



## **FACTUAL HISTORY**

On August 15, 2005 appellant, then a 50-year-old data collector technician, filed a Form CA-1, traumatic injury, alleging that on August 11, 2015 while stepping into a malfunctioning elevator she injured her right knee, hip, and back. OWCP accepted the claim for sprain/strain of the right knee and leg, sprain/strain of the right hip and thigh, and later expanded her claim to include right plantar fibromatosis, right tarsal tunnel syndrome, and aggravation of herniated disc at L5-S1. Appellant stopped work on August 11, 2005 returned to work on August 12, 2005, and worked intermittently thereafter four hours a day.

Appellant was treated by Dr. Thomas A. Carothers, a Board-certified orthopedic surgeon, from November 21, 2005 to July 20, 2006 for right knee and heel pain after a fall at work. Dr. Carothers diagnosed post-traumatic chondromalacia of the right knee and plantar fasciitis of the right foot. On October 10, 2006 he performed an endoscopic plantar fascia release and diagnosed chronic plantar fasciitis of the right heel. Appellant continued to be treated by Dr. Carothers for right ankle and foot pain with instability. Dr. Carothers opined that she had ankle and foot symptoms since the work injury which evolved into ankle instability. On October 12, 2010 he performed a modified collateral ligament repair and reinforcement of the right ankle and diagnosed chronic right ankle instability.

Appellant was referred for vocational rehabilitation. In an e-mail dated October 21, 2010, the rehabilitation counselor noted appellant's disagreement with the rehabilitation plan. Appellant asserted that OWCP should provide more training than a course in computer applications and that the job titles considered should be more technical. The rehabilitation counselor noted that there were no other technical job titles that fit within appellant's job restrictions. On October 27, 2010 OWCP advised appellant that the plan for her to return to work as a claims clerk or procurement clerk was an appropriate assignment consistent with her medical restrictions. It advised her that FECA provided penalties for claimants who did not cooperate with vocational rehabilitation efforts.

On February 22, 2011 the rehabilitation counselor noted that Dr. Carothers had requested that appellant be excused from the job search for six weeks until she completed physical therapy. She instructed appellant to utilize an online keyboarding tutorial to sharpen her keyboarding skills and to register for an office technology course in March 2011.

In a letter dated March 17, 2011, OWCP advised appellant that when she recovered sufficiently to return to work she would be referred for vocational rehabilitation. It advised her that she was required to cooperate fully in every aspect of her return to work and that when placement services conclude, whether she was employed or not, continuing compensation benefits would be reduced based on the pay of the position for which she was found qualified.

In a Form OWCP-44 dated March 24, 2011, the rehabilitation counselor noted that the case was currently in interrupted status. She noted appellant did not provide documentation indicating that she was unable to complete the online tutorials or register for a class at Cincinnati State Technical & Community College as the rehabilitation plan required. OWCP found that appellant had obstructed vocational rehabilitation and noted that she did not appear at scheduled meetings and failed to carry out agreed actions.

Appellant continued to be treated by Dr. Carothers from March 24 to August 25, 2011 for bilateral knee pain. Dr. Carothers diagnosed right patella chondromalacia and recommended proceeding with arthroscopic surgery of the right knee and then reconstruction of the left knee before embarking on vocational rehabilitation as these procedures would adversely affect the rehabilitation process.

Thereafter, in the course of developing the claim, OWCP referred appellant to a second opinion physician and an impartial medical examiner.<sup>2</sup> In a letter dated December 8, 2011, it informed her that the referee physician had determined that she was capable of performing work eight hours a day with restrictions. OWCP notified appellant that the referee physician was the weight of the evidence and she would be entered into a mandatory vocational rehabilitation program.

In a letter dated December 20, 2011, OWCP advised appellant that the rehabilitation counselor reported that she refused to participate in the vocational rehabilitation program. It noted that the referee physician had determined appellant could participate in vocational rehabilitation and was capable of employment eight hours a day with restrictions. The rehabilitation counselor noted speaking with appellant in December 2011 and advised her that she was required to participate in vocation rehabilitation. Appellant asserted that her physician disputed that she could participate in vocational rehabilitation and she noted that her back, legs, and knees hurt and she did not care. OWCP advised her that her refusal to take the preparatory efforts, including testing, counseling, and work evaluations would be seen as her refusal to cooperate with OWCP vocational rehabilitation efforts and result in a reduction of compensation benefits. It provided appellant 30 days to make a good faith effort to participate in vocational rehabilitation efforts or give good reason for not participating in this effort. No response was provided or actions taken by appellant.

In a decision dated January 26, 2012, OWCP reduced appellant's compensation to zero. It determined that she had, without good cause, declined to participate in vocational rehabilitation as directed. Appellant's compensation was reduced to zero until she underwent the essential preparatory effort of vocational testing in good faith or showed good cause for not complying, at which time the reduction of compensation would cease.

