

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 14, 2010 appellant, then a 43-year-old medical support assistant, filed an occupational disease claim alleging that she sustained an aggravation of a back injury as a result of sitting while performing her work duties.

By decision dated September 15, 2010, OWCP denied appellant's claim after finding that she had not submitted any medical evidence showing that she sustained a diagnosed condition causally related to the identified work factors. It noted that the only medical evidence she submitted referenced a prior employment injury, assigned file number xxxxxx137.

On October 5, 2010 appellant requested an oral hearing. Following a February 14, 2011 hearing, by decision dated March 23, 2011, an OWCP hearing representative affirmed the September 15, 2010 decision. He found that appellant had not submitted a detailed factual statement fully explaining her job duties and addressing any nonemployment-related back injuries. The hearing representative further determined that she had not submitted medical evidence establishing that her work duties caused or aggravated a back condition.

By letter dated June 22, 2011, appellant, through her attorney, requested reconsideration. He submitted a factual statement from appellant and a March 9, 2011 report from Dr. Perry J. Argires, an attending Board-certified neurosurgeon, who related, "[appellant] continues to have back pain, and sitting and standing can aggravate back pain symptoms when there is significant disc deterioration or facet disease." Dr. Argires indicated that back pain after extended sitting frequently occurred after spinal fusions. He concluded, "It is therefore my opinion that prolonged sitting episodes can cause back pain and this may have happened with [appellant's] low back condition at her most recent place of employment."

In a decision dated August 17, 2011, OWCP modified its March 23, 2011 decision to find that appellant had established the work factors to which she attributed her condition.<sup>2</sup> It determined, however, that she had not submitted medical evidence sufficient to show causal relationship between a diagnosed condition and work duties.

On January 27, 2012 appellant, through her attorney, requested reconsideration. He asserted that Dr. Argires' November 16, 2011 report established that her work duties aggravated her back condition.

In a report dated November 16, 2011, Dr. Argires related that appellant underwent a spinal fusion after she injured her L3-4 disc at work on February 8, 2011. He stated, "[w]ith her most recent job, requiring prolonged sitting, her back pain has returned significantly." Dr. Argires further related:

"Once again [it] is my professional opinion that [appellant] has adjacent segment disease related to L4-L5 dis[c] deterioration. It is my opinion that the L4-L5 dis[c] is under increased pressure to the superior adjacent fused segment at L3-L4.

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<sup>2</sup> OWCP indicated that appellant had established fact of injury; however, it is apparent from its decision that it found that she had submitted sufficient factual evidence to show that she was required to sit for long periods of time.

Sitting and standing can exacerbate this type of pain. Her ability to work is directly related to her ability to sit or stand for any length of time and at the present time, due to her pain, she is unable to do so.”

By decision dated May 3, 2012, OWCP denied appellant’s request for reconsideration after finding that the evidence submitted was insufficient to warrant reopening the case for further merit review under section 8128.

On appeal appellant’s attorney contends that she has submitted *prima facie* evidence that she sustained an employment-related aggravation of a low back condition. He argues that Dr. Argires’ reports, when read together, are sufficient to establish causal relationship.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</sup> OWCP’s regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>6</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>7</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup> While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>9</sup>

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.”

<sup>4</sup> 20 C.F.R. § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>8</sup> *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>9</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

## ANALYSIS

In the last merit decision dated August 17, 2011, OWCP denied appellant's occupational disease claim after finding that she had not submitted medical evidence showing that she sustained a low back condition caused or aggravated by factors of her federal employment. On January 27, 2012 appellant requested reconsideration.

As noted above, the Board does not have jurisdiction over the August 17, 2011 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her January 27, 2012 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument.

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case. Appellant submitted a report dated November 16, 2011 from Dr. Argires, who advised that she was unable to sit or stand for a prolonged period due to disc degeneration at L4-5. Dr. Argires attributed her problems with her L4-5 disc to stress on the disc from a prior fusion at L3-4. He noted that her back pain increased after extensive sitting in her last position at work. Dr. Argires' November 16, 2011 report, however, is substantially similar to a prior report dated March 9, 2011. On March 9, 2011 he advised that sitting and standing could aggravate appellant's back pain given her prior fusion and that this might have occurred at her employment. Dr. Argires' November 16, 2011 report is thus cumulative in nature and thus insufficient to warrant reopening the case for merit review.<sup>10</sup>

On appeal appellant's attorney argues that she has submitted evidence sufficient to establish a *prima facie* case and that when Dr. Argires' reports are read together they establish causal relationship. OWCP, however, properly conducted a limited review and determined that the newly submitted report was cumulative in nature and thus did not warrant reopening the case to conduct a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

## CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen her claim for further review of the merits under section 8128(a).

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<sup>10</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 3, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board