elbow, and tingling in the right hand. He obtained an x-ray, which demonstrated lateral calcification at the lateral humeral ridge. Dr. Byrne diagnosed right carpal tunnel syndrome and right lateral epicondylitis.

An August 4, 2021 magnetic resonance imaging (MRI) scan of the right elbow demonstrated abnormal thickening of the common extensor tendon, with increased signal within the tendon at its origin on the lateral epicondyle, consistent with tendinosis and lateral epicondylitis.

During the hearing, held on August 9, 2021, appellant reiterated that Dr. Barry's report was inaccurate as she had not performed any volunteer work.

In an August 18, 2021 report, Dr. Byrne summarized the history of injury and treatment. He noted that, as years of therapies and alternative treatments had not resolved appellant's symptoms, he had ordered additional studies. Dr. Byrne opined that an August 4, 2021 MRI scan of the right elbow demonstrated abnormal thickening of the common extensor tendon, with increased signal within the tendon at its origin on the lateral epicondyle, consistent with tendinosis and lateral epicondylitis. He noted that an EMG/NCV study on an unspecified date demonstrated "even though [appellant] had carpal tunnel surgery years ago she had residual carpal tunnel syndrome." Dr. Byrne opined that appellant was "still suffering from her original injury of [May 22, 1998] and will need to continue to seek treatment for these injuries."

By decision dated October 22, 2021, an OWCP hearing representative affirmed the April 8, 2021 decision.

On December 15, 2021 appellant, through counsel, requested reconsideration. Counsel contended that Dr. Barry's opinion was in conflict with that of Dr. Byrne, warranting an impartial medical evaluation.

In support of the reconsideration request, counsel submitted an August 3, 2021 EMG/NCV study performed by Dr. Barletta, who noted appellant's history of right carpal tunnel release "many years ago" with complaints of right hand pain. The EMG/NCV study demonstrated a right median motor distal latency of 4.4, improved over a prior study result of 5.0. The right median sensory result of 0.1 had also improved. Dr. Barletta noted that the evidence was consistent with "residual carpal tunnel syndrome, better than previous study," with no denervation noted. He referred appellant back to the care of Dr. Byrne.

By decision dated March 15, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). It found that, as Dr. Byrne described the August 3, 2021 EMG/NCV study in his August 18, 2021 report, the diagnostic study report submitted on reconsideration was cumulative and substantially similar to evidence considered by OWCP in its October 22, 2021 decision.

On May 27, 2022 appellant, through counsel, requested reconsideration. He contended that the August 3, 2021 EMG/NCV study report was not cumulative.

By decision dated June 7, 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 FECA⁴ does not entitle a claimant to review of an OWCP decision as a matter of right.⁵

OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ 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.⁷ A timely request 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.⁸ When a timely request 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 review on the merits.⁹

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁰ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹¹ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's request for reconsideration and any evidence submitted in support thereof.¹²

⁴ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁵ *Id.*

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 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 its 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 § 10.606(b)(3).

⁹ *Id.* at § 10.608(b).

¹⁰ *A.M.*, Docket No. 22-0529 (issued August 22, 2022); *L.O.*, Docket No. 21-0030 (issued May 19, 2022); *F.E.*, Docket No. 20-0070 (issued August 4, 2020); *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

¹¹ See *supra* note 8. *F.E., id.*; *Mark H. Dever*, 53 ECAB 710 (2002).

¹² *L.O.*, *supra* note 10; *G.K.*, Docket No. 20-1026 (issued December 11, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

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. Therefore, OWCP properly determined that her request did not warrant a review of the merits of the claim based on the first and second requirements of 20 C.F.R. § 10.606(b)(3).¹³

Appellant also did not submit any relevant and pertinent new evidence. In a letter dated May 27, 2022, appellant, through counsel, contended that the August 3, 2021 EMG/NCV study report was not cumulative. As Dr. Byrne summarized the study in his August 18, 2021 report previously of record, the diagnostic study is cumulative and does not constitute relevant and pertinent new evidence. The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the record, does not constitute a basis for reopening a claim.¹⁴ Therefore, appellant is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁵ Consequently, OWCP properly determined that appellant's request did not warrant a review of the merits of the claim based on the third requirement of 20 C.F.R. § 10.606(b)(3).

As appellant has not met any of the regulatory requirements under 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).

¹³ See *M.C.*, Docket No. 18-1278 (issued March 7, 2019); see also *S.M.*, Docket No. 17-1899 (issued August 3, 2018).

¹⁴ *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁵ See *R.J.*, Docket No. 24-0316 (issued April 25, 2024); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 7, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 28, 2024
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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