

FACTUAL HISTORY

On March 5, 2010 appellant, a 58-year-old tax consultant, sustained a traumatic injury in the performance of duty while moving 70 laptops from the basement, packing them three to a box and taking them to the mailroom. OWCP accepted her claim for a temporary aggravation of preexisting lumbar spinal stenosis. Appellant stopped work and received compensation for temporary total disability beginning April 25, 2010.

On October 18, 2010 appellant returned to work for four hours a day. On January 31, 2011 she increased her workday to five hours. On March 28, 2011 appellant accepted a full-time limited-duty position as a stakeholder relationship tax consultant.

Appellant again stopped work on July 11, 2011. On July 29, 2011 she filed a recurrence of disability and claim for compensation alleging a recurrence on May 5, 2011 that caused her to stop work on July 11, 2011. Appellant explained that her back became more painful on May 4, 2011 while she was typing on her laptop. She got out of her seat several times that day to stand up. Appellant took medication and tried heat and cold that evening, but she had a flare up the following morning. She could not straighten up. "My back was so painful I had to call my daughter to take the bus to my job and drive my car to take me to my doctor appointment." Appellant added: "I believe my condition is related to the original injury because the sitting, reaching and repetitive getting up and down at work has aggravated my back."

Appellant saw a registered nurse on May 5, 2011, who diagnosed an exacerbation of low back pain, degenerative disc disease and lumbar radiculopathy. The nurse took appellant off work that Thursday and Friday and returned her to work the following Monday. On May 10, 2011 Dr. Daryl J. Melzer, a Board-certified internist, signed the nurse's note and indicated his agreement.

On May 16, 2011 Dr. Dale E. Bauwens, an attending Board-certified orthopedic surgeon, noted that appellant had a flare up of back and leg pain that caused her to miss several days of work. On May 23, 2011 he advised that appellant was off work that day due to back pain. Dr. Bauwens excused her from work from June 21 to 22, 2011 with a diagnosis of low back pain and sciatica.

On July 11, 2011 Dr. Bauwens stated: "[Appellant] tells me today [that] she can no longer work." Appellant explained that her pain and stress levels were so high, she was convinced that she could not manage work and decided to apply for medical retirement. Dr. Bauwens described his findings on physical examination, including range of motion, diffuse lumbar tenderness, left sciatic notch tenderness and positive straight leg raising. He recommended medical retirement.

By decision dated September 1, 2011, OWCP denied appellant's recurrence claim. It found that the evidence did not establish that the claimed recurrence of disability resulted from the accepted work injury. Appellant's entitlement to medical treatment remained unaffected.

Appellant requested a telephonic hearing before an OWCP hearing representative. On October 18, 2011 Dr. Bauwens stated that appellant remained disabled from her work based on the chronicity of her back problems and failure to respond to any other treatment.

During the December 22, 2011 hearing, appellant testified that she became unable to work in July 2011 due to sitting: “When I was the four or five hours I never felt comfortable. But when I started working the eight hours the sitting became really bad for me.”

On January 4, 2012 Dr. Bauwens related appellant’s March 5, 2010 history of injury and medical treatment. He noted that diagnostic testing in 2010 confirmed degenerative disc disease, facet arthropathy and foraminal encroachment at L4-5 and L5-S1. Dr. Bauwens stated that appellant continued to have chronic pain, radicular symptoms and numbness and tingling. It was his opinion that she had preexisting asymptomatic degenerative changes in her lumbar spine that became symptomatic in March 2010 when lifting computers at work.

By decision dated February 29, 2012, the hearing representative affirmed the September 1, 2011 decision. She noted that the full-time work appellant performed after March 28, 2011 was within the medical limitations recommended by her treating physician. The hearing representative further noted that none of Dr. Bauwens’ reports provided objective findings to support a worsening of appellant’s accepted condition or an increase in her disability for work. When appellant told him that she was no longer able to work because her pain and stress levels were too high, his findings on examination were essentially the same as his prior findings. The hearing representative reviewed the medical evidence, including Dr. Bauwens’ January 4, 2012 report and a February 14, 2011 report from Dr. Steven J. Donatello, a Board-certified pain management specialist. The hearing representative found that appellant had not submitted sufficient medical evidence to support that her disability from work after July 11, 2011 was causally related to and necessitated by the March 5, 2010 work injury.

