

FACTUAL HISTORY

On April 29, 2010 appellant, then a 42-year-old, assistant unit operator filed a traumatic injury claim alleging that, on March 18, 2010, she was isolating four large water valves over the course of an hour, when she experienced upper back and neck issues in the performance of duty. She stopped work on April 12, 2010. The employing establishment controverted the claim.

In a letter dated May 19, 2010, Kevin Beiner, the employing establishment's operations manager, controverted the claim. He noted that appellant reported her injury to the nurse on April 15, 2010 *via* telephone and then reported it at the site on April 16, 2010. Mr. Beiner advised that appellant indicated that she was injured on March 8, 2010. He noted that she took scheduled leave for two weeks, returned to her assigned duties on April 2, 2010 and then completed four 12-hour shifts without issue or report of injury.

By letter dated May 6, 2010, OWCP informed appellant of the type of evidence needed to support her claim and requested that she submit such evidence within 30 days.

In a June 11, 2010 decision, OWCP denied appellant's claim. It found that she failed to establish the essential element of "fact of injury" in her claim because the evidence did not support that the injury and/or events occurred.

On May 31, 2011 appellant requested reconsideration. In a June 25, 2010 return to work report, Dr. Gregory Corradino, a Board-certified neurological surgeon and treating physician, advised that appellant could return to work on June 28, 2010 with restrictions comprised of no lifting over 30 pounds.

OWCP received treatment notes dating from June 10 to September 8, 1997 from Dr. Galen Smith, a Board-certified orthopedic surgeon, who treated appellant for low back pain and left leg pain and diagnosed a large right L4-5 disc herniation. In a June 23, 1997 treatment note, Dr. Smith noted that appellant reported numbness in her left foot and weakness in her left leg. In his September 8, 1997 treatment note, he indicated that appellant was entirely pain free. OWCP received an October 8, 2003 operative report from Dr. Smith, who performed a left L5-S1 laminotomy and discectomy. It also included an operative report dated July 23, 1997 from Dr. Smith.

OWCP also received a September 18, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine read by Dr. Thomas F. Pugh, a Board-certified diagnostic radiologist, which revealed findings to include a large left paracentral disc protrusion at L5-S1 with inferior migration of an extruded disc fragment and a severe left S1 nerve root.

In a decision dated July 11, 2011, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁴

ANALYSIS

Appellant disagreed with the denial of her claim and requested reconsideration. The underlying issue on reconsideration was whether she submitted sufficient factual evidence to establish that the claimed work events and factors occurred at the time, place and in the manner alleged. However, appellant did not provide any relevant or pertinent new evidence regarding the time, place and manner in which her claimed back injury occurred at work.

In support of her request, appellant submitted additional medical evidence. As noted, the issue in this case is whether she submitted sufficient factual evidence to support that she sustained an injury in the performance of duty at the time, place and in the manner alleged. The submitted medical evidence is not relevant as the underlying issue is factual in nature; whether the claimed events that contributed to the claimed injury occurred as alleged.⁵ Furthermore, the submitted medical evidence also contains no pertinent factual history of the claimed March 18, 2010 incident. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁶

² *Id.* at § 8128(a).

³ 20 C.F.R. § 10.606(b).

⁴ *Id.* at § 10.608(b).

⁵ See *Bonnie A. Contreras*, 57 ECAB 364 (2006) (where a claimant did not establish an employment incident alleged to have caused an injury, it was not necessary to consider any medical evidence).

⁶ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB 116 (2000).

Appellant did not provide any relevant and pertinent new evidence to establish that she sustained an injury in the performance of duty. Consequently, the evidence submitted by her on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that OWCP erroneously applied or interpreted a specific point of law, or advanced a relevant new argument not previously submitted. Therefore, OWCP properly denied her request for reconsideration.⁷

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 2012
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

⁷ The Board notes that, subsequent to OWCP's July 11, 2011 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).