

FACTUAL HISTORY

This case has had a complicated history.³ The case began on November 16, 2000 when appellant then a 29-year-old rural carrier associate, filed an occupational disease claim alleging that her work duties had caused severe swelling and pain in her right hand. This claim was opened under OWCP File No. xxxxxx794 and was accepted for wrist strain. Appellant subsequently filed a claim for compensation (Form CA-7) for the period October 8, 2000 through April 20, 2001 which was paid by OWCP on the daily rolls. She returned to work and continued to be eligible to receive medical benefits for the accepted wrist condition.

Appellant filed a claim for recurrence of disability (Form CA-2a) for the period January 29 through February 16, 2002. The recurrence claim was denied by OWCP on April 10, 2002 because the medical evidence had failed to establish any disability due to the accepted wrist strain.

Appellant requested an oral hearing and submitted a November 7, 2002 report from Dr. David P. Steinberg, a physiatrist, Board-certified in physical medicine and rehabilitation. Dr. Steinberg explained that appellant had serious preexisting conditions when she began work with the employing establishment in 2000. Appellant had been injured in a March 21, 1998 motor vehicle accident where she suffered from severe right arm and neck problems. The symptoms persisted despite extensive conservative treatment with rest, medication, braces, and physical therapy. Exhaustive diagnostic testing revealed only soft tissue etiology and Dr. Steinberg diagnosed lateral epicondylitis and cervical strain. Appellant was returned to her nonfederal position as a chauffeur in March 1999.

Dr. Steinberg also referenced another motor vehicle collision on April 23, 1999 after which appellant returned to physical therapy, but had persisting complaints in her right upper extremity again consistent with soft tissue pain with referred patterns. He noted that she continued to experience residual right arm symptoms localized to the upper trapezius and extensor forearm before she began work at the employing establishment in early 2000. Dr. Steinberg diagnosed chronic pain syndrome and had referred appellant to Dr. Ross Halpern, a treating psychologist, for chronic pain psychological assessment with a determination that she was experiencing moderate depression and severe anxiety.

Dr. Steinberg noted that appellant alleged an acute exacerbation of her preexisting right upper extremity conditions in October 2000. Appellant identified repetitive postal work activities as the key provocative factor, but was encouraged to work with modest restrictions. All diagnostic tests were normal and Dr. Steinberg noted that she had chronic right upper extremity pain with myofascial and biomechanical qualities relating to the two prior motor vehicle accidents. Dr. Steinberg diagnosed overuse syndrome with wrist strain, mild arthritis and

³ Appellant's various claims have been processed under three different case File Nos. xxxxxx794, xxxxxx147, and xxxxxx571. Handling these cases in such a way had rendered this case much more complicated than necessary and caused significant delay; however, OWCP has since consolidated the records into one master case File No. xxxxxx794.

exacerbation of chronic right lateral epicondylitis and shoulder myofascial pain. He saw no contraindication for continuing to work with minimal restrictions of avoiding repetitive use of the right upper extremity (grasping, squeezing, sorting, pulling, and lifting) and to use a right wrist splint and forearm band for reassurance and support of involved forearm areas.

From appellant's commencement of employment in early 2000 until her removal, she was working a limited-duty assignment reflective of her preexisting conditions. During the period June through August 2002 appellant received several letters of warning for disciplinary infractions, unrelated to her medical condition, and ultimately was removed from her position on August 2, 2002. The removal action was based on failure to follow instructions, speeding, failure to wear seat belt, and for wearing ear phones while driving.

On September 11, 2002 appellant filed a claim for compensation (Form CA-7), for the period June 30 through September 11, 2002. Although she was provided a development letter from OWCP on October 18, 2002, no further information was received, nor action taken by OWCP regarding this claim.

By decision dated February 11, 2003, the hearing representative, affirmed the denial of appellant's recurrence claim. She found that appellant had presented no evidence to establish either a change in her light-duty position or a change in her medical condition such that she could no longer perform the duties of her position. The period of disability, January 29 to February 13, 2002, authorized by Dr. Steinberg was found to be related to stress, not due to appellant's accepted wrist strain.

