

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

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M.K., Appellant )

and )

U.S. POSTAL SERVICE, MORGAN PARK )  
STATION POST OFFICE, Chicago, IL, )  
Employer )  
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**Docket No. 25-0022**  
**Issued: November 21, 2024**

*Appearances:*

*Samantha Hartwig, for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On October 11, 2024 appellant, through his representative, filed a timely appeal from an August 26, 2024 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated August 23, 2023 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks 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 his claim, pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On November 18, 2022 appellant, then a 65-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 10, 2022 he injured the right side of his lower back, right hip, and groin while in the performance of duty.<sup>3</sup> He explained that he felt a pulling sensation in his lower back when he stepped out of his postal vehicle. Appellant stopped work on November 10, 2022.

OWCP received unsigned notes dated November 10, 2022 from James T. Elias, a chiropractor, documenting severe back pain.

In a November 22, 2022 report, Dr. J. Michael Morgenstern, an orthopedic specialist, noted the history of a November 10, 2022 work injury and advised that appellant was first seen on November 17, 2022 with complaints of worsening back pain. He provided physical examination findings and an impression of acute musculoligamentous pain, lumbosacral spine. Dr. Morganstern opined in a November 22, 2022 disability note that appellant was totally disabled from November 22 to December 8, 2022 as a result of muscle sprain. In a November 29, 2022 duty status report (Form CA-17), he held him off work due to low pain spasms with weakness, antalgic gait, and balance dysfunction.

In a November 29, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit additional evidence and to respond to its inquiries.

In a November 29, 2022 prescription slip, Dr. Morgenstern diagnosed low back pain with radiculopathy.

In a duty status report (Form CA-17), Dr. Morgenstern reported a July 25, 2018 date of injury, diagnosed right hip TNR/lumbar radiculopathy and provided work restrictions.

By decision dated January 6, 2023, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish a diagnosed medical condition causally related to the accepted November 10, 2022 employment incident.

On August 8, 2023 appellant requested reconsideration and submitted additional medical evidence.

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<sup>3</sup> Under OWCP File No. xxxxxx321, a appellant has a previously-accepted traumatic injury claim for a July 25, 2018 unspecified sprain of right hip, unspecified sprain of left hip, strain of muscles, fascia and tendon of right hamstring and right hamstring tendonitis, right knee patellar tendinitis, sacrococcygeal disorders, aggravation of right hip osteoarthritis, other tear of medial meniscus, iliopsoas impingement left hip, intervertebral disc disorders with radiculopathy at L3-4, L4-5, L5-S1, and multilevel spondylosis of the lumbosacral spine with radiculopathy. Appellant's claims have not been administratively combined.

In a March 6, 2023 report, Dr. Morgenstern advised that appellant had a past history of back conditions which were mild and nonproblematic until the November 10, 2022<sup>4</sup> work incident. He opined that given the mechanism of injury and aggravation of symptomology, it was within reasonable medical certainty that appellant's current medical findings of sprain/strain of lumbosacral region, left hand contusion and strain, aggravation of accepted work-related lumbar radiculopathy and right hip strain were caused by the November 10, 2022 traumatic work injury. Dr. Morgenstern reviewed appellant's history, imaging studies, physical examination and the medical literature, and opined that it appeared that appellant suffered an aggravation of his lower back injury due to a new work injury caused by the sudden strain displaced into the lower back and low extremities, which caused the new injury and aggravation of preexisting condition of the lower back. He further opined that appellant's symptoms were not of normal degenerative progression but rather a manifestation of worsening underlying lower back injuries and a new finding of low back, right hip and left-hand injuries. Dr. Morgenstern indicated that the mechanism of injury was a sudden onset of aggravation and worsening of preexisting lower back condition with new finding of lumbosacral strain. He noted that the contusion and strain of left hand were due to impact from bracing. Dr. Morgenstern explained that as appellant stepped out of his work vehicle on the day of injury, he was leaning to the left side, and the positional change caused pulling and sudden strain onto the lower back which then reagravated the existing back injury. He also referenced the American Academy of Orthopedic Surgeons to explain the biophysiological mechanism of appellant's injuries. Dr. Morgenstern noted that appellant had returned to work.

By decision dated August 23, 2023, OWCP denied modification of its January 6, 2023 decision.

On August 22, 2024 appellant, through his representative, requested reconsideration.

In an August 6, 2024 report, Dr. Morgenstern explained with rationale how the work injury caused an aggravation of an underlying condition. He explained that on November 10, 2022, when appellant stepped out of his truck and felt sudden pain on the right lower back, the sudden onset caused him to brace from falling, which caused sudden impact to the left hand. Dr. Morgenstern noted that prior to the November 10, 2023 work incident, appellant had a preexisting lower back condition which he had been tolerating well overall. He indicated that the constant stepping in and out of the vehicle had weakened appellant's lower back and caused sudden spasm and injury to the lower extremity which caused the new work injuries. Furthermore, his attempt to brace his fall precipitated the lower back injuries and led to his muscle strain as the sudden application of force led to the overstretching or tearing of the muscles and tendons in the lower back, with resulting pain, stiffness and restricted mobility. Dr. Morgenstern indicated that ligament sprain due to the overextension and tearing of the ligaments, resulted in the lower back instability and significant pain.

By decision dated August 26, 2024, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

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<sup>4</sup> The Board notes that the report references November 10, 2023 as the date of injury. However, this appears to be a typographical error.

## 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.<sup>5</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>6</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>7</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</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>9</sup>

## ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

The underlying issue on reconsideration is the medical question of whether appellant's newly diagnosed conditions of sprain/strain of lumbosacral region, left hand contusion and strain, aggravation of accepted work-related lumbar radiculopathy and right hip strain were causally related to the accepted November 10, 2022 employment incident. With his August 22, 2024 reconsideration request, appellant submitted an August 6, 2024 narrative report wherein Dr. Morgenstern provided a more detailed medical rationale as to the causal relationship between appellant's diagnosed hip and lumbar conditions and the accepted November 10, 2022 employment incident. As the August 6, 2024 report addresses the underlying issue of causal relationship with additional medical rationale, the report constitutes relevant and pertinent new evidence that was not previously considered by OWCP. Therefore, the submission of this evidence

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<sup>5</sup> 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

<sup>6</sup> 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.*; *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

<sup>7</sup> *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.

<sup>8</sup> *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

requires reopening of appellant's claim for merit review, pursuant to the third above-noted requirement of 20 C.F.R. § 10.606(b)(3).<sup>10</sup>

The Board shall, therefore, set aside OWCP's August 26, 2024 decision and remand the case for an appropriate merit decision. For a full and fair adjudication, upon return of the case record, OWCP shall also administratively combine the current case record with OWCP File No. xxxxxx321.<sup>11</sup>

**CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 26, 2024 decision of the Office of Workers' Compensation Programs is reversed, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 21, 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

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<sup>10</sup> See *B.D.*, Docket No. 23-0240 (issued December 13, 2023); *R.L.*, Docket No. 21-0220 (issued October 19, 2021); *L.M.*, Docket No. 20-1185 (issued January 13, 2021); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

<sup>11</sup> *Supra* note 7 at Chapter 2.400.8c(1); *B.D.*, *id.*; *W.D.*, Docket No. 19-0961 (issued March 31, 2021); *L.P.*, Docket Nos. 18-1558, 18-1568 (issued June 21, 2019).