

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

M.F., Appellant

and

**DEPARTMENT OF THE ARMY, MEDICAL
RESEARCH & MATERIEL COMMAND,
Fort Detrick, MD, Employer**

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Docket No. 13-532
Issued: June 14, 2013

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 7, 2013 appellant, through her attorney, filed a timely appeal of a December 4, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from April 12, 2011, the date of the most recent OWCP merit decision, to the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 28, 2009 appellant, then a 41-year-old animal use review specialist, slipped on ice and fell while in the performance of duty. She did not stop work and subsequently underwent physical therapy and epidural steroid injections.² An April 6, 2009 lumbar magnetic resonance imaging (MRI) scan obtained by Dr. Anthony M. Rowedder, a Board-certified diagnostic radiologist, exhibited L4-L5 disc protrusion as well as evidence of previous surgeries. OWCP accepted appellant's traumatic injury claim for contusion and sprain of the lower back and authorized medical treatment.³

OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination. In an April 27, 2010 report, Dr. Smith reviewed the April 14, 2010 statement of accepted facts and medical file. On examination, he observed satisfactory range of motion (ROM) and the absence of back spasms, atrophy, trigger points, rigidity and other deformities. Neurological results were also unremarkable. Dr. Smith diagnosed resolved lumbosacral sprain and soft tissue contusion based on the lack of objective findings. He asserted that a lumbar sprain and contusion would normally heal within three months of the date of onset and opined that appellant should have reached maximum medical improvement on April 28, 2009. Dr. Smith added that she no longer required treatment related to the accepted conditions.

Dr. Christopher D. Berman, a Board-certified physiatrist, related in May 21 and June 18, 2010 reports that appellant experienced lower back pain radiating to the buttocks. On examination, he noted tenderness to palpation of the left sacroiliac joint area. Dr. Berman diagnosed lower back pain, L4-L5 disc protrusion and lumbar radiculopathy.

In a July 21, 2010 letter, OWCP determined that Dr. Smith's April 27, 2010 report constituted the weight of the evidence and notified appellant of its proposal to terminate her medical benefits on the grounds that she no longer was disabled or had residuals due to her work injury. It gave her 30 days to submit additional argument or evidence. Appellant submitted an August 12, 2010 report from Dr. Berman reiterating that she remained symptomatic.

By decision dated September 1, 2010, OWCP finalized the termination of appellant's medical benefits.

Counsel requested a telephonic hearing, which was held on January 18, 2011. Appellant testified that she underwent lumbar microdiscectomy for a preexisting L4-L5 disc herniation several years prior to the January 28, 2009 employment injury.

On April 12, 2011 an OWCP hearing representative affirmed the September 1, 2010 decision.

Appellant, through her attorney, requested reconsideration on January 26, 2012. She submitted medical reports and treatment notes from Dr. Michael D. Dabbah, a Board-certified

² The case record indicates that appellant's term of employment expired sometime in April 2010.

³ This information was incorporated into the April 14, 2010 statement of accepted facts.

orthopedic surgeon, for the period June 4 to August 27, 2007 and Dr. Berman for the period September 11, 2007 to June 9, 2008.⁴ Their notes reflect ongoing treatments for low back/buttocks pain and the prescribing of various medications.

By decision dated December 4, 2012, OWCP denied appellant's request for reconsideration on the grounds that she did not submit new and pertinent evidence warranting further merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP's regulations provide that the evidence or argument submitted by a claimant must either: (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.⁶ Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

OWCP accepted that appellant sustained lower back contusion and sprain while in the performance of duty on January 28, 2009. By decision dated September 1, 2010, it terminated medical benefits based on the weight of Dr. Smith's April 27, 2010 second opinion examination report. Following a telephonic hearing, an OWCP hearing representative affirmed the termination on April 12, 2011. Appellant, through her attorney, requested reconsideration on January 26, 2012 and submitted new evidence. OWCP denied the request on December 4, 2012, finding that she did not present new and pertinent evidence warranting further merit review.

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review. First, her application included copies of reports already contained in the case record. The submission of evidence that repeats or duplicates evidence already found in the record does not constitute a basis for reopening a case.⁸ Second, while appellant submitted medical reports from Drs. Berman and Dabbah for the period June 4, 2007 to June 9, 2008 that were not previously considered, they were immaterial because they did not address whether she still experienced residuals of the accepted lower back contusion and sprain that would require further medical treatment. The submission of evidence that does not address the relevant issue

⁴ Appellant also provided duplicates of reports already contained in the case record.

⁵ 5 U.S.C. § 8128(a).

⁶ E.K., Docket No. 09-1827 (issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

⁷ L.D., 59 ECAB 648 (2008). See 20 C.F.R. § 10.608(b).

⁸ Edward W. Malaniak, 51 ECAB 279 (2000).

involved does not constitute a basis for reopening a case.⁹ In addition, these documents predated the January 28, 2009 work incident.¹⁰

Appellant neither showed that OWCP erroneously applied or interpreted a specific point of law nor advanced a relevant legal argument not previously considered by OWCP. Because she failed to meet one of the standards enumerated under section 8128(a) of FECA, she was not entitled to further merit review of her claim.

Counsel argues on appeal that the December 4, 2012 decision was contrary to fact and law. As discussed above, appellant did not provide evidence or argument satisfying any of the three regulatory criteria for reopening a claim. Therefore, OWCP properly denied the request for reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2012 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: June 14, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁹ D.K., 59 ECAB 141 (2007).

¹⁰ See F.W., Docket No. 10-1975 (issued May 13, 2011).