

FACTUAL HISTORY

On September 11, 2012 appellant, then a 46-year-old lead sales associate, filed a traumatic injury claim alleging that on that date she injured her right knee due to standing on an uneven floor and mat for long periods of time.

In a September 26, 2012 letter, OWCP advised that additional information was required to support appellant's claim. It noted that initially it appeared to be a minor injury, which resulted in minimal or no lost work time and that the merits of the claim had not been adjudicated. Appellant was advised as to the medical and factual evidence required to support her claim. OWCP requested additional information on the circumstances of the injury and clarification on whether she was filing an occupational or traumatic injury claim. It gave appellant 30 days to provide this information.

In response appellant submitted reports from Dr. Alica Rucekova, a treating physician Board-certified in preventive medicine and occupational medicine. In California State form reports for occupational injury or illness, dated September 25 and October 4, 2012, Dr. Rucekova indicated that appellant was seen for a September 11, 2012 injury. In a September 25, 2012 report, she described the mechanism of injury as an aggravation of right leg swelling which began in May 2012. Diagnoses included right knee joint swelling and pain. In the October 4, 2012 report, Dr. Rucekova diagnosed peripheral vascular disease, swelling of the limb, lymphedema and popliteal cyst. Appellant, in the October 4, 2012 report, stated that the injury occurred due to excessive standing and working for hours at a time on an uneven floor. In both form reports, Dr. Rucekova stated, "y[es]" to the question of whether the diagnosed condition was consistent with appellant's description of how the injury occurred.

In a September 25, 2012 industrial work status report, Dr. Rucekova diagnosed joint swelling and knee joint pain. She noted an injury date of September 11, 2012 and indicated that appellant was unable to work due to uncontrollable symptoms from September 25 to October 3, 2012. In an October 5, 2012 industrial work status report, Dr. Rucekova diagnosed peripheral vascular disease, limb swelling, lymphedema and popliteal cyst, noting an injury date of April 11, 2012 and that appellant was able to perform modified work for six hours per day for the period October 5 to 26, 2012. In progress reports dated October 5, 9 and 26, 2012, she stated that appellant was seen for left lower leg problems and increasing pain and swelling in her right medial knee. Dr. Rucekova provided physical findings on examination and diagnosed peripheral vascular disease, swelling of the limb, lymphedema and popliteal cyst. She indicated that appellant was capable of working up to six hours with restrictions.

By decision dated November 7, 2012, OWCP denied appellant's claim on the grounds that the incident did not occur as alleged. It found that she failed to provide information clarifying the mechanism of injury.

On November 15, 2012 appellant requested review of the written record by an OWCP hearing representative. She attached a copy of her response to the questions posed by OWCP. Appellant stated that the injury occurred when she backed up and then turned to put a parcel in the hamper. While trying to avoid the damaged floor and mats, she twisted her right ankle and leg.

In a November 13, 2012 progress note, Dr. Rucekova provided physical examination finding and diagnoses of peripheral vascular disease, swelling of the limb, lymphedema and popliteal cyst. She released appellant to full-duty work as of November 13, 2012.

On January 2, 2013 OWCP received additional October 1 and 9, 2012 industrial work status form reports from Dr. Rucekova. In the October 1, 2012 form report, Dr. Rucekova noted an injury date of September 11, 2012 and diagnosed limb swelling. She indicated that appellant was disabled from working from October 1 to 3, 2012 and placed her on modified work for October 4 to 19, 2012. On the October 9, 2012 form report, Dr. Rucekova diagnosed peripheral vascular disease, swelling of the limb, lymphedema and popliteal cyst and reported an injury date of September 11, 2012. She placed appellant off work from October 9 to 11, 2012 and released her to return to modified work for the period October 12 to 26, 2012.

A February 6, 2013 magnetic resonance imaging (MRI) scan noted a September 2012 knee injury. Under impression, it noted findings of multidirectional junction body tear and posterior medial horn mensicus; degenerative posterior horn and body tearing; moderate to high-grade focal chondral loss central to weightbearing medial femoral condyle surface; anterior cruciate ligament cystic mucinous degeneration; and moderate grade chondral degeneration medial trochlear facet inferiorly.

In a March 5, 2013 report, Dr. Laure Marie Bradford Lee, a treating Board-certified internist, related that appellant sustained a twisting injury at work on September 11, 2012. She stated that there appeared to be some confusion regarding the knee and ankle swelling and pain from the September 11, 2012 incident and appellant's preexisting leg swelling condition. A review of a February 6, 2013 MRI scan revealed a mensical tear. A January 15, 2013 evaluation and review of a prior x-ray interpretation revealed an internal knee injury.

