

to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has lack jurisdiction over the merits of this case.³

ISSUE

The issue is whether OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 24, 2014 appellant, then a 50-year-old account technician, filed a traumatic injury claim (Form CA-1) alleging that on March 19, 2014 she sustained an injury when she was walking to the garage and the guard closed the gate on her as she was entering the worksite. She reported getting hit in the nose by the gate and sustaining a neck and shoulder injury, nose fracture, extreme swelling of the face, and a bruised neck and collar bone. Appellant first sought treatment on March 19, 2014.

In a March 21, 2014 diagnostic report, Dr. Jocelyn Scheinert, a Board-certified diagnostic radiologist, reported that an x-ray of the nasal bone revealed no fracture.

Handwritten treatment notes dated March 26 through May 21, 2014 from Central Medical Services of Westrock were also submitted. These reports did not contain a legible signature.

In an April 29, 2014 progress note, Dr. Matthew Clarke, Board-certified in family medicine, noted treatment for the neck and back.

In a May 21, 2014 Attending Physician's Report (Form CA-20) and prescription note, John Mullin, a certified physician assistant, documented appellant's treatment.

In a May 13, 2014 report, Dr. Lily Belfi, a Board-certified diagnostic radiologist, provided diagnostic findings pertaining to an x-ray of the cervical spine. Her impression of mild grade 1 retrolisthesis of C4-5, moderate left-sided neural foraminal narrowing at C4-5, and mild left-sided neuroforaminal narrowing at C3-4 and C5-6.

In a June 18, 2014 note, Dr. Jean Xiao, Board-certified in internal medicine, reported that appellant was unable to work due to a work-related condition sustained on March 19, 2014. He diagnosed neck and back pain and provided work restrictions.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence after OWCP rendered its November 3, 2015 nonmerit decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered for the first time by the Board on appeal. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

By letter dated June 24, 2014, OWCP notified appellant that her claim was initially administratively handled to allow medical payments as her claim appeared to involve a minor injury resulting in minimal or no lost time from work. However, the merits of her claim had not been formally considered and her claim had been reopened because a claim for wage loss had been received. Appellant was advised of the medical and factual evidence needed to support her claim and was afforded 30 days to respond.

In a June 18, 2014 narrative report, Dr. Xiao reported that appellant was employed as an accounting technician and sustained a work-related injury on March 19, 2014. Appellant sustained injury to her neck, back, face, shoulder, and hands when a gate fell on her.

In a June 29, 2014 State of New York Workers' Compensation Form, Dr. Xiao reported that appellant was an accounting technician and was injured on March 19, 2014 when she was performing accounting work. He diagnosed unspecified backache, cervicgia, and unspecified derangement of joint of shoulder region. When asked if the incident as described by appellant was the competent medical cause of her injury/illness, Dr. Xiao checked the box marked "yes."

In a July 9, 2014 Form CA-20, Dr. Michael Hearn, Board-certified in occupational medicine, diagnosed traumatic neck pain, headaches, bilateral shoulder pain, and chest wall pain. He noted the date of injury as March 19, 2014 when appellant was hit by a gate at her job. Dr. Hearn checked the box marked "no" when asked if the condition was caused or aggravated by the employment activity.

By decision dated July 25, 2014, OWCP denied appellant's claim as the evidence of record was insufficient to establish that she sustained an injury because she did not submit any medical evidence containing a medical diagnosis in connection with the accepted March 19, 2014 employment incident. It noted that the medical evidence submitted contained a diagnosis of "pain" which is a symptom, but not a diagnosed medical condition.

On August 11, 2014 appellant requested review of the written record before an OWCP Branch of Hearings and Review hearing representative.

In support of her claim, appellant submitted medical reports dated March 19, 2014 from Roosevelt Hospital. In the March 19, 2014 report, Dr. Resa Lewiss, Board-certified in emergency medicine, reported that appellant was at work when a gate hit her in the nose and left shoulder. She diagnosed contusion at multiple sites and noted the external cause of injury as accident on industrial premises.

