

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

D.P., Appellant

and

**SOCIAL SECURITY ADMINISTRATION,
FIELD OFFICE, Rego Park, NY, Employer**

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**Docket No. 15-53
Issued: June 1, 2015**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On October 10, 2014 appellant filed a timely appeal from a May 12, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from January 14, 2014, the date of the most recent merit decision, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's requested for further merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 30, 2011 appellant, then a 51-year-old claims representative, filed a traumatic injury claim (Form CA-1) claiming injuries to her back, both hands, and her right knee sustained

¹ 5 U.S.C. § 8101 *et seq.*

that day when she caught her foot on the base of a printer stand, then fell forward onto her hands and knees. She stopped work at the time of injury. Appellant noted that she had previously sustained a 1999 occupational back injury and a 2008 occupational injury causing tendinitis of the left shoulder.

Dr. Nitin Narkhede, an attending physician Board-certified in pain management, provided an August 30, 2011 report relating appellant's account of the workplace incident. He noted appellant's history of a 1999 lumbar injury, and 2008 right shoulder, wrist, and elbow injuries which had not been treated since July 2009. On examination, Dr. Narkhede observed severe cervical and lumbar paraspinal tenderness with spasm, restricted cervical, lumbar, right knee, and left wrist motion, bilaterally positive acromioclavicular impingement signs, ecchymoses of the right patella, diminished right quadriceps and hamstring strength, and sensory loss in the right S1 dermatome. He diagnosed cervical radiculitis, bilateral shoulder derangement, right knee derangement, tendinitis, dizziness, and "rule out cervical and lumbar disc displacement without myelopathy." Dr. Narkhede held appellant off work four weeks and prescribed physical therapy.² Appellant returned to full-time restricted duty on October 17, 2011.

In an October 21, 2011 decision, OWCP denied the claim as the medical evidence was insufficient to establish that the accepted incident caused the claimed injuries.

On November 8, 2011 appellant requested a review of the written record. She submitted an October 4, 2014 report from Dr. Narkhede, finding that her condition was unchanged.

By decision dated February 2, 2012, an OWCP hearing representative found that the case was not in posture for a decision. She remanded the case to double appellant's claim files and obtain a second opinion. Thereafter, OWCP doubled appellant's claim for the August 30, 2011 injury, file number xxxxxx090, with file number xxxxxx919, accepted for a September 20, 1999 lumbar strain, and file number xxxxxx240, accepted for right shoulder impingement after a February 25, 2008 slip and fall.

Appellant provided additional medical evidence. In a February 9, 2012 report, Dr. Narkhede explained that the "force of the fall was transmitted from her hands through her wrists to her shoulders, resulting in injury to both wrists, and both shoulders" and the right knee. "The force of the fall was so great that [appellant] hyperextended her neck and low back thus injuring her neck and low back." Dr. Narkhede noted that her prior injuries had resolved years before the August 30, 2011 fall. He submitted additional progress notes.

A March 9, 2012 magnetic resonance imaging (MRI) scan of the cervical spine showed central disc protrusion at C4-5 and C5-6, and a posterior disc protrusion at C6-7. Appellant stopped work on March 16, 2012.

On March 21, 2012 OWCP obtained a second opinion from Dr. Leon Sultan, a Board-certified orthopedic surgeon, who opined that there were no objective findings of the injuries described by Dr. Narkhede. Dr. Sultan submitted addenda on April 9 and May 16, 2012 opining

² Dr. Miriam Kanter, a Board-certified physiatrist, administered trigger point injections on September 27, 2011.

that the August 30, 2011 fall caused contusions of the hands, shoulder, low back, and cervical spine, which had resolved without residuals. Based on this, OWCP accepted that appellant sustained bilateral hand contusions and a back contusion. It later expanded the claim to accept bilateral shoulder contusions.

On September 21, 2012 appellant filed a notice of recurrence of disability (Form CA-2a) commencing March 16, 2012. She asserted that she could no longer continue working due to severe neck and back pain. In support of her claim, appellant submitted reports from Dr. Ashin E. Razi, an attending orthopedic surgeon, holding her off work from March 20 through early October 22, 2012 due to cervical and lumbar radiculitis coincidental with the accepted injuries. Appellant also submitted additional reports from Dr. Narkhede opining that the accepted August 30, 2011 incident caused or aggravated cervical and lumbar disc herniations.³

OWCP found a conflict of medical opinion between Dr. Sultan, for the government, and appellant's treating physicians. It selected Dr. Norman Sveilich, an osteopathic physician Board-certified in orthopedic surgery, to resolve the conflict. By decision dated October 9, 2012, OWCP denied appellant's claim for a recurrence of disability finding that causal relationship was not established. Appellant requested a review of the written record. In a January 7, 2013 decision, an OWCP hearing representative set aside the October 9, 2012 decision, finding that the case was not in posture for a decision pending receipt of an impartial medical report. Dr. Sveilich submitted a December 17, 2012 report, opining that appellant's symptoms were disproportionate to the lack of objective findings. He found that the accepted injuries had resolved without residuals. Dr. Sveilich submitted a requested addendum on March 13, 2013, finding that appellant did not require additional treatment and could resume full-duty work.

