

FACTUAL HISTORY

On April 11, 1994 appellant, then a 38-year-old import specialist, filed a traumatic injury claim (Form CA-1) alleging that on March 28, 1994 she sustained injuries while lifting heavy stereo equipment in the performance of duty. She underwent a cervical discectomy with C5-6 and C6-7 fusion on May 10, 1994. OWCP accepted the claim for cervical herniated disc at C5-6 and C6-7. Appellant stopped working and received compensation for total disability on the periodic compensation rolls.

In a report dated September 30, 2009, Dr. Susan Aull, a Board-certified physiatrist, provided results on examination. She diagnosed continued myofascial dysfunction of the cervical paravertebrals and intrascapular musculature, history of right C7-8 radiculopathy, and rule out a recurrent cervical herniated nucleus pulposus (HNP). In a report dated May 4, 2011, Dr. Aull diagnosed continued myofascial dysfunction and dyskinesia of the cervical paravertebral muscles and bilateral shoulder girdle muscle and rule out cervical stenosis, central and lateral, secondary to dysesthesias and paresthesias of both hands.

OWCP referred appellant for a second opinion examination by Dr. Jonathan Black, a Board-certified orthopedic surgeon.³ In a report dated May 1, 2012, Dr. Black provided a history and results on examination. He opined that the accepted condition of cervical herniated discs at C5-6 and C6-7 had resolved, stating that they were treated operatively by discectomy and arthrodesis. Dr. Black stated that on physical examination appellant did have signs of ongoing right cervical radiculopathy with C7 nerve involvement. He opined that appellant remained disabled for the date-of-injury position due to lifting restrictions.

On May 8, 2012 OWCP accepted right cervical radiculopathy with C7 nerve involvement. By letter dated May 16, 2012, it advised appellant that it proposed to terminate compensation for wage-loss and medical benefits for the accepted condition of cervical herniated discs at C5-6 and C6-7. OWCP noted that the evidence from Dr. Aull did not provide a diagnosis of herniated disc and Dr. Black had opined that the accepted condition had resolved. Appellant could submit evidence or argument within 30 days if she disagreed with the proposed action.

In a letter dated May 29, 2012, appellant's representative argued that termination of the herniated disc condition was improper. Appellant argued that OWCP had misinterpreted Dr. Aull's reports and should have referred her for a referee examination. In an April 27, 2012 report, Dr. Aull reviewed the medical history and noted results on examination. She diagnosed status post 1994 surgery, probable recurrent cervical HNP "above and below the area of stabilization vs. instability," right C6-7 cervical radiculopathy, cervical degenerative joint disease, myofascial pain syndrome, of the cervical paravertebrals, shoulder girdle and interscapular musculature. Dr. Aull opined that appellant remained disabled.

³ 5 U.S.C. § 8123(a) provides that an employee shall submit to an examination by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required.

In a decision dated July 17, 2012, OWCP terminated appellant's compensation with respect to the accepted herniated cervical discs at C5-6 and C6-7. It stated that the April 27, 2012 report from Dr. Aull was insufficient to counter the findings of Dr. Black, who represented the weight of the medical evidence. OWCP noted that appellant continued to be disabled due to a cervical radiculopathy.

By letter dated July 1, 2013, appellant, through her representative, requested reconsideration.⁴ With respect to the termination of an accepted cervical herniated disc, she referred to OWCP procedures regarding, a notice of proposed termination, the burden of proof, and the need to support termination based on positive and specific evidence that the employment-related disability had ceased. Appellant argued that Dr. Aull's April 27, 2012 report was not speculative and OWCP should have referred her for a referee examination.

On July 24, 2013 appellant submitted a July 15, 2013 narrative report from Dr. John Moor, a Board-certified orthopedic surgeon, who addressed the history of treatment provided and results on examination. Dr. Moor diagnosed "neck to right upper extremity pain of radiculopathy post WC [workers' compensation] injury and C5-7 fusion with NCS [nerve conduction studies] verified bilateral C6 radiculopathy." The record also contains a July 15, 2013 form report with work restrictions.

By decision dated October 7, 2013, OWCP determined the application for reconsideration was insufficient to warrant merit review of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."⁶ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁷

⁴ Appellant requested reconsideration of both the July 17, 2012 decision and a September 25, 2012 decision regarding participation in vocational rehabilitation. As noted above, the issues regarding vocational rehabilitation will be considered in a separate appeal. The Board also notes that the record contains a request for reconsideration dated June 29, 2013, that is similar to the July 1, 2013 request.

⁵ 5 U.S.C. § 8128(a) (providing 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").

⁶ 20 C.F.R. § 10.606(b)(3).

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

ANALYSIS

OWCP terminated appellant's compensation benefits with respect to the accepted condition of cervical herniated discs at C5-6 and C6-7 in a decision dated July 17, 2012. To require further review of the merits, appellant must meet one of the above requirements under 20 C.F.R. § 10.606(b)(2). The Board finds that appellant did not meet any of these requirements.

With respect to showing that OWCP erroneously applied or interpreted a specific point of law, appellant did not meet this requirement. She referred to OWCP procedures and noted that it had the burden of proof to terminate compensation. Appellant's contention does not establish that OWCP erroneously interpreted or applied a point of law, as OWCP acknowledged that it had the burden of proof. She also noted that procedures require a pretermination notice which the record reflects was issued on May 16, 2012.

As to advancing a new and relevant legal argument, appellant did not meet this requirement. She argued that, under OWCP procedures, a termination must be based on positive and specific evidence. The July 17, 2012 decision was clearly based on positive and specific evidence -- namely, the May 1, 2012 report from Dr. Black. OWCP noted that Dr. Black found that the accepted herniated discs had resolved and that his opinion represented the weight of the medical evidence. The legal argument that it terminated compensation without positive and specific evidence is not supported by the evidence of record. Where the legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.⁸ The Board finds appellant did not advance a relevant legal argument not previously considered by OWCP.

A claimant that submits relevant and pertinent evidence not previously considered by OWCP on the issue presented is entitled to a merit review of the claim. In this case, appellant did not submit new and relevant medical evidence. The July 15, 2013 report from Dr. Moor does not discuss the issue of a continuing employment-related herniated C5-6 or C6-7 disc and, therefore, it is not relevant to the issue.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 submit relevant and pertinent evidence not previously considered by OWCP.

On appeal, appellant argues that OWCP erroneously terminated her accepted cervical conditions and that its failure to further review the merits was an abuse of discretion. The issue of whether to reopen a case for merit review is determined by the provisions of 20 C.F.R. § 606(b)(3). For the reasons stated, appellant did not satisfy any of the regulatory requirements and OWCP properly denied merit review.

⁸ See *Norman W. Hanson*, 40 ECAB 1160 (1989).

CONCLUSION

The Board finds that OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 7, 2013 is affirmed.

Issued: May 7, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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