

FACTUAL HISTORY

On September 19, 2008 appellant, a 54-year-old clerk, filed a traumatic injury claim alleging that she developed neck pain while sorting parcels on August 31, 2008. She stopped work on September 6, 2008 and returned to a full-time limited-duty job on October 17, 2008.

Appellant submitted a September 11, 2008 magnetic resonance imaging (MRI) scan of the cervical spine which revealed degenerative changes with abnormal bone marrow edema at C3 and C4, neural foraminal narrowing at multiple levels at C3-4 and C4-5.

On October 3, 2008 OWCP advised appellant of the factual and medical evidence needed to establish her claim.

Appellant submitted reports from Dr. Joon Y. Lee, an orthopedic surgeon, dated September 26 and 29, 2008. Dr. Lee diagnosed mild radiculitis. Appellant reported sorting mail on August 31, 2008 and having neck pain radiating into the shoulder. In an attending physician's report dated September 29, 2008, Dr. Lee diagnosed cervical stenosis and noted with a checkmark "yes" that appellant's condition was caused by an employment activity.

Appellant was also treated by Dr. Robert Baraff, a Board-certified neurologist, from October 10 to 29, 2008. Dr. Baraff performed an electromyogram (EMG) which revealed no abnormalities. In reports dated October 16 and 29, 2008, he diagnosed cervical strain with cervical radiculopathy. Dr. Baraff returned appellant to full-time light duty on October 17, 2008. In an October 29, 2008 attending physician's report, he diagnosed cervical strain and cervical radiculopathy and checked a box "yes" that appellant's condition was work related.

In a September 27, 2008 statement, appellant noted that on August 31, 2008 she was lifting parcels from the chute to a container and experienced pain in her neck region. She asserted that her claim was both an occupational disease and a traumatic injury, noting that it was occupational due to the repetitive lifting of parcels in excess of 35 pounds since 1996 and traumatic due to stress and strain of lifting parcels weighing 35 to 70 pounds each day. Appellant noted that she was not involved in any activities outside of work.

In a November 5, 2008 decision, OWCP denied appellant's claim finding that the medical evidence did not establish that the claimed medical condition was related to the accepted incident of August 31, 2008.

On November 4, 2009 appellant requested reconsideration. She submitted an emergency room report dated September 4, 2008 which noted treatment for neck pain caused by lifting heavy parcels at work. Appellant was diagnosed with degenerative disc disease. On November 21, 2008 and April 16, 2009 Dr. Baraff diagnosed cervical strain with cervical radiculopathy and aggravation of migraine headaches. On November 3, 2009 appellant was treated by Dr. Lee who diagnosed spondylosis, spondylolisthesis and kyphosis causing intrachordal irritation and neurogenic pain.

In a decision dated November 17, 2009, OWCP denied modification of the November 5, 2008 decision.

On September 20, 2010 appellant requested reconsideration. In a November 13, 2010 statement, she noted working for the employing establishment for over 30 years and described the incident of August 31, 2008 when she lifted a heavy parcel and experienced neck pain radiating into her finger tips. Appellant submitted a November 11, 2010 report from Dr. Lee, who diagnosed spondylosis, spondylolisthesis and kyphosis. Dr. Lee opined that within medical certainty that lifting heavy parcels on August 31, 2008 caused appellant's myeloradiculopathy and cheiralgia paresthetica. Further, appellant's work activities exacerbated her cervical spondylosis and nerve-related pain.

In a decision dated December 2, 2010, OWCP denied modification of the prior decisions.

In a November 29, 2011 appeal request form, appellant requested reconsideration. She submitted an undated two-page statement asserting that she sustained a traumatic injury and an occupational disease. Appellant reiterated that on August 31, 2008 while lifting parcels she experienced neck pain. During 30 years of employment, she keyed parcels, sorted/lifted parcels into container and lifted sacks of parcels into containers. Appellant asserted that her injury was not caused by lifting one parcel in particular but lifting a combination of parcels weighing from 35 to 70 pounds from a high chute while raising her arms. She believed her injury was a combination of a traumatic injury and an occupational disease caused by repetitive lifting of parcels in excess of 35 to 70 pounds from a high chute over a long period of time causing stress on her neck.

In a February 24, 2012 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁴

ANALYSIS

OWCP's most recent merit decision dated December 2, 2010 denied appellant's claim for compensation on the grounds that she failed to provide sufficient medical evidence to establish that her neck condition was causally related to the accepted lifting incident of August 31, 2008. It denied appellant's reconsideration request, without a merit review and she appealed this decision to the Board.

The Board does not have jurisdiction over the December 2, 2010 OWCP merit decision. The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument.

Appellant asserted in her reconsideration request that she sustained both a traumatic injury and an occupational disease. The Board notes that OWCP adjudicated her claim as one of traumatic injury and accepted that the August 31, 2008 incident occurred as alleged. Appellant also noted that in her 30 years of employment, she keyed parcels, sorted/lifted parcels into container and lifted sacks of parcels into containers. She asserted that her injury was a combination of a traumatic injury and an occupational disease caused by repetitive lifting of parcels in excess of 35 to 70 pounds from a high shoot over a long period of time. Appellant's assertions were previously considered by OWCP and do not establish a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant's diagnosed condition is causally related to the August 31, 2008 incident. That is a medical issue which must be addressed by relevant medical evidence.⁵ A claimant may be also entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in support of her claim.

The Board accordingly 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 constitute 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 OWCP properly denied appellant's request for reconsideration.

⁴ *Id.* at § 10.608(b).

⁵ *See Bobbie F. Cowart, 55 ECAB 746 (2004).*

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2013
Washington, DC

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

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

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