On March 21, 2012 Dr. Bauwens advised that appellant was not fit for work due to her back and leg pain.

On March 29, 2012 appellant, through her representative, requested reconsideration. She submitted a copy of Dr. Bauwens’ January 4, 2012 report, “not previously considered.” Appellant’s representative argued that, based on this new evidence, OWCP’s decision should be vacated. OWCP received appellant’s reconsideration request on April 2, 2012.

OWCP also received a copy of Dr. Donatello’s February 14, 2011 report as well as additional treatment notes from Dr. Bauwens.

Appellant took disability retirement effective April 7, 2012.

On December 17, 2012 appellant’s representative asked about the status of the March 29, 2012 reconsideration request.

By decision dated January 30, 2013, OWCP denied appellant’s reconsideration request. Finding no evidence in the record of a March 29, 2012 reconsideration request, it treated the December 17, 2012 inquiry, received on December 19, 2012, as a reconsideration request. OWCP set forth the standard for obtaining a merit review of the case and found that appellant’s

request did not meet at least one of those standards. Dr. Donatello's February 14, 2010 report, OWCP explained, was duplicate evidence already taken into consideration. The evidence submitted to support the request did not address the issue under review. The evidence did not show that OWCP erroneously applied or interpreted a point of law and did "not advance a point of law or fact not previously considered by [OWCP]." OWCP added that the statement received from appellant's representative did not mention how OWCP erred in its September 1, 2011 decision. "Further there was no statement provided by the claimant dated March 29, 2012 so it is unclear why the claimant was requesting reconsideration."²

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.³ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁶

If a reconsideration decision is delayed beyond 90 days, the claimant's right to review of the original decision by the Board is abrogated. When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review. There is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired with the 90-day period following OWCP's receipt of the claimant's reconsideration request.⁷

² Notwithstanding the analysis showing that appellant's reconsideration request did not meet at least one of the three standards for obtaining a merit review of her case, OWCP stated that the evidence was sufficient to warrant further review and the cover letter stated that OWCP had reviewed the merits of the case.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606.

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7.a (October 2011).

ANALYSIS

The basis for OWCP's January 30, 2013 decision is not clear. The cover letter states that OWCP reviewed the merits of the case, and a statement inside the decision indicates that the evidence submitted to support the request was sufficient to warrant further review. But it is clear from the Board's reading of the decision that OWCP did not conduct a merit review of the case. OWCP did not evaluate the probative value of the evidence submitted. It did not set forth the elements necessary to establish a recurrence of disability or make a finding, as it did in its September 1, 2011 merit decision, that appellant's claim for recurrence was being denied because the evidence was not sufficient to discharge her burden of proof.

OWCP conducted a nonmerit review of appellant's December 17, 2012 inquiry and denied reconsideration of her recurrence claim on the grounds that her request did not meet at least one of the three standards for obtaining a merit review.

Appellant did, in fact, file a March 29, 2012 reconsideration request. OWCP received the request 33 days after the hearing representative's February 29, 2012 merit decision. It delayed a decision on this request beyond 90 days, and the delay jeopardized her right for a review of the merits of the case by this Board. Appellant had until August 27, 2012 to appeal the hearing representative's February 29, 2012 merit decision to the Board, but OWCP did not issue a decision on her reconsideration request until January 30, 2013. In such a situation, OWCP should have conducted a merit review of her case.

Accordingly, the Board finds that OWCP improperly denied appellant's March 29, 2012 reconsideration request. The Board will set aside OWCP's January 30, 2013 decision and remand the case for a merit review and a *de novo* decision on her July 2011 recurrence claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's March 29, 2012 reconsideration request. OWCP should have conducted a merit review of her recurrence claim. Further action is warranted.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2013 decision of Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 5, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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