

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).

FACTUAL HISTORY

On June 28, 2010 appellant, then a 30-year-old environmental education Peace Corps volunteer in Guatemala, filed an occupational disease claim (Form CA-2) alleging that she sustained multiple traumatic events to her lower back in the performance of duty. She indicated that she sustained herniation of three discs at L3-4, L4-5, and L5-S1. Appellant indicated that she first realized the conditions were caused or aggravated by her employment on April 30, 2008. She stopped work on March 27, 2010.

Documents submitted with the claim indicated that on August 13, 2008 appellant underwent a hemilaminectomy, foraminotomy, and discectomy at L4-5, and L5-S1, performed by Dr. William R. Taylor, a Board-certified neurosurgeon. Dr. Taylor continued to treat appellant and note her status.

On July 23, 2010 OWCP accepted the claim for aggravation of displacement of lumbar intervertebral disc without myelopathy, L4-5, L5-S1, and L3-4.³

In July 2013 appellant filed claims for disability beginning on March 28, 2010 and continuing.

A December 7, 2011 lumbar myelogram procedure and computerized tomography (CT) scan report, read by Dr. Ramin Sean Pakbaz, a Board-certified diagnostic radiologist, revealed L5-S1 flowing osteophyte from L5-S1 with calcifications about the nerve root of S1 and disc herniation at L4-5, mostly on the right.

In an undated attending physician's report (Form CA-20), Dr. Taylor indicated that appellant was only partially disabled beginning August 12, 2008.⁴ He noted that she continued to have right-sided pain from the work injury to include a herniated disc. Dr. Taylor checked the box "yes" in response to whether he believed the condition was caused or aggravated by an employment activity.

In a July 18, 2013 telephone call memorandum, appellant contacted OWCP to request that it expand her claim from a temporary aggravation to a permanent aggravation. She indicated that she needed surgery.

In a letter dated July 18, 2013, OWCP informed appellant of the type of evidence needed to support her claim for wage-loss compensation and requested that she submit such evidence

³ The record reflects that appellant had a preexisting nonindustrial back injury. In a September 11, 2013 decision, OWCP denied appellant's claim for a schedule award.

⁴ Dr. Taylor also filled in partial disability commencing July 2008 on a separate undated attending physician's report.

within 30 days. It also specifically noted that appellant went to Costa Rica on August 3, 2010 for a job in private industry and requested information about that job and her work history in that job.

OWCP continued to develop the claim and, by letter dated August 21, 2013, referred appellant for a second opinion examination to obtain an independent assessment of her work-related condition, along with a statement of accepted facts, a set of questions, and the medical record to Dr. William P. Curran, a Board-certified orthopedic surgeon.

In a September 11, 2013 report, Dr. Curran noted appellant's history of injury and treatment and examined her. He provided findings and concluded that the need for a two-level right-sided hemilaminotomy and discectomy was causally related to the April 30, 2008 work incident. Dr. Curran indicated that, prior to that date, appellant had a two-level herniated disc in April 2001, but she had a seven-year hiatus of no treatment. He opined that the April 30, 2008 accident caused a permanent aggravation of multilevel lumbar disc, joint central and neuroforaminal stenosis. Dr. Curran determined that appellant continued with residuals of her injury which included pain and atrophy with decreased sensation in the right lower extremity. He advised that she was temporarily totally disabled from work for the period July 31, 2008 to February 1, 2009, at which time the period of disability had ceased.

In a letter dated September 26, 2013, OWCP requested that Dr. Taylor review Dr. Curran's report and provide his opinion. No response was received.

By decision dated October 29, 2013, OWCP denied appellant's claim for compensation beginning March 28, 2010.

Appellant continued to submit evidence. She resubmitted evidence that included Dr. Pakbaz's December 7, 2011 report as well as Dr. Taylor's attending physician's report. Appellant also provided a June 28, 2013 treatment note from Dr. Taylor in which he recommended surgery. Attached to this was a July 12, 2013 progress note from Dr. Justin Brown, a Board-certified neurosurgeon, who noted that appellant presented requesting surgery more than a year after her prior visit. Dr. Brown noted that appellant was deciding whom she would like to perform the surgery. Appellant submitted other treatment notes from Dr. Brown.

In a November 27, 2013 report, Dr. Taylor indicated that appellant was awaiting approval for surgery. He noted that, despite being a clear candidate for surgery, her claim was denied.

On September 6, 2014 appellant requested reconsideration of the October 29, 2013 decision. She requested that her claim be expanded to include a permanent aggravation of her lumbar spine condition, as opposed to a temporary aggravation. Appellant also requested that additional diagnoses be added to her claim. She indicated that she was awaiting a second surgery. Appellant also reviewed Dr. Curran's report and argued that her physicians did not agree with all of his comments.

In a decision dated December 11, 2014, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.⁵

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁶ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(3) 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].”⁷

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.⁸

ANALYSIS

Appellant disagreed with the denial of her claim for disability for the period beginning March 28, 2010 and timely requested reconsideration on September 6, 2014.

On reconsideration appellant requested that her claim be expanded to include a permanent aggravation of her lumbar spine condition, as opposed to a temporary aggravation. She indicated that she was awaiting a second surgery. Appellant also reviewed Dr. Curran's report and argued that her physicians did not agree with all of his comments. OWCP denied appellant's application on December 11, 2014, finding that no new evidence was offered warranting further merit review. The underlying issue on reconsideration is medical in nature, whether appellant had disability causally related to her accepted condition beginning March 28, 2010. Appellant's arguments are irrelevant with regard to whether she was disabled beginning March 28, 2010 as medical evidence is needed to address this question. Although she argued that her claim should be expanded, OWCP has not issued a decision on this matter. The

⁵ OWCP noted that its October 29, 2013 decision only pertained to appellant's claim for wage-loss compensation beginning March 28, 2010. It declined to address whether additional conditions should be accepted.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(b).

Board finds that appellant did not offer any arguments which would show a legal error by OWCP nor did she advance a relevant legal argument not previously considered by OWCP.

Appellant also submitted medical evidence not previously of record. However, the Board finds that this evidence is irrelevant to the underlying issue; whether she had any disability beginning March 28, 2010 causally related to her accepted conditions. In a November 27, 2013 report, Dr. Taylor indicated that appellant was awaiting approval for surgery after being denied authorization. This report does not offer any opinion regarding the period of disability at issue. Likewise other treatment notes from Drs. Taylor and Brown did not specifically support that appellant had any disability beginning March 28, 2010 causally related to her accepted conditions. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹ Thus, this evidence is irrelevant. OWCP also received copies of previously submitted evidence. The Board has held that submitting evidence that is repetitious or duplicative of evidence already in the case record does not constitute a basis for reopening the claim.¹⁰

The Board finds, therefore, that 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 pertinent new and relevant evidence not previously considered. As appellant did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

On appeal appellant repeated her arguments from her reconsideration request. She also provided a copy of previously submitted medical evidence. As noted, the Board does not have jurisdiction over the merits of the claim. As explained, appellant has not met any of the necessary regulatory requirements to be entitled to further merit review.

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).

⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *Brent A. Barnes*, 56 ECAB 336 (2005).

ORDER

IT IS HEREBY ORDERED THAT the December 11, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board