By decision dated March 20, 2013, the hearing representative affirmed the denial of appellant's claim. He found that due to inconsistencies in the evidence and the lack of a clear statement from her that the evidence was insufficient to establish that the September 11, 2012 incident occurred as alleged.

In a July 15, 2013 report, Dr. Michael E. Hebrard, a treating Board-certified physiatrist, diagnosed right knee internal derangement, bilateral sciatica, lower extremity edema, right ankle sprain and peripheral vascular disease, which were aggravated by appellant's employment. Appellant related twisting her leg as the result of lifting a package off the scale to put into a hamper and that she informed her supervisor. She related the history of treatment and current illness. Dr. Hebrard provided physical findings from his examination. Under assessment, he opined that the diagnosed conditions were employment related. Dr. Hebrard stated that appellant's injury was consistent with repetitive squatting, standing for extending periods of time and twisting of knee with the foot in a stationary position.

On August 30, 2013 OWCP received a February 11, 2013 report from Dr. Wendell Darby Ferguson, a treating Board-certified orthopedic surgeon, reported that appellant was seen for a right ankle and knee work injury sustained in September 2012. The injury occurred when appellant twisted her ankle on a floor irregularity. At the time of the incident, she noted that a swollen ankle with knee pain occurring that evening. Dr. Ferguson provided physical findings

and opined that it appeared to be a right knee work injury as there was no evidence of a preexisting knee condition. He diagnosed some medial femoral condyle chondromalacia and medial meniscus tear.

In an August 29, 2013 report, Dr. Hebrard indicated that appellant was seen for right ankle and knee pain. Diagnoses included knee internal derangement, sciatica, edema, ankle strain and peripheral vascular disease. Lastly, Dr. Hebrard stated that as a result of appellant's decreased mobility which was secondary to right knee and ankle weakness and instability that she developed a stage two ulcer on her right leg.

On September 23, 2013 appellant's counsel requested reconsideration and argued that Dr. Ferguson's report was new evidence sufficient to warrant merit review. Counsel also argued that the September 11, 2012 incident aggravated a preexisting condition and was compensable under FECA.

By decision dated October 16, 2013, OWCP denied reconsideration. It found that appellant failed to provide any factual evidence addressing the inconsistencies in her description as to how the injury occurred.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA² 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.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

ANALYSIS

In a November 7, 2012 decision, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that the September 11, 2012 incident occurred as alleged. On March 20, 2013 an OWCP hearing representative affirmed the November 7, 2012 decision finding that she did not establish that the alleged incident occurred at the time, place and in the

² *Id.* Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

³ 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁴ *Id.* at § 10.607(a). *See S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁵ *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

manner alleged due to inconsistencies. Appellant disagreed with the denial of her claim and requested reconsideration on September 23, 2013.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered. In the September 23, 2013 request for reconsideration, counsel alleged that Dr. Ferguson's medical report warranted a merit review as it constituted pertinent new and relevant evidence not previously considered by OWCP. He further contended that medical reports were sufficient to establish that appellant sustained a work-related injury and aggravation of a preexisting condition. These arguments are not new and are repetitious of evidence already of record and considered by OWCP and, therefore, cumulative in nature. Arguments which repeat or duplicate arguments already in the case record do not constitute a basis for reopening a case for a merit review.⁶

With respect to the third requirement, the Board finds that the evidence submitted is not relevant to the underlying reason for the denial of the claims by OWCP, that the factual evidence of record did not establish that the September 11, 2012 incident occurred as alleged due to factual inconsistencies in the record. While Dr. Ferguson reports that appellant sustained an injury in September 2012 due to twisting her ankle on a floor irregularity, he does not indicate the exact date of the incident. Moreover, on appellant's traumatic injury claim she attributed her condition to standing on an uneven mat and floor for a long period of time. Appellant also submitted reports from Dr. Hebrard who, on the one hand, reported that she injured herself at work while lifting a package off of a scale and later in the same report indicated that her injury was consistent with repetitive squatting, standing for extended periods and twisting the knee. However, as this evidence is not relevant to whether the September 11, 2012 incident occurred at the time, place and in the manner as alleged, the reports from Drs. Hebrard and Ferguson are not sufficient to warrant a new merit review.⁷

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her September 23, 2013 request for reconsideration.⁸

On appeal, appellant argues that the evidence is sufficient to support her claim and provides a description of the September 11, 2012 incident. As noted above, she failed to provide a statement clarifying the inconsistencies regarding the alleged incident when requested by OWCP.

⁶ See *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Betty A. Butler*, 56 ECAB 545 (2005).

⁷ See *Freddie Mosley*, 54 ECAB 255 (2002) (evidence that does not address the particular issue involved does not warrant reopening a case for merit review).

⁸ *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); *Robert E. Cullison*, 55 ECAB 570 (2004).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 16, 2013 is affirmed.

Issued: September 10, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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