

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.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 22, 2012 appellant, then a 55-year-old cook, filed a traumatic injury claim (Form CA-1) alleging that on March 12, 2012 she sustained a back strain and thigh contusion when a coworker assaulted her over the use of a cart while in the performance of duty.⁴ She stopped work on March 21, 2012. In a March 14, 2012 statement, appellant explained that on March 12, 2012 she was assaulted by her coworker when she was using a food cart. She indicated that the coworker pushed the cart towards her, pushed her in the back causing her to fall on the table, and hit her in the face.

Appellant was initially treated in the employing establishment health unit. In a March 12, 2012 examination note, Dr. Jonathan E. Wiese, a Board-certified emergency medicine physician, diagnosed back strain and thigh contusion.

In a decision dated May 16, 2012, OWCP denied appellant's claim on the basis that the injury was not sustained in the performance of duty.

On September 13, 2012 appellant requested reconsideration and submitted a May 28, 2012 report by Dr. Robert B. Mandell, a clinical psychologist, who opined that appellant experienced depression and anxiety due to the alleged March 12, 2012 employment incident.

OWCP also received a May 2, 2012 initial injury report by Dr. Les Benson, a Board-certified emergency medicine physician, who described that appellant was shoved from behind and then struck in her face by a coworker at work. Dr. Benson noted that appellant was later arrested and suffered acute anxiety. He conducted an examination and diagnosed lumbar strain, cervical strain, hip/thigh contusion, and face contusion. Dr. Benson opined that the injuries that appellant suffered were due to the physical attack and subsequent arrest that occurred on March 12, 2012.

³ Docket No. 15-1829 (issued January 28, 2016).

⁴ The record reveals that appellant has two previously accepted claims for a lumbar condition. Under File No. xxxxxx268, OWCP accepted that appellant sustained a back strain due to a January 23, 2009 employment injury. Under File No. xxxxxx296, it accepted that appellant sustained lumbar sprain and sciatica as causally related to a September 27, 2011 employment injury. OWCP also accepted a neck condition under OWCP File No. xxxxxx128 due to a July 26, 2006 employment injury. These claims have not been administratively combined by OWCP with the current claim.

By decision dated November 16, 2012, OWCP modified the May 16, 2012 decision. It accepted that the March 12, 2012 employment incident occurred in the performance of duty, but denied appellant's claim, finding that the medical evidence of record was insufficient to establish that her diagnosed medical conditions were causally related to the accepted March 12, 2012 employment incident.

Appellant disagreed with the decision and continued to request reconsideration on October 1, 2013, January 7, March 7, and May 13, 2014. She submitted medical reports regarding the treatment she received for the diagnosed conditions of back strain, cervical strain, hip and thigh contusion, face contusion, and adjustment disorder with depression.

By decisions dated December 19, 2013, February 19 and April 15, 2014, and January 28, 2015, OWCP denied modification of its prior decisions.

On February 25, 2015 appellant requested reconsideration of the January 28, 2015 decision. In a March 6, 2015 decision, OWCP denied appellant's request for reconsideration.

On March 20, 2015 appellant again requested reconsideration and submitted a March 9, 2015 "Letter of Causation" by Dr. Benson. Dr. Benson described the March 12, 2012 employment incident and opined that appellant sustained and developed an intramuscular lipoma (mass), which had to be surgically removed, due to being hit in the left thigh with a food cart.

By decision dated June 18, 2015, OWCP denied modification of the January 28, 2015 decision, finding that the medical evidence of record was insufficient to establish causal relationship.

Appellant appealed to the Board. By decision dated January 28, 2016, the Board affirmed the June 18, 2015 OWCP decision. The Board determined that the medical evidence of record was insufficient to establish that appellant's diagnosed back strain and left thigh contusion were causally related to the accepted March 12, 2012 employment incident.

On February 18, 2016 OWCP received appellant's request for reconsideration. Appellant requested additional time to submit new and relevant evidence. No additional evidence was received.

By decision dated March 2, 2016, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

On September 10, 2016 appellant again requested reconsideration and submitted additional medical evidence. In a September 9, 2016 statement, she alleged that her lumbar spine condition was aggravated by her new work-related cervical spine injury.

OWCP received various chart and procedure notes dated June 13, 2016 through October 22, 2016. It also received diagnostic evaluation reports, including a May 21, 2016 left shoulder x-ray film report, a June 13, 2016 lumbar spine magnetic resonance imaging (MRI) scan report, a June 14, 2016 cervical spine MRI scan report, a June 30, 2016 lumbar spine MRI scan report, and an August 2, 2016 electrodiagnostic study report.