A grievance settlement of February 24, 2003 changed appellant's August 2, 2002 removal to a long-term suspension without pay, and she was allowed the opportunity to return to work provided she completed safe driver training. Appellant was reinstated to a rural mail carrier position effective April 19, 2003. The employing establishment requested that she provide specific work restrictions from her physician related to the accepted work-related conditions. Despite the request, appellant's physician provided restrictions for myofascial pain, ulnar neuropathy and right arm pain, none of which were accepted conditions.

On October 15, 2004 appellant filed a new traumatic injury claim alleging that on October 14, 2004 she was injured when she believed she was being chased by a dog and had to jump onto the car hood and ultimately the roof of her car to escape. Although there were witness statements that differed as to the facts surrounding the incident and whether she was actually chased by the dog, OWCP accepted the incident as factual and accepted a right upper arm strain and a right leg contusion.⁴ Appellant stopped work on November 8 and returned on November 15, 2004. On October 28, 2004 OWCP accepted the claim for right upper arm strain and right leg contusion.

⁴ Appellant released her rights to any litigation regarding the dog incident to the employing establishment on February 1, 2005 and later, by letter dated June 29, 2006, the employing establishment declined to pursue any litigation and advised appellant that if there were to be any litigation regarding the incident she would need to pursue it on her own behalf no later than October 14, 2007.

On December 1, 2004 appellant filed a claim for compensation (Form CA-7) for the period November 8 to 15, 2004 and a claim for recurrence of disability (Form CA-2a) beginning October 14, 2004. She argued that her acute myofascial pain syndrome was aggravated by the dog attack. Appellant submitted a November 18, 2004 report from Dr. David Vallance, a rheumatologist. Dr. Vallance determined that her right arm and right knee condition had resolved but noted continuing intractable myofascial pain syndrome in the right upper extremity due to overuse syndrome and that her restrictions remained the same. He noted, however, that appellant could work up to eight hours a day five days a week using primarily her left hand. Dr. Vallance continued the restriction of no repetitive use of the right arm.

By decision dated August 5, 2005, OWCP denied the claim for the period of total disability and for the recurrence of disability for the period November 8 to 15, 2004. It explained that the medical evidence confirmed that her accepted conditions had resolved. OWCP noted that, while Dr. Vallance attributed appellant's continuing intractable myofascial pain syndrome in the right upper extremity to overuse syndrome, it had not accepted that condition. In the August 5, 2005 OWCP decision, the senior claims examiner explained to appellant that no psychological or myofascial syndrome conditions had been accepted and if she wanted to have these additional conditions expanded she would need to file an additional claim.

During the period of time following appellant's reinstatement on April 19, 2003 to her rural carrier position, appellant faced disciplinary problems/actions, primarily relating to unexcused absences. A notice of removal from the employing establishment was issued on September 12, 2006. A grievance settlement regarding this matter allowed appellant until May 11, 2007 to provide medical evidence to support her unexcused absences. Failure to provide the documentation would finalize the termination effective January 23, 2007. Appellant failed to provide adequate proof and her termination was finalized on February 21, 2007.

On April 18, 2007 appellant filed a claim (Form CA-7) for recurrence for the period May 24, 2006 through January 12, 2007 because her limited-duty position had been withdrawn. This claim was never handled by OWCP. It was later reinstated in 2010 (discussed *infra*).⁵

On April 22, 2008 appellant filed an occupational disease claim (Form CA-2) alleging consequential conditions of fibromyalgia, post-traumatic stress disorder (PTSD), major depressive disorder, and exacerbation of myofascial pain syndrome. OWCP denied this claim on June 13, 2008 claiming erroneously that no medical evidence had been submitted.⁶ Appellant requested an oral hearing.

⁵ *Infra* note 9.

⁶ In fact, medical evidence had been received by OWCP on June 12, 2008. This evidence was later reviewed pursuant to appellant's request for an oral hearing.

By decision dated March 4, 2009, an OWCP hearing representative, found the evidence insufficient to establish that the additional conditions were related to employment factors.

