

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) without further merit review.

FACTUAL HISTORY

On March 15, 2013 appellant, then a 51-year-old claims examiner, filed an occupational disease claim alleging that she sustained a back condition in the performance of duty. She alleged that sitting in a broken chair for over two years caused or aggravated a L4-5 herniated disc and degenerative disc disease. Appellant advised that she became aware of her condition on January 2, 2010 and its relation to her federal employment on December 4, 2012.

By letter dated March 27, 2014, OWCP advised appellant that evidence was insufficient to establish her claim and advised her of the type of evidence needed. It particularly asked that she provide a physician's opinion supported by a medical explanation as to how work activities caused or contributed to her medical condition.

In reply, appellant provided a January 22, 2010 ergonomic workstation assessment conducted by the employing establishment. Its findings included that the back rest of appellant's chair was one fourth of an inch taller on the right than on the left which caused her to sit improperly and lean to the right. The report advised that appellant needed a new adjustable chair that properly supported appellant's lower back. The assessment also noted that appellant related that she provided her supervisor with a physician's note requesting a new chair because of her constant low back and right leg pain.

Appellant also submitted medical evidence including an August 13, 2012 form report, Dr. John Hohner, a Board-certified osteopath specializing in family medicine, who noted treating appellant since 2009 for her back pain and related symptoms. In a September 10, 2012 report, Dr. Hohner advised that appellant was placed on bed-rest by her orthopedic surgeon until she was stable for spinal fusion surgery. He requested that the employing establishment to allow appellant to work from home.

On November 12, 2012 Dr. Hohner noted that appellant's spinal condition remained disabling and that appellant would have surgery on November 21, 2012. On January 15, 2013 he advised that appellant had a long term permanent aggravation of a lumbar disc injury. Dr. Hohner noted her surgery on November 21, 2013. He also noted that appellant had a January 22, 2010 ergonomic assessment of her workstation that revealed her chair caused her to sit improperly and lean to the right. In a disability status report from the same visit, Dr. Hohner advised that she was unable to work until March 1, 2013. In an April 5, 2013 attending physician's report (Form CA-20), he advised that appellant had a prior history of back problems for which she previously had surgery in 1991. Dr. Hohner diagnosed L4-5 disc herniation and degenerative disc disease. He checked the box marked "yes" indicating that appellant's condition was caused or aggravated by work related factors, specifically sitting continually in an improper chair.

Appellant also submitted reports from Dr. William Earman, an orthopedic surgeon. In an August 31, 2012 disability status report, he advised that appellant should work from home three days a week so that she could lay down intermittently due to pain from her degenerative spondylolisthesis. In an October 9, 2012 report, Dr. Earman advised that appellant complained of increased back pain that radiated to her legs. On examination he found tenderness across the lower lumbar spine, flattening of lumbar lordosis, negative straight leg raise, no atrophy, and no fasciculation. He advised that x-rays revealed degenerative disc disease of the lower lumbar spine with evidence of a severe posterior facet arthroscopic changes and fluid within the posterior facet suggesting instability at L3-4 and L4-5. On November 5, 2012, Dr. Earman advised that appellant complained of low back pain that radiated to her legs. Examination showed positive straight leg raising and a slight decrease in reflexes over the patellar reflex. He diagnosed degeneration of lumbar intervertebral disc. An accompanying November 5, 2012 disability status report, advised that appellant could work part time and that she should work three days per week from home. On December 4, 2012 Dr. Earman advised that appellant could not work until her next visit scheduled on January 11, 2013.

Appellant also submitted several diagnostic reports. In a June 12, 2009 report, Dr. Michael Horton, a Board-certified diagnostic radiologist, advised that appellant presented with back pain following a motor vehicle collision. A lumbar spine computerized tomography scan (CT) revealed mild diffuse disc bulge at L3-4 and mild diffuse disc bulge at L4-5 with co-existing abnormal soft tissue density in the right lateral recess. On June 16, 2009 Dr. Jon R. Jester, a Board-certified diagnostic radiologist, advised that magnetic resonance imaging (MRI) showed moderately severe right and mild to moderate left foraminal narrowing at L4-L5 due primarily to lateralizing spondylosis and hypertonic facet arthropathy. Appellant had moderate right and mild to moderate left foraminal narrowing and mild central canal narrowing at L3-L4 due to a grade 1 spondylolisthesis and severe hypertonic facet arthropathy with potential synovial cyst from the right facet joint. She also had mild bulging of the L5-S1 disc. In an August 13, 2012 MRI scan report, Dr. Andrew Griffin, a Board-certified diagnostic radiologist, advised that appellant presented with right lumbar radiculopathy and a history of 1991 lumbar spine surgery. She had a minimal grade 1 degenerative anterolisthesis of L3 on L4 that was stable from 2009. Imaging showed lower lumbar spondylopathy, discogenic disease, a mild to moderate focal right paracentral disc bulge on L4-L5, and a mild to moderate epidural fat compatible with lipomatosis on L5-S1.

