

FACTUAL HISTORY

On June 3, 2011 appellant, then a 40-year-old city letter carrier, filed an occupational disease claim alleging a knee injury in the performance of duty. She attributed her condition to factors of her employment including; carrying up to 35 pounds of mail for six to eight hours a day. The employing establishment controverted the claim.

In a May 27, 2011 report, Dr. Brian K. Reiter, a Board-certified orthopedic surgeon, noted that appellant presented with complaints of back and bilateral knee pain. Appellant worked for the employing establishment and her back pain began in 2009 when she had a severe flare up with five to six days of significant back pain, but no flare ups since. In January and February 2011, she began having bilateral knee pain, which was related to an increase in the amount of outdoor hours she walked, carried mail and the steps climbed at work. Dr. Reiter examined appellant and diagnosed mechanical low back pain, likely bilateral patellofemoral syndrome and mild calf pain. He opined that the musculoskeletal complaints “are directly related to the amount of walking she is doing for the ‘postop’ as well as the weight that she is carrying.” In another May 27, 2011 report, Dr. Reiter opined that most of appellant’s complaints were musculoskeletal in nature and likely related to the amount of lifting and outdoor walking in her job.

By decision dated August 3, 2011, OWCP denied appellant’s claim. It found that the evidence supported that the claimed activities occurred; but the medical evidence was insufficient to establish a knee condition related to work factors.

On July 26, 2012 appellant requested reconsideration, submitted new evidence and copies of previously submitted reports.

In an August 24, 2012 report, Dr. John F. Lozowski, Board-certified in family medicine and an osteopath, noted appellant’s history of injury. He examined her on April 25, May 11 and 24, 2011. Dr. Lozowski diagnosed bilateral patella femoral syndrome and mechanical low back pain. He stated, “most likely that her diagnosis is due to repetitive motion (climbing stairs) and carrying heavy sacks of mail.”

Dr. Reiter submitted copies of his May 27, 2011 reports. In an August 19, 2011 report, he provided findings. OWCP also received a July 9, 2012 report from a physician’s assistant.

In a letter dated October 30, 2012, appellant’s attorney noted that additional evidence was forthcoming. He argued that Dr. Reiter supported that appellant’s low back and bilateral knee conditions were aggravated by walking and stair climbing in the course of her employment as a letter carrier.

In an October 31, 2012 duty status report, Dr. Steven Valentino, a Board-certified orthopedic surgeon and osteopath, noted appellant’s findings and work restrictions. He stated that the history provided by appellant was consistent with the history of injury provided by the employer. Dr. Valentino listed lumbar disc syndrome and patellar femoral syndrome as diagnoses due to injury.

On December 17, 2012 appellant's representative provided an undated report from Dr. Reiter who diagnosed mechanical low back pain, likely patellofemoral syndrome and mild calf pain. Dr. Reiter stated that "I do feel within a reasonable degree of medical certainty that her back pain and bilateral knee pain are due to her work-related activities including long periods of walking, heavy carrying in excess of 70 pounds and stair climbing between 9,000 and 10,000 stairs per day. Appellant's symptoms were exacerbated by an increase in the amount of hours she spent performing these activities." Dr. Reiter also opined that her repetitive work for the employing establishment contributed to her mechanical low back pain and bilateral patellofemoral syndrome.

By decision dated December 28, 2012, OWCP denied appellant's request for reconsideration without a review of the merits on the grounds that her request was insufficient to warrant review of its prior decision. It noted that the medical evidence submitted was duplicative.

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 for an injury in the performance of duty and timely requested reconsideration. The underlying issue on reconsideration is medical in nature, whether she has a diagnosed medical condition causally related to employment factors.

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b).

⁴ *Id.* at § 10.608(b).

Appellant submitted copies of reports previously of record together with new medical evidence. The new medical evidence included a new report from Dr. Reiter, which was received on December 17, 2012, an August 24, 2012 report from Dr. Lozowski and an October 31, 2012 report from Dr. Valentino. OWCP denied appellant's application on December 28, 2012, finding that no new evidence was offered warranting further merit review.

The Board notes that the new report from Dr. Reiter was not repetitive as it provided additional reasoning and addressed causal relationship. The reports from Drs. Lozowski and Valentino were new and not previously submitted. They are also relevant as each physician addressed causal relationship. The Board finds that the reports from Drs. Reiter, Lozowski and Valentino constitute relevant and pertinent new evidence not previously considered by OWCP. They addressed the underlying issue of appellant's bilateral patellofemoral knee condition. Reopening a claim for merit review does not require a claimant to submit all evidence which may be necessary to discharge his or her burden of proof.⁵ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁶ The case will be remanded for OWCP to conduct a merit review. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

On appeal, appellant's representative argued that the December 11, 2012 report from Dr. Reiter was not reviewed by OWCP. As noted, the case is not in posture for decision and is remanded for a merit review of the claim.

CONCLUSION

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

⁵ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁶ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2012 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for a review of the merits.

Issued: August 15, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board