

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

K.G., Appellant)	
)	
and)	Docket No. 14-1539
)	Issued: November 25, 2014
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Brockton, MA, Employer)	
)	

<i>Appearances:</i> <i>Appellant, pro se</i> <i>Office of Solicitor, for the Director</i>	<i>Case Submitted on the Record</i>
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DECISION AND ORDER

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

JURISDICTION

On June 30, 2014 appellant filed a timely appeal from the March 25, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. The last merit decision of record was OWCP's November 27, 2013 decision. Because more than one year elapsed from the last merit decision to the filing of this appeal on June 30, 2014, the Board lacks jurisdiction to review the merits of this claim.²

¹ 5 U.S.C. §§ 8101-8193.

² See 20 C.F.R. §§ 501.2(c) and 501.3. Appellant submitted additional evidence after OWCP's March 25, 2014 decision. The Board cannot consider such evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

ISSUE

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

FACTUAL HISTORY

OWCP accepted that on February 26, 2013 appellant, then a 50-year-old nurse, sustained a neck sprain due to catching and lifting a patient in order to prevent him from falling to the floor. She stopped work on February 26, 2013 and received disability compensation on the daily rolls.

In several reports from mid-2013, Dr. Jane Butlin, an attending Board-certified internist, stated that appellant was partially disabled due to protruding cervical discs causing radicular symptoms in her arms.

In reports dated September 13 and 30, 2013, Dr. Gilbert Shapiro, a Board-certified orthopedic surgeon serving as an OWCP referral physician, determined that appellant had no residuals of her February 26, 2013 work injury. He found that her work-related neck sprain had resolved and that her reported neck and arm complaints were not supported by objective clinical findings.

In an October 23, 2013 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits on the grounds that she ceased to have residuals of her February 26, 2013 work injury. It stated that the proposed termination was supported by the well-rationalized opinion of Dr. Shapiro. Appellant was provided 30 days to submit evidence and argument challenging the proposed termination action.

Appellant submitted an October 24, 2013 report, in which Dr. Butlin stated that appellant had cervical spasms which prevented her from lifting more than five pounds above her shoulders. In an October 25, 2013 form report, Dr. Butlin reiterated that appellant was totally disabled.

By decision dated November 27, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective November 27, 2013. It found that she had no residuals of her February 26, 2013 work injury after that date. OWCP stated that the reports of Dr. Butlin did not show that appellant had work-related residuals and that the weight of the medical opinion evidence regarding her work-related residuals rested with the opinion of Dr. Shapiro.

In a December 20, 2013 letter received on December 27, 2013, appellant requested reconsideration of OWCP's November 27, 2013 decision. She contended that, despite the findings of Dr. Shapiro, she continued to experience pain, numbness and spasms while carrying out her activities of daily life. Appellant made an appointment with a Board-certified orthopedic surgeon in order to accurately assess her current medical situation.

In support of her reconsideration request, appellant submitted October 17 and November 6, 2013 reports from Dr. Butlin and a January 6, 2014 report of Dr. Simon Chao, an

attending Board-certified orthopedic surgeon. She also submitted several previously submitted documents, including the findings of April 17, 2013 magnetic resonance imaging (MRI) scan testing of her cervical spine and a March 5, 2013 report and November 6, 2013 disability slip of Dr. Butlin.

In the October 17 and November 6, 2013 reports, Dr. Butlin noted that appellant presented to discuss issues with her chronic neck pain and stated, “[Appellant] initial diagnosis after the accident at work in February was cervical sprain but this is clearly evolved [to] cervical disc disease and spondylosis.” In the October 17, 2013 report, she diagnosed cervical spondylosis and recommended further pain management treatment. On November 6, 2013 Dr. Butlin diagnosed displacement of cervical the intervertebral disc without myelopathy, cervical spondylosis and screening for depression. She indicated that appellant was totally disabled and provided a more extensive discussion of her treatment for neck problems.

