



## **FACTUAL HISTORY**

On February 13, 2013 appellant, then a 40-year-old transportation security officer, filed a traumatic injury claim alleging that on February 8, 2013 she felt a “pop” in her low back after she leaned over to retrieve a bag that had fallen. She accepted a modified position on February 26, 2013.

In a report dated February 20, 2013, Dr. Mark Ellis, Board-certified in family practice, noted that appellant complained of tingling into her right leg and toes after a work injury on February 8, 2013. He diagnosed sciatica. In a work restriction evaluation dated February 20, 2013, Dr. Ellis found that appellant could work four hours a day with specified restrictions.

On February 27, 2013 Dr. Timothy R. Monroe, a neurosurgeon, noted that appellant described a sudden onset of pain over the past 19 days.<sup>2</sup> He diagnosed lumbar stenosis and recommended diagnostic studies. On May 6, 2013 Dr. Monroe diagnosed lumbar stenosis, lumbar degenerative disc disease and lumbar spondylosis. He noted that electrodiagnostic studies had not been approved by workers’ compensation. Dr. Monroe stated:

“Although the workplace incident did not cause her underlying lumbar degenerative and scoliotic issues, it may have exacerbated her symptoms, although I cannot be certain of this as the work up that I have recommended has not been approved as of yet.”

By decision dated May 22, 2013, OWCP denied appellant’s claim. It found that the medical evidence was insufficient to establish that she sustained a diagnosed condition causally related to the accepted February 8, 2013 employment incident.

By letter dated August 12, 2013, received by OWCP on January 17, 2014, appellant, through her attorney, requested reconsideration. Counsel argued that an employment injury need only contribute to a medical condition to be compensable. He also noted that an aggravation of a preexisting condition was compensable.

In a report dated June 27, 2013, Dr. Jeffrey P. Smith, a Board-certified physiatrist, discussed appellant’s history of low back and radiculopathy in the right lower extremity beginning in February 2013 with “[n]o known inciting event.” He diagnosed lumbar spondylosis and noted that an electromyogram (EMG) and nerve conduction study (NCS) showed bilateral radiculopathy at L5-S1.

In a progress report dated July 15, 2013, Dr. Monroe diagnosed lumbar spondylosis, lumbar radiculopathy and lumbar stenosis. He noted that appellant had a history of pain in the low back and right lower extremity after grabbing a carry-on bag that was falling off a conveyor belt. Dr. Monroe related that a lumbar magnetic resonance imaging (MRI) scan study showed a disc herniation at L5-S1 and that electrodiagnostic studies showed bilateral radiculopathy at S1.

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<sup>2</sup> In work restriction evaluations dated February 28 and April 1, 2013, Dr. Monroe advised that appellant was disabled from employment.

He concluded, “At this point, [appellant’s] lumbar radiculopathy is directly and causally related to this workplace incident.”

By decision dated January 30, 2014, OWCP denied appellant’s request for reconsideration after finding that she had not submitted sufficient evidence or argument to warrant reopening her case for further merit review under section 8128.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</sup> 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) submit relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> 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.<sup>5</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>6</sup>

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof.<sup>7</sup> The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.<sup>8</sup> If OWCP should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.<sup>9</sup>

### **ANALYSIS**

In its May 22, 2013 decision, OWCP determined that appellant had not submitted medical evidence sufficient to establish that she sustained an employment injury on February 8, 2013. With her request for reconsideration, appellant submitted a July 5, 2013 report from Dr. Monroe diagnosing a herniated disc by MRI scan study and bilateral L5-S1 radiculopathy by EMG and NCS testing. Dr. Monroe attributed the lumbar radiculopathy

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<sup>3</sup> *Supra* note 1. Section 8128(a) of FECA provides that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.”

<sup>4</sup> 20 C.F.R. § 10.606(b)(3).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> *Donald T. Pippin*, 53 ECAB 631 (2003).

<sup>8</sup> *Id.*

<sup>9</sup> *See Annette Louise*, 53 ECAB 783 (2003).

directly to her grabbing a bag when it fell off of a conveyor belt. In its January 30, 2014 decision, OWCP determined that appellant did not submit medical evidence sufficient to warrant a merit review of her claim. However, Dr. Monroe's July 5, 2013 report pertained directly to the issue of whether she sustained a work injury on February 8, 2013 and was not previously of record.

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.<sup>10</sup> The record does not contain a prior report from Dr. Monroe directly addressing the cause of a diagnosed condition. In a report dated May 6, 2013, Dr. Monroe found that the work incident may have aggravated a lumbar degenerative and scoliotic condition but advised that he was unable to make such a determination without the results of diagnostic studies. In his report dated July 5, 2013, submitted with appellant's reconsideration request, he reviewed an MRI scan study and EMG and diagnosed radiculopathy due to appellant's grabbing a bag when it fell off a conveyor belt. As Dr. Monroe's July 5, 2013 report constituted pertinent new and relevant medical evidence, the Board finds that OWCP improperly denied appellant's request for review of the merits of the claim. The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue an appropriate merit decision on the claim.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>10</sup> See *supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision by the Board.

Issued: August 22, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

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

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