

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

_____)	
T.J., Appellant)	
)	
and)	Docket No. 23-0026
)	Issued: May 24, 2023
U.S. POSTAL SERVICE, NORTH HOUSTON)	
PROCESSING & DISTRIBUTION CENTER,)	
Houston, TX, Employer)	
_____)	

Appearances:
Appellant, pro se
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
JANICE B. ASKIN, Judge

JURISDICTION

On October 11, 2022 appellant filed a timely appeal from an April 14, 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 July 6, 2021, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 14, 2022 decision, appellant submitted additional evidence to OWCP. However, 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.*

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, 2002 appellant, then a 32-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2002 she sustained a back injury when she retrieved a mail sack from an all-purpose container, causing her back to pop, while in the performance of duty. She did not stop work at the time she filed her claim, but later stopped work on an intermittent basis. OWCP accepted appellant's claim for lumbar strain. It paid her wage-loss compensation on the supplemental rolls, effective March 9, 2004, and on the periodic rolls commencing February 19, 2006.

On June 14, 2006 appellant underwent OWCP-authorized decompression and discectomy surgery at L5-S1.

Appellant filed a claim for compensation (Form CA-7) for disability from work commencing March 28, 2018. By decision dated June 27, 2018, OWCP denied her disability claim, finding that the medical evidence of record was insufficient to establish her claim.

Appellant also filed Form CA-7 claims for the period April 11 through June 5, 2021.

Appellant submitted an April 12, 2021 report from Dr. Charles Reinhardt, an osteopathic physician Board-certified in anesthesiology, who noted her back/lower extremity complaints, reported findings upon physical examination, and opined that OWCP should expand the acceptance of her medical condition to include lumbar disc disease. Dr. Reinhardt advised that she not return to work until May 10, 2021.

In reports dated April 19 and 30, May 18, and June 15, 2021, Dr. Reinhardt provided additional physical examination findings. Appellant also submitted an April 28, 2021 report of comparative muscle and range of motion testing, as well as several disability notes signed by Dr. Reinhardt between April and June 2021.

In an April 12, 2021 report, Dr. Mayur Kanjia, a Board-certified orthopedic surgeon, provided additional physical examination findings.

By decision dated July 6, 2021, OWCP denied appellant's claim for disability from work for the period April 11 through June 5, 2021, finding that the medical evidence of record was insufficient to establish her claim.³

³ By decision dated July 8, 2021, OWCP expanded the acceptance of appellant's claim to include the conditions of intervertebral disc disorder with radiculopathy of the thoracolumbar region; internal derangement of unspecified knee; other intervertebral disc displacement of the lumbar region; thoracic or lumbosacral neuritis/radiculitis; displacement of lumbar intervertebral disc without myelopathy; and other psychogenic pain.

On January 24, 2022 appellant requested reconsideration of the July 6, 2021 decision. She questioned why she could no longer be compensated given that she had been off work per her physician's orders, including being off work for medical appointments and outpatient surgery. Appellant asserted that her employment injury had worsened and described her back and lower extremity symptoms.

Appellant submitted August 10 and 31, October 5, and November 16, 2021 reports from Dr. Reinhardt who discussed the August 9, 2021 employment injury and the course of her medical treatment. Dr. Reinhardt indicated that she had been off work since April 5, 2021 due to lumbar disc disease. He noted,

“[t]he [appellant] is unable to do prolong [sic] walking or standing, no lifting anything of 20 pounds, [she] will continue off work pending [computerized tomography] (CT) scan and due to the 4.3 [millimeter] (mm) right paracentral extruded disc herniation at L5-S1 extending posterior to the S1 vertebral body. [Appellant] needs to be upgraded to DDD [degenerative disc disease] with radiculopathy.”

In the August 10, 2021 report, Dr. Reinhardt also advised that appellant was to return to work with no excessive pushing, pulling, or lifting, and no standing or sitting for more than two hours. In a February 28, 2022 report, he reported physical examination findings and advised that he did not recommend surgery.

In a November 9, 2021 report, Dr. Stephen Esses, a Board-certified orthopedic surgeon, reported physical examination findings and indicated that a July 1, 2021 CT scan showed a right-sided disc herniation and stenosis at L5-S1, as well as a central disc herniation at L4-5. In a state workers' compensation form of even date, he advised that appellant could return to work on November 11, 2021 without restrictions. In a state workers' compensation form dated February 28, 2022, Dr. Esses indicated that she could return to work on March 1, 2022 without restrictions.

In January 11, February 8, and March 15, 2022 reports, Jacqueline Watson, a nurse practitioner, noted that appellant presented complaining of lower back pain.

