



## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration.

On appeal, counsel asserts that OWCP's September 12, 2011 decision was "contrary to fact and law."

## FACTUAL HISTORY

OWCP accepted that on February 19, 2005 appellant, then a 49-year-old distribution clerk, sustained a lumbar strain, brachial, thoracic and lumbar neuritis while lifting mail. She stopped work shortly after the injury and did not return.

Dr. Ranga C. Krishna, an attending Board-certified neurologist, followed appellant beginning on May 4, 2005. He submitted reports through August 7, 2007 diagnosing cervical and lumbar disc bulges with radiculopathy which he related to the February 19, 2005 injury. Dr. Krishna found appellant totally disabled for work.<sup>4</sup>

In a February 14, 2006 report, Dr. Andrew M.G. Davy, an attending Board-certified anesthesiologist specializing in pain management, found appellant totally disabled for work due to neck and back pain attributable to multi-level disc pathologies throughout the spine.

On September 19, 2007 OWCP obtained a second opinion report from Dr. Michael J. Carciente, a Board-certified neurologist, who opined that appellant had a normal neurologic examination. A February 26, 2008 functional capacity evaluation demonstrated that appellant could perform sedentary work.<sup>5</sup> Based on recent medical evidence, on March 13, 2009, OWCP requested that she submit a narrative report from her attending physician addressing the nature and extent of the accepted conditions. Dr. Krishna submitted a June 1, 2009 report releasing appellant to full-time sedentary duty. He restricted her to part-time sedentary work as of March 29, 2010.

On April 29 and June 22, 2010 OWCP obtained second opinion reports from Dr. Ronald M. Silverman, a Board-certified neurologist, who obtained updated imaging studies showing age-related changes throughout the spine. Dr. Silverman opined that the accepted injuries had resolved without residuals, and that appellant could resume work.

By notice dated August 25, 2010, OWCP advised appellant that it proposed to terminate her compensation benefits on the grounds that the accepted spinal conditions had ceased without

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<sup>4</sup> Appellant submitted reports dated from March 2005 to March 2010 from Dr. Xerxes Oshidar, an attending chiropractor, who diagnosed spinal subluxations but did not indicate that he diagnosed those subluxations based on spinal x-rays. In a March 15, 2008 letter, OWCP advised her that Dr. Oshidar was not a physician under FECA for the purposes of the case as he did not diagnose a spinal subluxation by x-ray. *See* 5 U.S.C. § 8101(2).

<sup>5</sup> On May 12, 2008 OWCP obtained an opinion from Dr. Joel S. Cohen, a Board-certified neurologist, who found no neurologic abnormalities on examination. Dr. Cohen's role in the case is not clear from the record. OWCP referred appellant for vocational rehabilitation in November 2008. A vocational rehabilitation effort did not result in appellant's employment.

residuals. In response, appellant submitted a September 3, 2010 report from Dr. Krishna, finding that appellant continued to be substantially disabled due to herniated cervical and lumbar discs attributable to the February 19, 2005 lifting incident.

By decision dated September 28, 2010, OWCP terminated appellant's wage loss and medical compensation benefits effective September 29, 2010 on the grounds that the accepted conditions had ceased without residuals, based on Dr. Silverman's opinion.

In an October 1, 2010 letter, appellant requested a telephonic hearing, held February 10, 2011. At the hearing, she asserted that she remained largely disabled due to the accepted February 19, 2005 injuries. Following the hearing, appellant submitted copies of evidence previously of record, including Dr. Krishna's September 3, 2010 report. She also submitted November 22, 2010 spinal x-rays.

By decision dated April 26, 2011, OWCP's hearing representative affirmed the September 28, 2010 decision terminating appellant's compensation. The hearing representative found that appellant's physicians did not provide sufficient medical rationale explaining how and why the accepted February 19, 2005 injuries would continue to disable appellant for work on and after September 29, 2010.

In a June 13, 2011 report, counsel requested reconsideration. He submitted a third copy of Dr. Krishna's September 3, 2010 report. Counsel also submitted a February 23, 2011 report from Dr. Krishna reiterating previous findings, noting that appellant's cervical and lumbar conditions were unchanged, and repeating prior work restrictions. He also provided an April 7, 2011 functional capacity evaluation,

By decision dated September 12, 2011, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted in support thereof was duplicative of evidence previously of record.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>6</sup> section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides 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>7</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>9</sup> She need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>10</sup> When reviewing OWCP's decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>11</sup>

### ANALYSIS

Following OWCP's September 28, 2010 decision terminating appellant's compensation benefits effective September 29, 2010, counsel submitted an October 1, 2010 letter requesting a hearing, held February 10, 2011. Following the hearing, appellant submitted a second copy of a September 3, 2010 report from Dr. Krishna, an attending Board-certified neurologist. Originally submitted on September 14, 2010 and considered by OWCP prior to the September 28, 2010 termination decision, Dr. Krishna's September 3, 2010 report found her substantially disabled due to cervical and lumbar disc herniations attributable to accepted February 19, 2005 spinal injuries. On April 26, 2011 OWCP's hearing representative affirmed the termination of appellant's compensation benefits as the new evidence submitted did not contain sufficient rationale supporting continued residuals of the accepted conditions on and after September 29, 2010.

Counsel requested reconsideration on June 13, 2011. He submitted a third copy of Dr. Krishna's September 3, 2010 report, a February 23, 2011 report from Dr. Krishna reiterating previous findings, and an April 7, 2011 functional capacity evaluation. OWCP denied reconsideration by decision dated September 12, 2011, finding that the evidence submitted was cumulative and repetitious.

The critical issue at the time OWCP terminated appellant's compensation was whether the medical evidence established that appellant continued to have residuals of accepted February 19, 2005 spinal injuries on and after September 29, 2010. Dr. Krishna's September 3, 2010 report is not relevant because it was previously of record. His February 23, 2011 report is repetitious of his reports previously of record. The Board has held that evidence which is cumulative or repetitious of evidence previously submitted does not constitute a basis for reopening a claim on its merits.<sup>12</sup> The April 7, 2011 functional capacity evaluation is irrelevant to the claim as it did not address the causation of any of the deficits observed.

Accordingly, the Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). 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

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<sup>9</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>10</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>11</sup> *Annette Louise*, 54 ECAB 783 (2003).

<sup>12</sup> *A.R.*, Docket No. 11-1358 (issued January 3, 2012). *See L.H.*, 59 ECAB 253 (2007).

constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly issued its September 12, 2011 decision denying merit review.

On appeal, counsel asserts that OWCP's September 12, 2011 decision is "contrary to fact and law." As stated above, OWCP properly denied appellant's request for reconsideration.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 12, 2011 is affirmed.

Issued: September 26, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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