

**United States Department of Labor
Employees' Compensation Appeals Board**

L.U., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Willimantic, CT, Employer)

**Docket No. 13-884
Issued: August 19, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 4, 2013 appellant filed a timely appeal from a November 14, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her claim for compensation and a February 21, 2013 nonmerit decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over merits of this case. On appeal, appellant indicated that she was enclosing a copy of her letter of explanation along with medical documentation that she sent but was supposedly never received. The Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued its final merit decision in the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² See 20 C.F.R. § 501.2(c)(1).

ISSUES

The issues are: (1) whether appellant's medical condition is causally related to the August 13, 2012 work incident or factors of her employment; and (2) whether OWCP properly denied her request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 13, 2012 appellant, then a 54-year-old city carrier, filed a traumatic injury claim alleging that she injured her lower back and experienced difficulty standing and walking when she picked up a tray of mail. She stopped work that day. Appellant returned to full-time regular duty with no restrictions on August 31, 2012.

Medical reports were received from Dr. Michael J. Halperin, a Board-certified orthopedic surgeon. In an August 23, 2012 duty status report, Dr. Halperin noted that he examined appellant on August 14, 2012 with a positive straight leg raise on the right leg. He diagnosed right leg radiculopathy and opined that she was disabled from work. In an August 24, 2012 Form CA-16, Dr. Halperin listed that appellant underwent a discectomy at L4-5 in October 2011 and a magnetic resonance imaging (MRI) scan showed central canal stenosis at L3-4 with no discectomy. He noted that on August 13, 2012, while at work, she experienced pain when carrying something heavy. Dr. Halperin diagnosed right leg radiculopathy with L3-4 canal stenosis and indicated that appellant was unable to resume work. On August 29, 2012 he reported that she walked with a nonantalgic gait and was neurovascularly intact to the bilateral lower extremities. Dr. Halperin noted that an MRI scan revealed lateral recess stenosis on the left at L4-5. He opined that appellant was much improved and that she would like to return to work. In an August 29, 2012 work restriction form, Dr. Halperin advised that she could return to full duty on August 31, 2012.

In an August 29, 2012 Form CA-17, duty status report, Kathleen Billings, a physician's assistant, noted that on August 13, 2012 appellant lifted a heavy object at work and experienced low back and leg pain. She diagnosed right leg radiculopathy as due to the injury and opined that appellant was able to return to full-time full-duty work.

In an October 9, 2012 letter, OWCP advised appellant of the deficiencies in her claim.³ It requested that she provide medical evidence from a qualified physician who provided a detailed well-rationalized opinion relating her diagnosed L3-4 spinal stenosis to her work duties and address any preexisting symptoms or conditions which may be related to her current condition. No additional evidence was received.

By decision dated November 14, 2012, OWCP denied appellant's claim for compensation. It accepted that the August 13, 2012 work incident occurred as alleged but found that the medical evidence did not establish that her medical condition was causally related.

³ OWCP noted that appellant's claim was originally received as a simple, uncontroverted case resulting in minimal or no lost time from work and payment was approved for limited medical expenses without formal adjudication.

On February 6, 2013 OWCP received appellant's reconsideration request. In a January 24, 2013 letter, appellant provided details about the mechanism of injury and the medical care she received. Her symptoms started getting worse and she received epidural injections. When appellant received OWCP's denial, she thought it was for the epidural injections and not the entire claim. She indicated that she was enclosing Dr. Halperin's MRI scans as well as other documentation from the August injury. No additional evidence was received.

By decision dated February 21, 2013, OWCP denied appellant's request for reconsideration on the grounds that she did not advance a point of law or submit new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim. When an employee claims that he or she sustained an injury in the performance of duty, he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He or she must also establish that such event, incident or exposure caused an injury.⁵

Causal relationship is a medical issue.⁶ The medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant,⁷ must be one of reasonable medical certainty⁸ and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.⁹

ANALYSIS -- ISSUE 1

Dr. Halperin saw appellant on August 14, 2012 and excused her from work due to right leg radiculopathy. He offered no opinion on causal relationship or discussion of the work incident. In subsequent reports, Dr. Halperin noted that appellant was carrying something heavy at work when she experienced new pain in her back and leg. He diagnosed right leg radiculopathy with L3-4 canal stenosis on the left. However, Dr. Halperin did not offer a medical opinion on the subject of causal relationship. He did not discuss, with medical rationale,

⁴ 5 U.S.C. § 8102(a).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁷ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁸ *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

⁹ *See William E. Enright*, 31 ECAB 426, 430 (1980).

how the August 13, 2012 lifting/carrying incident caused or aggravated any diagnosed condition. While Dr. Halperin noted that appellant had carried something heavy at work, he did not provide specific details as to the weight of the tray she carried, nor did he explain how carrying the tray of mail would have caused or aggravated the low back condition. Without an affirmative opinion with medical rationale as to how any diagnosed condition was caused or aggravated by the August 13, 2012 incident, his reports do not establish the critical element of causal relationship.¹⁰

A medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician.¹¹ While Ms. Billings, a certified physician's assistant, opined in an August 29, 2012 duty status report that appellant's right leg radiculopathy was due to the injury, her report does not constitute competent medical evidence as physician's assistants are not considered physicians as defined under section 8101(2) of FECA.¹²

As there is no medical evidence which offers a well-reasoned explanation of how the August 13, 2012 incident caused a diagnosed medical condition, appellant has not met her burden of proof to establish her claim for compensation benefits. The Board will therefore affirm OWCP's November 14, 2012 decision to deny her claim.

Appellant may submit new evidence or argument as part of a formal written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹³ 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.¹⁴ 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.¹⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

¹⁰ See *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹¹ *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹² 5 U.S.C. § 8101(2); *E.K.*, Docket No. 09-1827 (issued April 21, 2010) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *Allen C. Hundley*, 53 ECAB 551, 554 (2002).

¹³ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁵ *Id.* at § 10.607(a).

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁶ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁷

ANALYSIS -- ISSUE 2

Appellant did not identify a specific point of law or show that OWCP erroneously applied or interpreted it. She also did not advance a new and relevant legal argument. In her request for reconsideration, appellant provided mechanism and history of her injury and offered an explanation that she thought OWCP was denying her request for epidural injections and not the entire claim. However, she did not advance a relevant legal argument not previously considered by OWCP. Thus appellant has not shown that OWCP erroneously applied or interpreted a specific point of law and she has not advanced a relevant legal argument not previously considered by OWCP.

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence not previously considered by OWCP, but appellant submitted no such evidence with her reconsideration request. While appellant indicated in her reconsideration request that she was enclosing additional evidence from Dr. Halperin and other documentation from the August injury, no such evidence was received. Accordingly, the Board finds that she did not meet any of the necessary requirements and she is not entitled to further merit review.¹⁸

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 submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that her medical condition is causally related to the August 13, 2012 work incident. The Board also finds that OWCP properly denied her reconsideration request.

¹⁶ See *A.L.*, Docket No. 08-1730 (issued March 16, 2009). See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁷ *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁸ See *L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2013 and November 14, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 19, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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