Appellant also submitted several reports of diagnostic testing, including a June 21, 2021 drug test, July 1, 2021 CT scan of the lumbar spine, and December 14, 2021 magnetic resonance imaging (MRI) scan of the lumbar spine.

By decision dated April 14, 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 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.⁴

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.⁵

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

The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the case record⁹ and the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

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 January 10, 2022 appellant filed a timely request for reconsideration of a July 6, 2021 decision denying her claim for disability for the period April 11 through June 5, 2021 due to her

⁴ 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).

⁵ 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).

⁶ *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.

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

⁸ *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).

⁹ *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

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

accepted August 9, 2002 employment injury.¹¹ The Board finds, however, that she did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Appellant indicated that she did not understand why she could no longer be compensated given that she had been off work per her physician's orders, and she asserted that her employment injury had worsened. However, the underlying issue in the present case, is medical in nature, and the Board has held that, lay persons are not competent to render medical opinion and, therefore, their arguments have no probative value on a medical issue.¹² Accordingly, the Board finds that appellant is not entitled to a review of the merits based on either the first or second above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant has not provided any relevant and pertinent new evidence not previously considered. In support of her reconsideration, appellant submitted medical evidence, including August 10 and 31, October 5, and November 16, 2021 reports from Dr. Reinhardt who discussed the August 9, 2002 employment injury and the course of her medical treatment since that time. He indicated that she had been off work since April 5, 2021 due to the need to expand the acceptance of her claim to include lumbar disc disease. Dr. Reinhardt noted, "[Appellant] is unable to do prolong [sic] walking or standing, no lifting anything of 20 pounds, [she] will continue off work pending CT scan and due to the 4.3 mm right paracentral extruded disc herniation at L5-S1 extending posterior to the S1 vertebral body. [She] needs to be upgraded to DDD with radiculopathy." In the August 10, 2021 report, he also advised that appellant was to return to work with no excessive pushing, pulling, or lifting, and no standing or sitting for more than two hours. In a February 28, 2022 report, Dr. Reinhardt reported physical examination findings and advised that he did not recommend surgery.

While this medical evidence is new, it is not relevant because it does not directly address the underlying issue of the present case, *i.e.*, whether appellant submitted sufficient medical evidence to establish work-related disability for the period April 11 through June 5, 2021. While Dr. Reinhardt generally spoke of appellant having been off work since April 5, 2021 due to the need to expand her claim, he did not discuss that she was disabled from work for the period April 11 through June 5, 2021 due to the accepted August 9, 2002 employment injury. 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.¹³ Therefore, this evidence is also insufficient to warrant a merit review.

On reconsideration, appellant also submitted a November 9, 2021 report from Dr. Esses who reported physical examination findings and indicated that a July 1, 2021 CT scan showed a right-sided disc herniation and stenosis at L5-S1, as well as a central disc herniation at L4-5. In a state workers' compensation work status report of even date, Dr. Esses advised that appellant could return to work on November 11, 2021 without restrictions. In a state workers' compensation work

¹¹ See *J.F.*, Docket No. 16-1233 (issued November 23, 2016).

¹² See *R.P.*, Docket No. 22-0686 (issued September 30, 2022); *E.H.*, Docket No. 19-0365 (issued March 17, 2021); *B.C.*, Docket No. 16-1404 (issued April 14, 2017); *James A. Long*, 40 ECAB 538 (1989).

¹³ *Id.*

status report dated February 28, 2022, he indicated that she could return to work on March 1, 2021 without restrictions. However, these reports do not address the relevant period of claimed disability, April 11 through June 5, 2021, and the submission of this evidence also would not require reopening of appellant's claim for merit review. While this medical evidence is new, it is not relevant because it does not directly address the underlying medical issue of the present case.

Appellant submitted January 11, February 8, and March 15, 2022 reports, from Ms. Watson, a nurse practitioner. However, certain healthcare providers such as nurse practitioners are not considered physicians as defined under FECA.¹⁴ Consequently, Ms. Watson's medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.¹⁵

Appellant also submitted several reports of diagnostic testing, including a June 21, 2021 drug test, July 1, 2021 CT scan of the lumbar spine, and December 14, 2021 MRI scan of the lumbar spine. These reports would not require reopening of her claim for merit review given that they do not contain an opinion on disability and, therefore, are not relevant to the underlying medical issue of the present case. For these reasons, 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 *id.* at § 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).

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 supra* note 6 at 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 B.D.*, Docket No. 22-0503 (issued September 27, 2022) (nurse practitioners are not considered physicians as defined under FECA and their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits); *L.S.*, Docket No. 19-1231 (issued March 30, 2021) (a nurse practitioner is not considered a physician as defined under FECA).

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 24, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board