Appellant argued that she filed a claim for recurrence due to the withdrawal of her light-duty position and wanted the hearing representative to rule on that matter. The hearing representative explained that the only issue before her was the expansion of appellant's claim to include the additional conditions. She noted that, if appellant believed a light-duty position, which had been created to accommodate her prior accepted conditions, was withdrawn, she would need to file a recurrence claim.⁷ The hearing representative specifically noted the confusion associated with the various case records and, upon return of the case record, advised OWCP to consolidate the case records. On October 15, 2010 OWCP combined the case records.⁸

Shortly thereafter, counsel again sent directly to OWCP the claims for compensation for the period commencing May 24, 2006 and recurrence for the same period. These claims also remained dormant until he solicited the assistance of President Barack Obama. A letter of apology from OWCP dated July 9, 2010 was sent to counsel (at an incorrect address). Still hearing no response, counsel again reminded OWCP of the failure to receive any information regarding appellant's recurrence claim. OWCP then acknowledged its use of an incorrect address (caused by the various case files) and finally in October 2010 began to develop the claims.⁹

In support of appellant's claims, counsel had provided medical reports from Dr. Vallance and Dr. Ross Halpern, a treating psychologist. In a December 17, 2004 report, Dr. Halpern noted that appellant was involved in a work-related incident on October 14, 2014 when a dog threatened to attack her. He explained that, following the incident, she reported crying frequently, had low energy level, and had difficulty sleeping and suffered from nightmares, panic attacks and shaking when she went to her workplace. Dr. Halpern opined that the situation and appellant's stress appeared to be aggravated by a hostile work environment. He diagnosed PTSD and placed her off work "due to stress which occurred at work and has been exacerbated at work. Until the patient's symptoms are stabilized with treatment, I do not think the patient should return to work at this time."

Counsel further argued that appellant had not been fired, but rather that the employing establishment had simply eliminated her light-duty position which, according to FECA case law, is by definition a recurrence of total disability.

⁷ As noted, appellant had filed a recurrence claim (Form CA-7) but it was not processed by OWCP until ultimately 2010. *Infra* note 9.

⁸ *Supra* note 2.

⁹ *See supra* note 5.

In a November 14, 2012 decision, OWCP denied the claim for recurrence and total disability commencing May 25, 2006. It found that appellant's light-duty position had not been created due to her accepted conditions. Appellant's light-duty position had been created to accommodate her preexisting nonwork-related conditions. Further, she had failed to establish through the medical evidence that she was ever unable to perform her restricted duty. Although Dr. Halpern had discussed the need to be off work due to appellant's stress level, OWCP explained that no emotional condition had been accepted.

On November 27 and December 4, 2012 counsel requested a telephonic hearing, which was held on March 11, 2013.

By decision dated April 18, 2013, an OWCP hearing representative, denied appellant's claim for compensation beginning May 24, 2006. Counsel claimed that appellant's light-duty position had been withdrawn causing her work stoppage on May 24, 2006. He argued that as it was a removal of a light-duty position she was entitled to compensation under recurrence case law. The hearing representative found that the record established, however, that the light-duty position had not been created to accommodate appellant's work restrictions, it had been created to accommodate her preexisting nonwork-related conditions. Further, she found that the record clearly established that appellant had been removed for disciplinary reasons, mainly for not coming to work. In fact, the hearing representative, noted that the record contained a job offer for light duty dated June 23, 2006 which appellant had refused for a variety of reasons, including "severe disciplinary action," "threats," and the lack of a vehicle as necessary for a rural carrier. Furthermore, OWCP found that there was no disability associated with appellant's accepted conditions. Dr. Vallance had noted as early as November 18, 2004 that appellant's right arm and right leg strain had resolved. All of his restrictions were related to appellant's preexisting conditions. The hearing representative further noted that the psychological component of appellant's claim had been denied on June 13, 2008 and affirmed by a hearing representative on March 4, 2009.

On December 2, 2013 counsel requested reconsideration of the April 13, 2013 decision. He argued that appellant had continued post-traumatic stress and that her physician provided rationale bridging her condition to the work-related dog attack. Counsel explained that the prior hearing representative had not considered all the facts and blurred the history of numerous reports and documentation of treatment. He also argued that Dr. Halpern had clearly established the post-traumatic stress disorder. Counsel submitted a new March 25, 2013 report from Dr. Halpern who noted appellant's history and opined that her symptoms were consistent with PTSD from a work-related dog attack.