On February 7, 2012 appellant requested reconsideration of the January 26, 2012 decision. She submitted reports from Dr. Carothers dated June 11 to September 10, 2012, who treated her for chronic back pain. In a report dated July 9, 2012, Dr. Carothers diagnosed herniated lumbar disc and chronic right lower extremity pain and returned appellant to work four hours a day with restrictions.

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<sup>2</sup> On September 14, 2011 OWCP advised appellant that a conflict of opinion existed between a second opinion physician and Dr. Carothers with regard to whether appellant had disability related to her employment and restrictions due to her injuries. To resolve the conflict of opinion, it referred her to Dr. Rudolf Hofmann, a Board-certified orthopedic surgeon. In a November 14, 2011 report, Dr. Hofmann opined that appellant could return to work as a data collector technician eight hours a day with restrictions of no standing or walking more than 30 minutes at a time, move about every 30 minutes, occasional bending or twisting at the waist, and no lifting more than 25 pounds. He further opined that she could participate in job training and rehabilitation to any job which accommodates the permanent restrictions.

In a decision dated October 4, 2012, OWCP denied modification of the prior decision.

By appeal request form dated January 28, 2012,<sup>3</sup> received by OWCP on February 1, 2013, appellant requested reconsideration of the October 4, 2012 decision. She submitted an October 22, 2012 report from Dr. Carothers who treated her for right ankle pain and swelling. Appellant reported her work injury history and the physician noted an essentially normal examination. Dr. Carothers diagnosed other joint derangement, ankle and right foot, right tarsal tunnel syndrome and joint, ankle, and right foot pain resolved. In an October 31, 2012 report, he noted that a bone scan did not support an arthritic condition of the right knee. Rather, a June 2011 magnetic resonance imaging (MRI) scan of the right knee revealed chondromalacia of the upper apex of the patella. Dr. Carothers opined that the diagnosed chondromalacia resulted directly from blunt trauma to the knee from the work injury and was not caused by degenerative changes. Similarly, in a November 29, 2012 report, he noted that a recent bone scan did not support a diagnosis of lumbar spine arthritis. Rather, Dr. Carothers opined that appellant has been unable to work due to right sciatica from a herniated disc at L5-S1. In a duty status report dated November 29, 2012, he returned her to work part time, four hours a day with restrictions. In reports dated December 17, 2012 and March 4, 2013, Dr. Carothers treated appellant for back pain. He diagnosed sprain/tear of the right hip, thigh, knee, and leg, plantar fasciitis fibromatosis, tight tarsal tunnel syndrome, joint derangement, and herniated/displacement of the lumbar disc.

On December 4, 2012 the employing establishment offered appellant a limited-duty mail processing clerk position effective December 7, 2012, four hours a day with a salary of \$54,257.00 a year. Appellant accepted the position and returned to work.

On April 19, 2013 OWCP denied modification of the October 4, 2012 decision.

In an appeal request form dated March 8, 2014, received by OWCP on March 12, 2014, appellant requested reconsideration of the April 19, 2013 decision. In a February 19, 2014 statement, she indicated that she did not ask to be removed from the vocational rehabilitation program. Appellant indicated that she accepted a job offer and returned to work in April 2013 for four hours a day. She noted that she could not work additional hours due to pain from her herniated lumbar disc and right knee. Appellant disputed the findings of the referee physician and noted that she could not work eight hours a day or participate in vocational rehabilitation. In a March 8, 2014 letter, she asserted that she and Dr. Carothers disputed the findings of the referee physician and that Dr. Carothers continued to treat her with cortisone injections for the herniated lumbar disc pressing on her sciatic nerve. Appellant asserted that she never left work on her own volition, but was sent home when the employing establishment could not accommodate her restrictions. She noted the rehabilitation counselor did not listen to her concerns and objections and threatened her with obstruction. Appellant noted that she never wanted to be removed from the vocational rehabilitation program and was never given the essential preparatory effort of vocational testing.

Appellant submitted an e-mail from the vocational rehabilitation counselor dated October 21, 2010, letters from OWCP dated October 27, 2010, March 17, September 14, and

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<sup>3</sup> The Board finds that this date was a typographical error and should have read January 28, 2013.

December 8, 2011, a vocational rehabilitation report dated February 22, 2011, a Form OWCP-44 dated March 21, 2011, the employing establishment's letters dated June 12 and November 27, 2012, reports from Dr. Carothers dated July 9 and November 29, 2012, a job offer dated December 7, 2012, and an OWCP decision dated April 19, 2013, all previously of record.

Appellant submitted a December 22, 2003 employing establishment applicant rating for her which noted a low eligibility status. She submitted information from a catalog for a computer applications certificate. Also submitted was a request for an ergonomic chair dated April 3, 2012. Appellant submitted leave requests dated December 11 and 12, 2012. She submitted a February 6, 2014 letter co-signed by a union steward that noted that on December 12, 2012 she was instructed by a manager not to return to work until a modified chair was provided.