Handwritten treatment notes dated March 26 through August 13, 2014 from Central Medical Services of Westrock were also resubmitted. While many of the reports did not contain a legible signature, it appears that some of the reports were signed by PA Mullin.

In a June 5, 2014 diagnostic report, Dr. Belfi reported that an x-ray of the acromioclavicular joint, facial bones, left shoulder, right shoulder, chest, and lumbar spine revealed no acute fracture or dislocation.

In an August 11, 2014 Form CA-20, Dr. Hearn diagnosed herniated disc of the neck and back. He checked the box marked “no” when asked if the condition was caused or aggravated by the employment activity noting that appellant was hit by a gate.

Physical therapy notes dated July 14 through 24, 2014 were submitted documenting treatment.

In a September 26, 2014 report, Dr. Puneet S. Pawha, a Board-certified diagnostic radiologist, provided findings pertaining to a magnetic resonance imaging scan of the cervical spine.

In an October 9, 2014 report, Dr. Houman Danesh, Board-certified in physical medicine and rehabilitation, diagnosed cervical radiculopathy and left shoulder impingement.

By decision dated February 18, 2015, the hearing representative affirmed the July 25, 2014 decision finding that the evidence of record failed to provide a medical diagnosis which could be reasonably attributed to the March 19, 2014 employment incident.

By letter dated June 12, 2015 and received by OWCP on June 25, 2015 appellant, through counsel, requested reconsideration. Counsel argued that the medical reports submitted were not properly considered or developed by OWCP which established that her injury was causally related to the March 19, 2014 employment incident. He referenced Dr. Xiao’s June 19, 2014 report as the basis for his claim. Counsel noted that the physician provided a diagnosis of cervicgia and also established that the diagnosed medical condition was causally related to the work injury. He asserted that OWCP placed an unreasonably high burden of proof upon appellant and that it had a duty to assist in the development of the evidence. No other evidence was submitted with counsel’s arguments.

By decision dated November 3, 2015, OWCP denied appellant’s request for reconsideration, finding that she neither raised substantive legal questions nor included relevant and pertinent new evidence.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by 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) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In the June 12, 2015 application for reconsideration, counsel did not establish that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Counsel for appellant argued that Dr. Xiao's June 29, 2014 report, which established a diagnosed condition causally related to the March 19, 2014 employment incident, was not properly reviewed. He further argued that there was an unreasonably high burden of proof on her to establish her claim and that OWCP should develop the evidence.

The Board finds that counsel's argument has no reasonable color of validity.⁶ The claimant has the burden of establishing by the weight of reliable, probative, and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of the employment.⁷ As part of this burden, the claimant must present rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, establishing causal relationship.⁸ The Board notes that OWCP provided a June 24, 2014 development letter advising appellant of the evidence required to establish her claim. Furthermore, OWCP properly reviewed Dr. Xiao's report in its July 25, 2014 decision finding that it was insufficient to establish appellant's claim. Counsel did not establish an error on a specific point of law or advance a relevant legal argument not previously considered by OWCP.⁹ As such, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).¹⁰

The Board notes that the underlying issue in this case was whether appellant sustained a diagnosed condition causally related to the accepted March 19, 2014 employment incident. This is a medical issue which must be addressed by relevant medical evidence.¹¹ A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence.

⁶ See *L.H.*, 59 ECAB 253 (2007) (while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity).

⁷ *Michael E. Smith*, 50 ECAB 313 (1999).

⁸ See *Virginia Richard, claiming as executrix of the estate of Lionel F. Richard*, 53 ECAB 430 (2002); see also *Brian E. Flescher*, 40 ECAB 532, 536 (1989); *Ronald K. White*, 37 ECAB 176, 178 (1985).

⁹ *A.T.*, Docket No. 14-417 (issued June 25, 2014).

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

Appellant failed to submit any such new evidence addressing a medical diagnosis and causal relationship in support of her claim.¹²

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 new 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 further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2016
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

¹² *C.B.*, Docket No. 08-1583 (issued December 9, 2008).