Dr. Narkhede released appellant to light duty in March 2013.⁴

By decision dated April 29, 2013, OWCP denied appellant's claim for a recurrence of disability commencing March 16, 2012 as the medical evidence established that the accepted injuries had ceased without residuals on or before that date. It accorded Dr. Sveilich the weight of the medical evidence.

Appellant requested a review of the written record. She submitted additional reports from Dr. Narkhede reiterating previous findings and diagnoses. By decision dated and finalized July 29, 2013, an OWCP hearing representative affirmed the April 29, 2013 decision.

In an August 16, 2013 letter, appellant requested reconsideration. She contended that Dr. Sveilich and Dr. Sultan disregarded her pain symptoms and deliberately falsified their opinions. Appellant submitted additional reports from Dr. Narkhede and Dr. Razi reiterating prior findings and diagnoses.

³ An October 15, 2012 lumbar MRI scan showed diffuse disc bulges from L1 through S1 superimposed on L4-5 and L5-S1 central posterior disc protrusions.

⁴ Appellant resumed work, then filed a grievance on March 25, 2013 alleging retaliation for union activity and discrimination based on disability.

By decision dated January 14, 2014, OWCP affirmed the July 29, 2013 decision denying appellant's claim for recurrence of disability, finding that the additional evidence submitted was insufficient to outweigh Dr. Sveilich's opinion.

On March 26, 2014 appellant requested reconsideration, alleging that Dr. Sultan falsified his reports, and that Dr. Sveilich yelled at her and was unsure as to why she was in his office. She submitted a December 20, 2013 letter from the New York State Department of Health acknowledging her request for an investigation of Dr. Sultan, and copies of her letters to her elected representatives. Appellant also provided a copy of the March 9, 2012 cervical MRI scan previously of record as of March 12, 2012.

By decision dated May 12, 2014, OWCP denied reconsideration, finding that appellant's letters, the health department letter, and copy of the MRI scan did not present new, relevant evidence or argument regarding the critical issue of whether she was disabled for work on and after March 16, 2012 due to the accepted injuries.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provide that a claimant must: (1) show 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.⁶ Section 10.608(b) provides that, when an application for review of the merits of a claim 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.⁷

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁰

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁸ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS

OWCP accepted that appellant sustained contusions of both hands, both shoulders, and her back when she tripped and fell at work on August 30, 2011. Appellant returned to work on October 17, 2011, then claimed a recurrence of disability commencing March 26, 2012. OWCP found a conflict of medical opinion between appellant's physicians, who opined that she was totally disabled for work due to cervical and lumbar radiculitis, and Dr. Sultan, a second opinion specialist who found that the accepted injuries resolved as of March 21, 2012. It selected Dr. Sveilich, a Board-orthopedic surgeon, as impartial medical examiner. Dr. Sveilich opined that the accepted injuries had resolved. He attributed appellant's complaints to symptom magnification. On April 29, 2013 OWCP denied her recurrence claim based on Dr. Sveilich's opinion. It affirmed the denial by merit decisions dated July 29, 2013 and January 14, 2014.

Appellant requested reconsideration by March 26, 2014 letter, asserting that Dr. Sultan falsified his reports and Dr. Sveilich was confused and unprofessional. She submitted an acknowledgement letter from a state agency, her correspondence to elected representatives, and a copy of a March 9, 2012 cervical MRI scan previously of record. OWCP denied reconsideration by May 12, 2014 decision, finding that appellant's letters, the health department letter, and duplicate MRI scan report did not contain new, relevant evidence, or argument.

The Board finds that OWCP appropriately denied reconsideration as appellant's argument was not relevant to her claim. The underlying issue was the medical question of whether she was disabled for work on and after March 26, 2012 due to the accepted injuries. Appellant's letters and the health department letter are not medical evidence, and are thus irrelevant to that issue. Therefore, they do not comprise a basis for reopening the case.¹¹ The copy of the MRI scan report is duplicative of evidence previously of record. Evidence which is duplicative or cumulative or repetitive in nature is insufficient to warrant reopening a claim for merit review.¹² The duplicate copy of the MRI scan report is therefore insufficient to warrant consideration on the merits.

A claimant may be entitled to a merit review by submitting new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant contended that there should be no doubt as to how she was injured on August 30, 2011 because of her many consistent descriptions of the incident, as well as multiple witness statements supporting her account of events. The Board notes that OWCP accepted that the August 30, 2011 trip and fall occurred at the time, place, and in the manner alleged.

Appellant also argues that the evidence of record supports that the August 30, 2011 injury caused severe pain symptoms from October 17, 2011 to March 16, 2012, then disabled her for work from March 16 to November 4, 2012. She describes severe financial hardships as she

¹¹ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹² *Denis M. Dupor*, 51 ECAB 482 (2000).

cannot work and does not receive compensation. Appellant notes difficulties in receiving medical care because her insurance company would not cover treatment while her case was pending before OWCP, although an MRI scan demonstrates eight herniated lumbar discs. She asserts that Dr. Sultan was not truthful about the cause and severity of her condition, and that he was being investigated by the American Medical Association. Appellant alleges that Dr. Sveilich did not review her file and did not understand why she was in his office. The Board notes that her arguments on appeal pertain to the merits of the claim, concerning the nature and extent of the accepted conditions and the duration of any periods of disability. However, the Board does not have jurisdiction over the merits of the claim on the present appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's requested for return of the merits of her claims pursuant to 5 U.S.C. § 8108(a).

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 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