In a June 28, 2016 progress note, Dr. Mounir Fawzi Khalil, a Board-certified physical medicine and rehabilitation physician, indicated that a recent cervical MRI scan report demonstrated moderate C5-6 spinal stenosis, mild-to-moderate C4-5 spinal canal stenosis, and mild degenerative changes at other levels. He reported that appellant's complaints of neck pain with left arm pain did not match with her MRI scan findings.

In an August 31, 2016 "Letter of Causation," Dr. Benson described appellant's employment duties as a cook and the March 12, 2012 employment incident. He indicated that appellant had complained of neck pain. Dr. Benson discussed appellant's cervical MRI scan and opined that the injury that appellant sustained to her neck on March 12, 2012 was the "direct cause to her being assaulted by a coworker and being punched in the face causing her neck to jerk back in a whiplash motion."

In a November 18, 2016 decision, OWCP denied modification.

On April 27, 2017 appellant requested reconsideration. In support, thereof, she submitted additional factual and medical evidence.

In an April 27, 2017 letter, Dr. Thomas Martens, an osteopath who specializes in family medicine, reviewed appellant's history and opined that the medical evidence of record had established causal relationship because appellant's cervical injury would not have occurred without the March 12, 2012 assault at work. He explained that a cervical herniated disc was caused by excessive stress being placed on the disc as a result of heavy lifting or other damaging motions. Dr. Martens reported that appellant was on duty, was assaulted by another employee, and sustained an injury. He also completed duty status reports (Form CA-17) dated April 12, 2016 through May 23, 2017, which indicated that appellant could not return to work.

In a July 26, 2017 decision, OWCP denied modification of the November 18, 2016 decision.

On September 21, 2017 appellant again requested reconsideration and submitted additional medical evidence.

In a September 21, 2017 letter, Dr. Martens reiterated that appellant was on duty, was assaulted by another employee, and sustained an injury. He reviewed the definition of causal relationship and aggravation and indicated that appellant's injury would not have occurred without the interfering factor of the other employee on March 12, 2012. Dr. Martens also reported that appellant's injury occurred in a specific time, place, and affected a body part, which met the criteria of "traumatic injury."

In a September 26, 2017 decision, OWCP denied modification of the July 26, 2017 decision.

On May 22, 2018 appellant requested reconsideration and submitted additional medical evidence.

In a report dated December 11, 2017, Dr. Gregg Vagner, a Board-certified orthopedic surgeon, conducted an examination and diagnosed bilateral carpal tunnel syndrome.

OWCP also received an August 23, 2017 electromyography and nerve conduction velocity (EMG/NCV) study report, which showed evidence consistent with chronic cervical radiculopathy involving the right C6 and C7 nerve, moderate, bilateral median neuropathy, and no evidence of brachial plexopathy.

In a May 24, 2018 letter, Dr. Martens explained that he did not mention appellant's previous OWCP claims in his previous reports because those claims were all lumbar claims, but appellant was requesting that her claim be accepted for a cervical injury. He described the March 12, 2012 employment incident and reported that when appellant was shoved into a cart and twisted to the right, it caused a strain on her spine leading to applied stress on her spine. Dr. Martens also indicated that when appellant was punched in the face, it caused her head to put stress on the cervical spine due to the jerking fast motion. He opined that the assault on March 12, 2012 caused appellant's disc protrusion in the C4-7 area, as noted in the diagnostic evidence.

In an August 21, 2018 decision, OWCP denied modification of the September 26, 2017 decision.

On August 21, 2019 appellant requested reconsideration. She reiterated that on March 12, 2012 she sustained an injury and was treated in the emergency room. Appellant noted that she was diagnosed with a back strain and thigh contusion.

By decision dated November 25, 2019, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ 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.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

⁵ *Supra* note 1.

⁶ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also 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 L.D., id.*; *see also 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

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 her reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. She merely reiterated that she sustained a work-related injury on March 12, 2012. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹¹

Furthermore, appellant did not submit any new evidence with her August 21, 2019 request for reconsideration. Accordingly, she was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹²

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for reconsideration without reopening the case for review on the merits.¹³

On appeal appellant argues that she submitted medical evidence to establish that she sustained a left thigh injury. As noted, however, the Board lacks jurisdiction over the merits of the claim.

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). 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). Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *Supra* note 9; *see K.F.*, Docket No. 19-1846 (issued November 3, 2020).

¹² *Supra* note 9; *P.W.*, Docket No. 20-0380 (issued November 23, 2020); *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹³ *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

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 November 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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