Appellant submitted reports from Dr. Carothers dated May 6 to November 18, 2013 who treated her for low back pain. Dr. Carothers diagnosed sprain/tear of the right hip, thigh and knee, right plantar fasciitis fibromatosis, right tarsal tunnel syndrome, other joint derangement of the right ankle and foot and herniated displacement of lumbar disc. On August 19, 2013 he treated appellant for worsening right back and knee pain. Dr. Carothers noted the musculoskeletal examination did not reveal any significant abnormalities. He diagnosed sprain/tear of the right knee and leg and lumbar displacement with evidence of degenerative joint disease in the right knee. Similarly, in reports dated January 13 and February 17, 2014, Dr. Carothers noted appellant's complaints of worsening right knee and low back pain. He noted diagnoses and recommended additional corticosteroid injections. Appellant submitted duty status reports from Dr. Carothers dated February 16 and April 16, 2012 which noted appellant was totally disabled from work. In duty status reports dated May 6, 2013 to February 17, 2014, Dr. Carothers noted that she could return to work part time, four hours a day with restrictions. A September 19, 2013 MRI scan of the lumbar spine revealed degenerative disc disease at L5-S1 and left disc displacement at L1-2.

In a March 28, 2014 decision, OWCP denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>4</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;  
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

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<sup>4</sup> 5 U.S.C. § 8128(a).

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”<sup>5</sup>

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.<sup>6</sup>

### ANALYSIS

OWCP reduced appellant’s compensation to zero due to noncompliance with vocational rehabilitation efforts. Thereafter, it denied her reconsideration request, without a merit review.

The issue presented 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 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. In statements dated February 19 and March 8, 2014, she indicated that she did not ask to be removed from the vocational rehabilitation program. Appellant noted again returning to work in April 2013 for four hours a day. She and Dr. Carothers disputed the findings of the referee physician. Appellant noted the rehabilitation counselor did not listen to her concerns and threatened her with obstruction. She noted that she never wanted to be removed from vocational rehabilitation and was never given the essential preparatory effort of vocational testing. These general assertions are insufficient to show a legal error by OWCP nor do they comprise a new and relevant legal argument. The underlying issue in this case is whether appellant, in good faith, underwent the directed vocational testing or showed good cause for not complying with vocational rehabilitation.

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 support of her claim. She submitted reports from Dr. Carothers dated May 6 to November 18, 2013 who treated her in follow up for low back pain and offered diagnoses. On August 19, 2013 Dr. Carothers noted treating appellant for worsening right back and knee pain. He noted the musculoskeletal examination was normal and diagnosed sprain/tear of the right knee and leg and lumbar displacement with evidence of degenerative joint disease in the right knee. Similarly, in reports dated January 13 and February 17, 2014, Dr. Carothers noted appellant’s complaints of worsening right knee and low back pain. He noted diagnoses and recommended additional corticosteroid injections. Although these reports are new, they are not relevant because they do not address the point at issue, whether appellant was able to participate in vocational rehabilitation.<sup>7</sup> Likewise, other reports from Dr. Carothers, such as duty status reports, do not address appellant’s ability to participate in vocational rehabilitation. Therefore, this new evidence is irrelevant and is insufficient to warrant reopening the case for a merit review.

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<sup>5</sup> 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> See *Betty A. Butler*, 56 ECAB 545 (2005) (evidence that does not address the particular issue involved does not constitute a basis for reopening a claim).

Appellant submitted an e-mail from the vocational rehabilitation counselor dated October 21, 2010, letters from OWCP dated October 27, 2010, and March 17, September 14, and December 8, 2011, and a vocational rehabilitation report dated February 22, 2011, Form OWCP-44 dated March 21, 2011, the employing establishment letters dated June 12 and November 27, 2012, an x-ray dated October 12, 2012, reports from Dr. Carothers dated July 9 and November 29, 2012, a job offer dated December 7, 2012, and an OWCP decision dated April 19, 2013. However, these reports are duplicative of evidence previously submitted and considered by OWCP in its May 16, 2014 decision. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>8</sup> Therefore, this evidence is insufficient to require OWCP to reopen the claim for a merit review.

Appellant submitted an employing establishment rating dated December 22, 2003, information from a catalog for a computer applications certificate, an April 3, 2012 request for an ergonomic chair dated April 3, 2012, leave requests dated December 11 and 12, 2012, an MRI scan of the lumbar spine dated September 19, 2013 and a letter co-signed by a union steward dated February 6, 2014. As noted above, while these reports are new, they are not relevant because they do not specifically address the issue of whether appellant, in good faith, underwent the directed vocational resting or showed good cause for not complying with vocational rehabilitation. Thus, these reports are insufficient to require OWCP to reopen the claim for a merit review.

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 reconsideration.

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<sup>8</sup> See *Daniel Deparini*, 44 ECAB 657 (1993).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 2, 2015  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board