In the January 6, 2014 report, Dr. Chao stated that appellant visited his office on December 31, 2013 complaining of worsening neck pain, headaches and bilateral arm pain and numbness. He discussed appellant’s April 17, 2013 MRI scan testing and stated that her ongoing symptoms were likely due to cervical radiculopathy and bilateral carpal tunnel syndrome. Dr. Chao recommended a cervical epidural steroid injection at C6-7 for diagnostic and therapeutic purposes.

In a November 27, 2013 decision, OWCP denied appellant’s request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the medical reports she submitted were repetitive because they had previously been submitted or were irrelevant because they did not contain a clear opinion that she continued to have residuals of her February 26, 2013 neck sprain.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ 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.⁴ 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.⁵ 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.⁶ The Board has held that the submission of evidence

³ Under section 8128 of FECA, “[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.” 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

or argument which repeats or duplicates evidence or argument already in the case record⁷ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁸

ANALYSIS

OWCP issued a decision on November 27, 2013 which terminated appellant's wage-loss compensation and medical benefits effective November 27, 2013 on the grounds that she had no residuals of her February 26, 2013 work injury after that date. It accepted that on February 26, 2013 she sustained a work-related neck sprain. Appellant stopped work on February 26, 2013 and received disability compensation on the daily rolls. OWCP terminated her wage-loss compensation and medical benefits effective November 27, 2013 based on the opinion of Dr. Shapiro, a Board-certified orthopedic surgeon, who served as an OWCP referral physician. Appellant requested reconsideration of this decision on December 27, 2013.

As noted, the Board does not have jurisdiction over OWCP's November 27, 2013 decision. The issue on appeal 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 December 27, 2013 application for reconsideration, appellant did not contend 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.⁹ She submitted several documents that were previously submitted and considered by OWCP, including the findings of April 17, 2013 MRI scan testing of her cervical spine and a March 5, 2013 report and November 6, 2013 disability slip of Dr. Butlin, an attending Board-certified internist. The submission of these documents does not require reopening of appellant's claim for merit review because the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁰

The underlying issue in this case is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective November 27, 2013 as she had no residuals of her February 26, 2013 work injury after that date. That is a medical issue which must be addressed by relevant medical evidence.¹¹ A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case.¹²

⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁹ In her reconsideration request letter, appellant indicated that she continued to have symptoms and that she had an appointment to see a new physician.

¹⁰ *See supra* note 7.

¹¹ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹² *See supra* note 4.

Appellant submitted October 17 and November 6, 2013 reports of Dr. Butlin and a December 31, 2013 report of Dr. Chao. These reports were new in that they had not been previously submitted, but they are not relevant to the underlying issue of the case. Dr. Butlin and Dr. Chao did not provide any opinion as to why appellant continued to have residuals of her February 26, 2013 work injury. Therefore, the submission of these reports would not require reopening of appellant's claim for merit review.¹³

In the October 17 and November 6, 2013 reports, Dr. Butlin noted that appellant presented to discuss issues with her chronic neck pain and stated, "Her initial diagnosis after the accident at work in February was cervical sprain but this is clearly evolved [to] cervical disc disease and spondylosis." She diagnosed cervical intervertebral disc without myelopathy, cervical spondylosis and screening for depression. These reports are not relevant to the main issue of this case because Dr. Butlin did not address how appellant's neck and arm problems were related to her February 26, 2013 work injury. In the January 6, 2014 report, Dr. Chao stated that appellant visited his office on December 31, 2013 complaining of worsening neck pain, headaches and bilateral arm pain and numbness. He advised that her ongoing symptoms were likely due to cervical radiculopathy and bilateral carpal tunnel syndrome. This report also lacks relevance to the underlying issue of the case because Dr. Chao did not address how appellant's continuing symptoms were related to the accepted work injury.

On appeal, appellant indicated that she was currently seeing a psychiatrist for stress, anxiety and depression; however, her claim has not been accepted for a work-related emotional condition.

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 submit 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 further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹³ See *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 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