In an undated statement, appellant advised that a January 22, 2010 ergonomic assessment showed that she needed a new chair. She noted that she also provided her supervisor with medical evidence from her physician advising that she needed a new chair. Appellant advised that her date of injury should have been listed as January 2, 2008 and that her filing date should have been listed as January 17, 2013. She provided evidence that she mailed documents to OWCP on January 17, 2013.

By letter dated May 20, 2013, OWCP requested that the employing establishment provide additional information and respond to appellant's statements.

In a June 7, 2013 statement, appellant advised that she notified her supervisor in 2008 and 2009 that she needed a new chair. She noted that the chair leaned to one side and as a result

her spine was not in the proper position. Appellant further noted that her back continually worsened since 2008, which ultimately led to her undergoing back surgery.

In a June 19, 2013 statement, a district director of the employing establishment advised that there was no indication that appellant's chair was causing her back problems prior to the 2010 ergonomic assessment. He noted that after the assessment appellant was given a new chair to which she expressed satisfaction with and gave no indication that it did not fit and support her back. He also highlighted that appellant had preexisting back conditions.

By decision dated July 19, 2013, OWCP denied appellant's claim because the medical evidence was insufficient to establish that her condition was related to work factors.

On April 4, 2014 appellant requested reconsideration. She argued that OWCP should have developed her claim instead of denying it because she presented sufficient evidence. She argued that the medical evidence showed causal relationship, but if more evidence was needed, a medical report from a Dr. Chmell gave complete support for causal relationship. She also reiterated that she gave medical evidence to her supervisor and district director requesting a new chair in 2008 and 2009.

By decision dated May 22, 2014, OWCP denied appellant's request for reconsideration without a review of the merits. OWCP noted that appellant's claim was denied for insufficient medical evidence; however, she submitted no relevant medical evidence with her request.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, the evidence or argument submitted by 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.³ 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.⁴ 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.⁵

ANALYSIS

In a July 19, 2013 merit decision, OWCP denied appellant's claim finding that the medical evidence did not establish that work factors caused or aggravated her back condition. Appellant submitted a timely request for reconsideration which was denied on May 22, 2014 without a merit review.

³ 20 CFR § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review. On reconsideration appellant argued that OWCP was obligated to further develop her claim because she submitted evidence in support of her claim. She asserted that she gave medical evidence to her supervisor requesting a new chair in 2008 and that she sat in the broken chair for over two years before it was replaced. 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.⁶ The underlying issue in this case is not whether appellant needed a new chair but whether she established that work factors caused or contributed to a diagnosed medical condition.⁷ This is a medical issue. OWCP, in its March 27, 2014 letter as well as its July 19, 2013 initial decision informed appellant of the defects of her claim and particularly advised her of why the medical evidence was deficient. Appellant also cited no authority for her general contention that OWCP was obligated to further develop her claim. Consequently, these assertions do not show that OWCP erroneously applied or interpreted a specific point of law nor do they advance a relevant legal argument not previously considered.

Furthermore, appellant did not submit relevant evidence not previously considered by OWCP. OWCP explained in its July 19, 2013 merit decision that additional medical evidence was needed to establish the claim. However, appellant did not submit any new medical evidence on reconsideration. While she offered her argument for why she believed her claim should be accepted, the underlying point at issue in the claim, causal relationship, is medical in nature.⁸ Although before OWCP and on appeal, appellant refers to a report from a Dr. Chmell as sufficient to show causal relationship, no such medical report is in the record. Thus, appellant has not provided relevant new evidence which warrants reopening her claim for a merit review.

On appeal, appellant reiterates that she was not timely given a new chair and that this permanently aggravated her prior conditions causing a new herniated disc that required surgery. However, as noted, the Board does not have jurisdiction over the merits of the claim. Because she failed to meet any of the three regulatory criteria for reopening a claim, she was not entitled to further merit review of her claim.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits.

⁶ *Robert P. Mitchell*, 52 ECAB 116 (2000).

⁷ *See Darletha Coleman*, 55 ECAB 143 (2003) (evidence that does not address the particular issue involved does not constitute a basis for reopening a case).

⁸ *See Paul Foster*, 56 ECAB 208 (2004).

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2014 decision of OWCP is affirmed.

Issued: April 14, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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