

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

S.M., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
MOBILITY COMMAND, Goose Creek, SC,
Employer**

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**Docket No. 14-778
Issued: September 16, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 13, 2014 appellant, through counsel, filed a timely appeal from a January 17, 2014 Office of Workers' Compensation Programs' (OWCP) nonmerit decision, denying her request for further merit review of her claim. As the last merit decision was issued on January 17, 2013 more than 180 days from the filing of this appeal, the Board does not have jurisdiction over the merits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 27, 2012 appellant, then a 51-year-old family life specialist, filed a traumatic injury claim alleging that on January 18, 2012 she fell at work when her right ankle became caught on a concrete wall. She indicated that she sustained neck pain, upper and lower back pain, pain in both lower hips and tenderness in the right ribs. Appellant stopped work on January 19, 2012.

In an October 6, 2011 report, Dr. David L. Castellone, Board-certified in family medicine and a treating physician, noted that appellant presented with back ache and back pain, which had begun weeks ago. He advised that she complained of radiating and nonradiating, “gnawing and burning pain,” which was severe and constant. Dr. Castellone diagnosed: depression; attention deficit disorder; sleep apnea, obstructive; osteoarthritis, knee unspecific (generalized, localized, bilateral); degenerative disc disease (DDD); fibromyalgia; insomnia and hypersomnia.

In a June 14, 2012 report, Dr. Castellone, noted that appellant was having an exacerbation of her sciatica. Appellant indicated that the severity of her injury worsened after a fall five months earlier, followed by pain and muscle spasms. In a June 28, 2012 report, Dr. Castellone, similarly noted back pain which was aggravated by activity, depression and fibromyalgia. He noted that appellant’s symptoms began in 2006, but worsened after a fall earlier in the year. Appellant had missed intermittent work as a result.

In a July 11, 2012 report, Dr. Castellone repeated his previous findings and diagnoses.

By decision dated August 3, 2012, OWCP denied appellant’s claim on the grounds that the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related events.

Thereafter, appellant submitted a May 30, 2012 report from Dr. Castellone who noted treating her since January 20, 2012. Dr. Castellone indicated that she was walking to her car when she caught her right shoe and fell forward onto the lot, injuring her lower back, buttock, right shoulder, hands and elbows. He diagnosed back sprain with increased pain from severe fibromyalgia, osteoarthritis, degenerative disc disease, anxiety and depression. Dr. Castellone advised that these conditions worsened because of appellant’s injury on January 18, 2012. In a July 27, 2012 report, he confirmed that he had been treating appellant for pain and depression since the January 18, 2012 fall at work. Dr. Castellone continued to treat appellant and submit reports.

On November 22, 2012 appellant requested reconsideration and submitted additional evidence.

In a decision dated January 7, 2013, OWCP denied modification of the prior decision. It found that the medical evidence did not provide sufficient rationale and findings to establish that her conditions were caused or aggravated by an employment incident.

OWCP subsequently received additional reports from Dr. Castellone. They included copies of previously submitted reports dated October 6, 2011, June 14, 28, July 11 and 26, 2012.

In reports dated August 17 and October 16, 2012, Dr. Castellone noted that appellant had suffered anxiety and depression for years. He advised that her condition was aggravated by recent life stressors, work demands and by a recent fall.

In a February 19, 2013 report, Dr. Castellone noted that appellant had anxiety and depression which began in 2006 but were exacerbated by her fall.

In an April 30, 2013 report, Dr. Castellone confirmed his earlier opinion that appellant had back ache and DDD, which was exacerbated by a fall earlier in the year. Appellant missed work intermittently and was not working because of pain and had filed for disability.

On January 2, 2014 appellant, through counsel, requested reconsideration and advised that additional evidence from Dr. Castellone would be submitted.

In a January 17, 2014 decision, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

- “(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
- (ii) Advances a relevant legal argument not previously considered by OWCP; or
- (iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁴

ANALYSIS

Appellant disagreed with the denial of her traumatic injury claim and requested reconsideration through counsel on January 2, 2014. The issue on reconsideration is medical in nature, whether the January 18, 2012 work incident caused or contributed to an injury.

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b).

⁴ *Id.* at § 10.608(b).

On reconsideration, appellant's counsel did not argue a legal error by OWCP or advance a relevant legal argument not previously considered by OWCP. Rather, he stated that he was submitting additional medical evidence from Dr. Castellone.

The Board notes initially that some of the reports provided by appellant were not new. The reports dated October 6, 2011, June 14 and 28, July 11 and 26, 2102 were considered by OWCP prior to its decision of August 3, 2012. The Board has held that the submission of evidence or argument which repeats or duplicates that already in the case record is not a basis for reopening a case.⁵ The new reports dated August 17, October 16, 2012, February 19 and April 20, 2013 repeated earlier findings and were cumulative. Dr. Castellone repeated his previous opinion that her symptoms were caused or exacerbated by her workplace fall in his April 20, 2013 report. Dr. Castellone did not add any further explanation or rationale to support that the conditions were caused or aggravated by the fall on January 18, 2012.⁶

Appellant therefore 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 new and relevant evidence not previously considered.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

⁵ *Edward W. Malaniak*, 51 ECAB 279 (2000).

⁶ *See id.*

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2014 decision of the Office of Workers' Compensations Programs is affirmed.

Issued: September 16, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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