

FACTUAL HISTORY

On November 8, 2012 appellant, then a 58-year-old city carrier, filed an occupational disease claim alleging that on February 11, 2012 she first realized that her degenerative disc disease and spondylolisthesis at L5 were caused or aggravated by her federal employment. She stopped work on the date of injury.

In an undated narrative statement, appellant described her injury. On February 11, 2012 she awoke with pain in her legs and could not walk without limping. Appellant continued to limp during her eight-hour work shift that day. When she later awoke at 3:00 a.m., she was unable to get out of the bed. Appellant had severe pain in her right hip and back, and cramps in her hands, arms, feet and legs. She had to walk in small slow steps. Appellant was unable to bend over, stand for a long period and perform daily tasks such as taking a thorough bath, dressing herself and tying her shoes. On February 15, 2012 she sought medical treatment from her physician who immediately placed her off work under the Family and Medical Leave Act. Appellant had been diagnosed with rheumatoid arthritis and her physician advised that this condition did not cause her chronic back pain. She stated that a chiropractor determined that her right hip bone had slipped and was sitting on a sciatic nerve. The chiropractor advised that appellant's condition was caused by years of repetitive reaching from the left to the right, twisting, lifting, getting in and out of a mail truck to the right, stretching, bending and jumping in and out of the back of the truck. Appellant noted her work schedule and listed the physical requirements of her job. She sustained a prior back strain when she lifted too much weight at work. Following this injury, appellant was allowed to go home and returned to work the next day. The body parts affected by her current injury included her back, hips, wrists, hands, feet, knees, muscles and joints.

Appellant submitted progress notes and reports dated May 16 to October 16, 2012 which stated that she had back pain, lumbar radiculitis, degenerative disc disease, spondylolisthesis at L5. This evidence also addressed her medical treatment, work capacity and physical restrictions. In an October 16, 2012 attending physician's report, Dr. C. Jason Dove, an attending chiropractor, provided a history of injury that on February 13, 2012 appellant woke up with pain. Appellant worked all day and later that night she sought medical treatment in an emergency room. Dr. Dove's findings included degenerative disc disease and spondylolisthesis at L5 based on x-ray. He advised that appellant's degenerative disc disease was caused by repetitive stress at work.

By letter dated November 23, 2012, OWCP requested that appellant submit additional factual and medical evidence. Also, it requested that the employing establishment submit factual evidence in response to her claim.

In a November 23, 2012 letter, the employing establishment challenged appellant's claim, contending that the medical evidence of record did not establish that she sustained an injury causally related to her employment. By letter dated December 3, 2012, it described her work duties and submitted a description of her city carrier position.

In a December 17, 2012 medical report, Dr. Dove diagnosed spondylolisthesis at L3, L4 and L5 and degenerative disc disease at L3-L4, L4-L5 and L5-S1 by x-rays. He opined that appellant's job duties year in and year out and the repetitive stress placed on her back more

likely than not (more than 50 percent) contributed to the diagnosed conditions and her inability to perform her postal duties. In a January 7, 2013 report, Dr. Dove advised that she was incapacitated and unable to work from August 2, 2012 through an undetermined date due to low back pain and radiculitis.

In a January 9, 2013 report, a physician whose signature is illegible advised that appellant had low back pain and requested that she be excused from work on that day.

In a January 29, 2013 decision, OWCP denied appellant's claim, finding that the medical evidence was insufficient to establish that she sustained a back injury causally related to the accepted employment factors.

By letter dated February 19, 2013, appellant, through her attorney, requested a review of the written record by an OWCP hearing representative.

In a progress note dated February 15, 2012, Dr. Ann S. Tuggle, a Board-certified family practitioner, advised that appellant had a cramp and pain in a limb, muscle spasm and hypertension. In progress notes dated May 17 and December 3, 2012, she reported that appellant related that she was unable to return to work due to her work-related back injury. Dr. Tuggle advised that appellant had depressive disorder, depression with anxiety, rheumatoid arthritis, radiculopathy, back pain and continuous alcohol abuse.

