

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

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D.R., Appellant)	
)	
and)	Docket No. 24-0427
)	Issued: May 30, 2024
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOM AND BORDER PATROL, Tecate, CA,)	
Employer)	
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Appearances: *Case Submitted on the Record*
Alan J. Shapiro, 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 14, 2024 appellant, through counsel, filed a timely appeal from a February 22, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to

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 The Board notes that, following the February 22, 2024 decision, OWCP received additional evidence. 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. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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 August 14, 2020 appellant, then a 38-year-old customs and border protection officer, filed an occupational disease claim (Form CA-2) alleging that she developed pain in her fingers, and right wrist, forearm, elbow, upper arm, shoulder, neck and upper back due to factors of her federal employment.⁵ She did not stop work. OWCP accepted the claim for right carpal tunnel syndrome, sprain of the metacarpophalangeal joint of the right index finger, right wrist strain, right lateral epicondylitis, neck strain, and right shoulder girdle sprain. It paid appellant wage-loss compensation on the supplemental rolls.

On November 8, 2023 appellant filed a claim for compensation (Form CA-7) for four hours of disability from work on October 24, 2023 due to a medical appointment.

On November 8, 2023 OWCP received an undated note from Tracy M. Sebastian, a physician assistant, confirming that appellant had an appointment in the office of Dr. Scott P. Leary, a Board-certified neurosurgeon, on October 24, 2023.

In a November 9, 2023 development letter, OWCP notified appellant of the deficiencies of her disability claim. It advised her of the type of factual and medical evidence needed, and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In an October 10, 2023 report, Dr. Leary addressed appellant's chronic neck pain with associated right upper extremity pain and paresthesias, which she attributed to her August 11, 2020 employment injuries. He diagnosed neck pain with bilateral upper extremity radiculopathy secondary to multilevel cervical foraminal stenosis, most significant at C6-7.

³ 5 U.S.C. §8101 *et seq.*

⁴ The Board notes that counsel only appealed from OWCP's February 22, 2024 nonmerit decision. Although OWCP's December 18, 2023 merit decision is within the Board's jurisdiction, counsel did not appeal from that decision. Therefore, the Board will not address the December 18, 2023 merit decision in this appeal. 20 C.F.R. § 501.3(c)(4); *see D.K.*, Docket No. 22-0111 (issued February 8, 2023); *E.R.*, Docket No. 20-1110 (issued December 23, 2020).

⁵ OWCP assigned the present claim OWCP File No. xxxxxx812. Appellant subsequently filed a traumatic injury claim (Form CA-1) alleging on February 25, 2021 she developed pain, numbness, and tingling in the left hand and wrist while typing, using a computer mouse, and inspecting baggage. OWCP accepted that claim for left carpal tunnel syndrome and assigned OWCP File No. xxxxxx901. On December 15, 2023 it administratively combined OWCP File Nos. xxxxxx901 and xxxxxx812, with the latter designated as the master file.

By decision dated December 18, 2023, OWCP denied appellant's claim for four hours of disability from work on October 24, 2023, finding that the medical evidence of record was insufficient to establish the claim.

OWCP continued to receive evidence. In reports dated December 14, 2023 and January 3, 2024, Dr. David M. Kupfer, a Board-certified plastic surgeon, noted his examination of appellant due to neck discomfort, and episodic tingling and numbness in her fingers. In a January 2, 2024 report, Dr. James F. McSweeney, a Board-certified orthopedic surgeon, completed a form report indicating that she could return to modified duty. In a December 27, 2023 report, Dr. Bernardo Ng, a Board-certified psychiatrist, listed his treatment dates which did not include October 30, 2023, and diagnosing psychological conditions. OWCP also received a note dated April 17, 2023 from Dr. Charles Stevens, a Board-certified anesthesiologist, which was previously of record.

In February 5 and 8, 2024 narrative statements, appellant attributed her diagnosed major depressive disorder to her modified-duty work.

On February 13, 2024 appellant requested reconsideration.

In a January 24, 2024 note, Dr. Kupfer examined appellant due to persistent cervical radicular and shoulder symptoms.

On February 6, 2024 Dr. Leary diagnosed neck pain, with bilateral upper extremity radiculopathy secondary to multilevel cervical foraminal stenosis. He provided an undated note that appellant had an appointment on February 6, 2024.

By decision dated February 22, 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.⁶

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.⁷

⁶ 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).

⁷ 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).

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

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹¹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

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).

In support of her request for reconsideration, appellant submitted narrative statements asserting that she was treated on October 24, 2023, the date in question, for her accepted employment-related injuries. The underlying issue in this case, however, is whether appellant has submitted medical evidence sufficient to establish up to four hours of disability from work on October 24, 2023 due to medical treatment of her accepted conditions. As this issue requires the submission of medical evidence, her statements do not establish that OWCP erroneously applied or interpreted a specific point of law, nor do they 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 the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

On reconsideration, appellant submitted new medical evidence. However, none of the newly-submitted medical evidence addressed whether she attended a medical appointment on October 24, 2023, and/or the purpose of that appointment.¹³ The Board has held that the submission of evidence or argument which does not address the particular underlying issue

⁸ *Id.* at § 10.607(a). 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). 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); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

¹⁰ *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).

¹¹ *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹² *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹³ *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001) (The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation).

involved does not constitute a basis for reopening a case.¹⁴ Appellant also resubmitted an April 17, 2023 note from Dr. Stevens, which was previously of record. The Board has held that evidence that duplicates evidence previously of record does not constitute a basis for reopening a case.¹⁵ Therefore, she 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, thus, 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).

ORDER

IT IS HEREBY ORDERED THAT the February 22, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 30, 2024
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

¹⁴ *A.G.*, Docket No. 23-0045 (issued February 15, 2024); *M.K.*, *supra* note 12; *Edward Matthew Diekemper*, *supra* note 12.

¹⁵ *See E.L.*, Docket No. 24-0232 (issued April 9, 2024); *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*, *supra* note 11.