

FACTS

On August 1, 2005 appellant, then a 49-year-old human resources specialist, filed a traumatic injury claim alleging that on July 27, 2005 she injured her right knee and hands when she tripped and fell over a curb. OWCP accepted her claim for contusion of the right knee and contusion of the right hand and paid appropriate benefits. Appellant retired in October 2006.

On August 3, 2009 OWCP issued a notice of proposed termination based on the grounds that the weight of the medical opinion evidence established that appellant no longer had residuals of the accepted work injury. It accorded determinative weight to Dr. Steven Thomas, Jr., a Board-certified orthopedic surgeon and an OWCP referral physician, who opined in an April 26, 2007 report that appellant's right knee contusion had resolved and that no further medical treatment was needed for the minimally objective finding of decreased flexion at the right metacarpophalangeal joint. Dr. Thomas concluded that appellant could return to her date-of-injury position full time without restrictions. OWCP did not receive any additional evidence or argument within the allotted 30 days. By decision dated September 3, 2009, it terminated appellant's claim for medical benefits effective that day.

On September 7, 2010 OWCP received appellant's appeal request form dated September 2, 2010 requesting reconsideration. Appellant submitted a September 1, 2009 statement with attached disc of pictures of her right hand. In a September 9, 2010 letter, OWCP returned the physical evidence to her as it was not scannable and there was no verifiable information on the pictures. In an August 21, 2009 statement, Janet Schulz, a coworker, noted that a band on appellant's hand developed after her fall and that she witnessed the pain and discomfort it caused appellant both before and after her retirement. Appellant submitted reports dated October 1, 2008 and June 26, 2009 from Dr. Jay Brad Butler, a Board-certified orthopedic surgeon, previously of record; physical therapy referrals and treatment notes dated May 11 through June 29, 2007; and an August 30, 2010 claim for a schedule award.

In a June 17, 2010 report, Dr. Anne M. Hirsch, a Board-certified internist, opined that appellant's ongoing persistent right hand symptoms are directly related to the July 27, 2005 work injury. She noted the history of injury and the treatment to appellant's right hand, including an April 14, 2010 surgery for right trigger thumb, and stated that nothing had done much to relieve her ongoing pain, atrophy, or tendency for her hand to curl unnaturally related to the trauma.

In an August 5, 2010 report, Dr. McPherson Beall, a Board-certified orthopedic hand surgeon, indicated that appellant had unchanged fascial thickening, right thenar eminence, without any evidence of significant dysfunction on examination and with no pathological lesions which would be expected to cause the degree of pain or disability of which she was complaining. He indicated that no medical treatment was necessary now or back in January 2006 when he first saw her for the on-the-job injury.

In an August 31, 2010 report, Dr. Jeffrey J. Brown, a Board-certified diagnostic radiologist, noted a prominent shortening of the tendon band across the thenar eminence as demonstrated by photographs. He stated that, since he was not an orthopedic specialist, he could not determine if her condition was related to the original work injury.

By decision dated October 8, 2010, OWCP denied further reconsideration of the merits.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ 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.⁴ To be entitled to a merit review of OWCP's 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.⁵ 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.⁶

ANALYSIS

The only decision before the Board is the October 8, 2010 nonmerit decision denying appellant's request for reconsideration of OWCP's September 3, 2009 merit decision terminating her medical benefits. The underlying issue is whether she established any residuals due to her accepted contusions of the right knee and right hand. The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant new argument not previously considered. OWCP returned the pictures appellant submitted as the date and origin of the pictures could not be verified. The August 21, 2009 statement from Ms. Schultz, while confirming that a band was visible on appellant's hand, is not relevant to the issue of whether appellant continues to suffer residuals of her accepted right hand contusion, requiring further medical treatment. Appellant also submitted a claim form for a schedule award. The claim form itself however is not relevant to the underlying issue of whether appellant continues to require medical treatment for her accepted right hand contusion. Consequently, she was not entitled to a review of the merits of her case based on the first and second above noted requirements under 20 C.F.R. § 10.606(b)(2).

Appellant also submitted medical evidence. The October 1, 2008 and June 26, 2009 reports from Dr. Butler were previously of record. 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.⁷ Appellant also submitted physical therapy referrals and treatment notes dated May 11 through June 29, 2007. Pursuant to section 8101(2) of FECA, the term

³ Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 20 C.F.R. § 10.606(b)(2). See *Susan A. Filkins*, 57 ECAB 630 (2006); *J.M.*, Docket No. 09-218 (issued July 24, 2009).

⁵ *Id.* at § 10.607(a). See *Robert G. Burns*, 57 ECAB 657 (2006); *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

⁶ *Id.* at § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁷ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

physician includes surgeons, podiatrists, dentists, psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice.⁸ Lay individuals, such as physical therapists, are not physicians as defined under FECA. Therefore, their opinions do not constitute competent, relevant evidence and can not constitute a basis for reopening a case.⁹

Appellant also submitted new medical reports from Drs. Beall, Brown and Hirsh, which OWCP found were not relevant or sufficient to warrant a review of the case on its merits. The Board agrees that Dr. Beall's August 5, 2010 report, in which he relates appellant's examination is unchanged from any of her previous examinations and appellant requires no further medical treatment, and Dr. Brown's August 31, 2010 report, in which he specifically states he cannot determine if appellant's prominent showing of the thenar band across the thenar eminence is related to the work injury, do not substantiate that appellant continues to suffer residuals of her accepted right hand contusion, which require further medical treatment.

However, the June 17, 2010 report of Dr. Hirsh opined that appellant's ongoing persistent right hand symptoms were directly related to the July 27, 2005 work injury. Because this medical evidence is new and relevant to the underlying issue, the Board finds that appellant's request for reconsideration satisfies the third standard for obtaining a merit review of her claim.¹⁰ Although OWCP found that Dr. Hirsch's opinion was insufficient to warrant a merit review because she provided only a minimal history of injury with no well-reasoned opinion explaining how appellant's current condition had materially worsened over the last few years, this pertains to the standard for weighing the probative value of medical evidence when OWCP is conducting a merit review. To require it to conduct a merit review, the evidence need only be new and relevant.¹¹ If OWCP should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹² The Board will set aside OWCP's decision denying reconsideration and remand the case for an appropriate final decision on the merits.

On appeal, appellant set forth arguments regarding the merits of her claim. As noted, the Board only has jurisdiction regarding whether OWCP properly denied a merit review of the claim. In light of the disposition of this appeal, OWCP shall issue a decision that addresses the merits of the claim.¹³

⁸ 5 U.S.C. § 8101(2); *Roy L. Humphrey*, 57 ECAB 238 (2005).

⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *V.B.*, 58 ECAB 725 (2007).

¹¹ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹² *Donald T. Pippin*, 54 ECAB 631 (2003).

¹³ Appellant submitted new evidence on appeal. The Board notes that it cannot consider new evidence on appeal as its review of the case is limited to the evidence of record which was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the October 8, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision.

Issued: December 20, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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