In a May 13, 2013 decision, an OWCP hearing representative affirmed the January 29, 2013 decision. Appellant failed to submit sufficiently rationalized medical evidence based on an accurate factual background to establish that she sustained a lumbar condition causally related to her employment factors.

By letter dated June 12, 2013, appellant, through her attorney, requested reconsideration. Counsel contended that Dr. Dove's opinion on causal relation was sufficient to establish appellant's claim.

In a March 1, 2011 report, Dr. Thomas H. Maskell, a specialist in emergency medicine, noted appellant's hand, shoulder and knee symptoms which she had experienced since having a cold that had cleared up. He reported essentially normal findings on physical examination with the exception of tenderness in the right elbow and some general diffuse tenderness through the distal interphalangeal joints of the fingers.

Progress notes from appellant's physical therapists addressed the treatment of her back condition from February 21 through May 2, 2012.

In a May 23, 2013 report, Dr. Sheryl L. Manges, a chiropractor, reviewed x-rays of appellant's lumbar spine and pelvis that were performed on August 2, 2012 at Dr. Dove's clinic. She advised that the x-rays reflected a subluxation at L5.

In a June 26, 2013 decision, OWCP denied appellant's request for reconsideration without a merit review.³

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,⁴ 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.⁵ 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.⁶ Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁷

ANALYSIS

On June 12, 2013 appellant, through her attorney, disagreed with OWCP's May 13, 2013 decision, finding that she did not sustain a back condition causally related to the accepted employment factors. She requested reconsideration.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, she did not advance a relevant legal argument not previously considered. In a June 12, 2013 request for reconsideration, appellant's attorney contended that Dr. Dove's opinion that appellant's back injury was caused by her work duties was sufficient to establish her claim. Lay individuals such as appellant and her attorney are not competent to render a medical opinion.⁸ The Board finds, therefore, that appellant's argument does not establish a legal error by OWCP and thus she has not submitted a new and relevant legal argument not previously considered by OWCP.

The Board further finds that appellant also did not submit relevant and pertinent new evidence not previously considered. Dr. Maskell's March 1, 2011 report, while new, does not contain any opinion addressing whether appellant's current back condition was causally related

³ The Board notes that, in the June 26, 2013 decision, OWCP stated that appellant submitted x-rays in support of her June 12, 2013 reconsideration request and found that this evidence was irrelevant or immaterial to the issue of causal relationship. The Board, however, notes that this evidence is not contained in the record as an accompaniment to appellant's request.

⁴ 5 U.S.C. §§ 8101-8193. 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).

⁵ 20 C.F.R. § 10.606(b)(1)-(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁸ *Gloria J. McPherson*, 51 ECAB 441 (2000).

to the established employment factors. He only provided essentially normal findings on physical examination of her joints. Similarly, the May 23, 2013 report of Dr. Manges, a chiropractor, is new, but does not contain an opinion on the causal relationship between appellant's subluxation at L5 as demonstrated by x-ray and the accepted work duties.⁹ The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ The Board finds, therefore, that the reports of Drs. Maskell and Manges are insufficient to reopen appellant's claim for a merit review.

The progress notes from appellant's physical therapists are also insufficient to warrant further merit review as a physical therapist is not a physician as defined under FECA.¹¹ The Board finds, therefore, that this evidence is not relevant to the underlying medical issue on appeal and is insufficient to reopen appellant's claim for a merit review.

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to the requirements under section 10.606(b)(2). OWCP properly denied her June 12, 2013 request for reconsideration.¹²

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

⁹ The Board finds that Dr. Manges is a physician as defined under FECA. Section 8101(2) of FECA provides that chiropractors are considered physicians and their reports considered medical evidence only to the extent that they treat spinal subluxations as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2); *Paul Foster*, 56 ECAB 208 (2004).

¹⁰ *R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

¹¹ 5 U.S.C. § 8101(2); *E.H.*, Docket No. 08-1862 (issued July 8, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *see also Roy L. Humphrey*, 57 ECAB 238 (2005).

¹² *Robert E. Cullison*, 55 ECAB 570 (2004); *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration 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).

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 26, 2013
Washington, DC

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

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

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