

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

M.M., Appellant)

and)

NATIONAL CREDIT UNION)
ADMINISTRATION, CITY OF)
SCHENECTADY OFFICE, Albany, NY,)
Employer)

**Docket No. 14-367
Issued: May 9, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 2, 2013 appellant filed a timely appeal from a June 13, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for further merit review. As more than 180 days elapsed from the last merit decision of June 12, 2012 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim and only has jurisdiction over the nonmerit decision.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 11, 2008 appellant, then a 46-year-old federal examiner, filed a traumatic injury claim (Form CA-1) alleging that on September 9, 2008 she sustained an injury to her low back, neck and shoulder after she twisted while trying to catch a file that was falling off a desk. Medical evidence was received. Appellant returned to full-duty work on December 19, 2008.

By letter dated October 21, 2008, OWCP advised appellant of the deficiencies in the evidence and requested that she submit a medical report which contained a physician's opinion supported by objective evidence as to how her employment activities caused, contributed to or aggravated any diagnosed condition(s). Further medical evidence was received.

By decision dated November 25, 2008, OWCP denied the claim on the basis that the medical evidence did not establish that her clinical medical conditions were caused by the September 9, 2008 incident. The decision noted that appellant's physician did not address how the September 9, 2008 incident was caused or was related to the diagnosed conditions.

Appellant requested an oral hearing before an OWCP hearing representative, which was held by telephone on March 17, 2009. She submitted additional medical evidence.

By decision dated June 11, 2009, an OWCP hearing representative remanded the case to OWCP for further medical development. The hearing representative found that the medical evidence submitted did not provide sufficient rationale to establish the claim. OWCP was directed to combine the claim with appellant's prior claims for low back injuries and to refer her for a second opinion examination to address whether the September 9, 2008 incident caused an injury.

On remand, OWCP combined this case with claim numbers xxxxxx727, date of injury April 13, 1992; case number xxxxxx585, date of injury November 22, 1994; and case number xxxxxx509, date of injury July 10, 2002.

In a September 3, 2009 report, Dr. Edwin Mohler, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant. He reviewed the medical record and statement of accepted facts and found that there was no causal relationship between any diagnosed conditions and the September 9, 2008 incident. Dr. Mohler advised that the medical records dating back to 1992 demonstrated degenerative disc disease by magnetic resonance imaging (MRI) scan, disc herniation and congenital spinal stenosis. He opined that the motion appellant performed on September 9, 2008 did not rise to a level of a traumatic event or injury. Dr. Mohler advised that appellant was able to do her usual job without restrictions.

By decision dated December 16, 2009, OWCP denied appellant's claim on the basis that the medical evidence failed to establish that her medical conditions were causally related to the September 9, 2008 incident.

On December 4, 2010 and March 4, 2012 appellant requested reconsideration. She submitted additional medical evidence from Drs. Deborah Hrustich and Brian Gordon, neurosurgeons. By decisions dated March 18, 2011 and June 11, 2012, respectively, OWCP

denied modification of the December 16, 2009 decision on the basis the medical reports submitted were insufficiently rationalized to support her claim.

On June 11, 2013 OWCP received appellant's June 3, 2013 request for reconsideration. Appellant contended that it did not provide a timely decision of her prior request for reconsideration. Because OWCP issued a delayed decision on June 11, 2012, it should accept her claim. Appellant further contended that her current claim was an exacerbation of her prior injuries. She stated that she was asymptomatic prior to the injury, which satisfied the medical portion of her claim. Appellant contended that the medical evidence was sufficient to establish causal relationship. No additional medical evidence was received.

By decision dated June 13, 2013, OWCP denied appellant's request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's regulations provide that the evidence or argument submitted by 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.³ 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.⁴ 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.⁵

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. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared. 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 within the 90-day period following OWCP's receipt of the claimant's reconsideration request.⁶

² 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).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(a) (October 2011); *M.D.*, Docket No. 13-1344 (issued November 7, 2013).

ANALYSIS

Appellant disagreed with OWCP's June 11, 2012 decision, finding that she did not sustain a medical condition causally related to the accepted September 9, 2008 work incident. 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 her June 3, 2013 request for reconsideration, appellant argued that OWCP did not issue a timely decision on June 11, 2012 and that it should accept her case due to this delay. Her March 4, 2012 request for reconsideration was received by OWCP on March 13, 2012. On June 11, 2012 OWCP issued a decision denying modification. This is within the 90 days generally provided for issuing a reconsideration decision. Further, the decision was a merit review. Therefore, appellant's rights for a merit review on appeal to the Board were not jeopardized. However, she did not appeal OWCP's June 11, 2012 decision to the Board. The Board finds, therefore, that appellant's argument does not establish a legal error by OWCP.

While appellant further contended that her claim is an exacerbation of a preexisting condition; but she did not submit any new medical evidence with her reconsideration request. The fact that she was asymptomatic prior to the injury is not dispositive of whether her medical conditions are causally related to the accepted incident. Medical opinion from a physician is needed to establish causal relationship. Lay individuals such as appellant are not competent to render a medical opinion.⁷ Her contention does not establish a legal error by OWCP. The Board further finds that appellant also did not submit relevant and pertinent new evidence with her request.

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 3, 2013 request for reconsideration.⁸

⁷ *Gloria J. McPherson*, 51 ECAB 441 (2000).

⁸ *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).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).⁹

ORDER

IT IS HEREBY ORDERED THAT the June 13, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2014
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

⁹ Appellant submitted new evidence accompanying her request for appeal. The Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit such evidence to OWCP accompanying a request for reconsideration.