In a December 16, 2013 decision, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision. It found that the underlying decision did not involve her earlier claim to expand her conditions to include a psychological component. The claim to expand the accepted conditions had been denied by decision dated March 4, 2009. No request for reconsideration had been filed on that aspect of the case. Thus, Dr. Halpern's report was

found not relevant and OWCP found that the previous claim to expand the accepted conditions could not be re-adjudicated in the instant claim. The issue in the present claim was whether appellant had disability or a recurrence on May 24, 2006 causally related to her accepted conditions.

In a letter dated April 7, 2014, counsel again requested reconsideration. He argued that the claim had a significant evidentiary basis upon which to support the approval of PTSD. Counsel argued that appellant never had a full review of the claim promised to her because of the confusion associated with the many case files. Furthermore, he argued that she had presented evidence to document her claim for a recurrence due to the withdrawal of her light-duty position. Counsel further argued that OWCP had never done a complete review of the claim, that the medical reports were never properly reviewed, and that there is no dispute in the record that the dog attack was the cause of appellant's PTSD. This demonstrated an error of law.

By decision dated April 22, 2014, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.¹⁰

LEGAL PRECEDENT

Under section 8128(a) of FECA,¹¹ 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:

- “(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
- (3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹²

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.¹³

¹⁰ OWCP found that the case had been properly developed and the evidence appropriately considered in all three combined claims.

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b).

¹³ *Id.* at § 10.608(b).

ANALYSIS

On April 22, 2014 OWCP denied a merit review of the claim. It found that the arguments presented were insufficient to warrant review of the April 18, 2013 decision, which denied appellant's claim for a recurrence of disability on May 24, 2006 causally related to the accepted work injury.

In his April 7, 2014 reconsideration request, counsel made several arguments which essentially relate to whether OWCP properly developed and adjudicated appellant's claims. He asserted that there was an evidentiary basis to support the approval of PTSD and that had OWCP properly reviewed the record, that consequential condition would clearly have been accepted. Counsel argued that the record had never been completely reviewed by OWCP. The Board finds, however, that this argument is not relevant to the underlying issue of recurrence. Counsel has failed to show how OWCP had erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. His arguments regarding appellant's psychological condition are not relevant to the underlying claim before the Board. That decision was finalized on March 4, 2009 and was not appealed. The Board also notes counsel offered similar arguments in his previous reconsideration request which were rejected by OWCP in its December 16, 2013 decision.¹⁴

Counsel also argued that the hearing representative had ignored the reports from Dr. Vallance and Dr. Halpern and that OWCP had not addressed the continuing and recurring claim related to the withdrawal of appellant's limited-duty secondary to the continuing PTSD and physical injuries from the dog attack. The Board notes that these arguments were also previously considered and addressed by OWCP and do not support a legal error by OWCP or advance a relevant legal argument not previously considered by OWCP. Appellant did not submit any new and relevant evidence with her request for reconsideration. She 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.

On appeal, counsel has submitted a detailed, 15-page brief outlining the case from the beginning to the end. The Board has carefully reviewed not only his arguments, but also each and every document in the three case records. There certainly are areas where OWCP failed to timely process appellant's claims and the confusion of the many case files did not assist in the development of the case. However, the Board finds no error of law or fact associated with the handling of this case. Although counsel argues vehemently that appellant's light-duty position was created to accommodate her work-related injuries, OWCP has on many occasions explained that the accommodations were based on her preexisting conditions resulting from her two motor vehicle accidents and not due to the wrist strain from 2000 or the right upper arm strain and right leg contusion from 2004. The Board in this appeal has no jurisdiction over the merits of those

¹⁴ Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case. *J.P.*, 58 ECAB 289 (2007).

claims. Further, although appellant had attempted to expand the claim to include the additional conditions of fibromyalgia, PTSD, major depressive disorder, and exacerbation of myofascial pain syndrome, OWCP has denied that claim and the merits of that claim are also not before us.

The Board finds that because appellant failed to meet any of the three regulatory criteria for reopening a claim, OWCP properly denied further merit review of her claim.

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).

ORDER

IT IS HEREBY ORDERED THAT the April 22, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 28, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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