

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 January 7, 1987 appellant, then a 38-year-old nursing assistant, filed a traumatic injury claim alleging that on that date a patient struck her in the left side of her chest in the performance of duty. She did not initially stop work. OWCP accepted the claim for lumbar sprain and bulging discs at L3-4 and L4-5. Appellant was subsequently placed on the periodic rolls.

OWCP continued to develop the claim.

On April 15, 2011 OWCP determined there was a conflict in the medical evidence between Dr. Leslie Pollard, Jr., the treating physician Board-certified in family medicine, who found appellant totally disabled, and the second opinion physician, Dr. James Bethea, a Board-certified orthopedic surgeon, who found that appellant was not capable of working her date-of-injury job but that she could work another type job with restrictions. OWCP referred appellant to Dr. Thomas R. Cadier, a Board-certified orthopedic surgeon, for an impartial medical opinion as to appellant's work capacity.

In his June 27, 2011 report, Dr. Cadier noted appellant's history of injury and findings on examination. He determined that she could not perform her date-of-injury job as a nursing assistant for multiple reasons. Dr. Cadier noted that appellant had been out of the work force for greater than 20 years and had multiple comorbidities along with her on-going complaints of persistent back pain. He advised that she was capable of working in another type of job with restrictions. Dr. Cadier noted an absence of significant objective finding and opined that the accepted injuries should have resolved. He advised that appellant still complained of pain, but that it was impossible to quantify. Dr. Cadier opined that the work injury had resolved, but the ongoing pain had not resolved. He explained that appellant could work in a sedentary-type job.³

On August 5, 2011 OWCP requested clarification from Dr. Cadier with regard to whether her accepted conditions of lumbar sprain and bulging discs at L3-4 and L4-5 had completely resolved in relation to the January 7, 1987 work-related incident.

In an August 8, 2011 response, Dr. Cadier opined that bulging discs were present but that the work-related injury had resolved.

In a letter dated September 8, 2011, OWCP requested clarification with regard to bulging discs and whether they were related to the work-related incident and whether or not they had

³ Dr. Cadier also noted that the most practical way to resolve her case would be to accept the fact that she was near retirement and met the Medicare standard of disability, *i.e.*, she could reasonably be placed on social security disability with the above diagnoses and, therefore, terminate her workers' compensation disability status, provided she was given extensive job training.

resolved. It also requested whether there were any work restrictions related to the accepted condition of bulging discs.

In a September 26, 2011 response, Dr. Cadier opined that bulging discs were a product of normal degenerative change over time and there were no objective findings in appellant's case to suggest they were related to the accepted work incident. He explained that he did not expect them to "resolve" since they were simply a radiographic finding. Dr. Cadier indicated that he would not place any work restrictions on appellant simply due to the bulging discs which were discovered following the work incident, as they appeared over months and years due to slow disc degeneration. He advised that any work restrictions would be due to her multiple preexisting medical problems and not due to the presence of the bulging discs.

On October 21, 2011 OWCP proposed to terminate appellant's wage-loss and medical benefits. Appellant submitted two medical reports dated November 3 and 8, 2011 from Dr. Alex D. Collins, a Board-certified orthopedic surgeon and an osteopath. Dr. Collins found that appellant's pain had been constant since her January 7, 1987 incident.

On December 1, 2011 OWCP finalized the termination, effective that date, finding that the medical evidence of record failed to support continued residuals related to the work injury of January 7, 1987. It relied upon the report of the impartial medical examiner, Dr. Cadier, a Board-certified orthopedic surgeon. OWCP explained that there were no objective findings to support continuing disability due to the accepted bulging discs.

On December 12, 2011 counsel for appellant requested an oral hearing, which was held on March 12, 2012. During the hearing, he argued that appellant remained disabled and questioned the validity of the impartial medical examiner. Counsel indicated that Dr. Cadier was over 200 miles away and that he did not examine appellant or take x-rays or CT scans. He also discussed Dr. Cadier's medical report, and found it was the only contradictory report. In a separate letter, also dated December 12, 2011, counsel argued that there never had been a conflict in the medical opinion and that OWCP failed to follow its procedures to give proper notice.

By decision dated May 14, 2012, the OWCP hearing representative affirmed the December 1, 2011 decision. He found the report from Dr. Cadier was sufficient to carry the weight of the medical evidence and affirmed the termination.

In a letter dated June 21, 2012, counsel for appellant requested reconsideration of the May 14, 2012 decision and enclosed a report from Dr. Collins dated June 1, 2012. Dr. Collins opined that appellant was permanently disabled, unable to work, and was currently receiving injections for her conditions.

On August 30, 2012 OWCP denied modification of the prior decision, finding that Dr. Collins' opinion was based on an inaccurate history and was insufficient to overcome the weight of Dr. Cadier.

On February 13, 2013 appellant requested reconsideration. In a December 11, 2012 statement, she stated that she was injured at work in January 1987 and received workers' compensation from 1987 to November 2011. Appellant advised that she continued to receive

treatment and her condition had not resolved. She argued that all of her physicians found that she was unable to work. Appellant also acknowledged that the impartial medical examiner, Dr. Cadier, thought her condition was a product of normal degenerative change, but she believed Dr. Cadier was searching for a reason to terminate her benefits. She also argued that Dr. Cadier's opinion should not be given special weight as he did not perform any tests or provide treatment. Appellant complained that she had to travel three hours away to see Dr. Cadier and noted his contradictory reasoning when he found her not disabled, but could be on social security disability.

Appellant provided an October 17, 2012 report from her treating physician, Dr. Collins, who advised that her low back pain began with her on-the-job injury on January 7, 1987. Dr. Collins explained that this led to spondylosis of the back, which in turn led to chronic changes, which led to the current diagnosis of bulging discs. He opined that appellant was unable to work due to these bulging discs and her back pain which limited her ability to walk and get up and down from a chair. Dr. Collins found appellant permanently disabled.

By decision dated April 1, 2013, OWCP denied modification of the prior decision as Dr. Collins had simply restated his opinion which did not overcome the weight of Dr. Cadier.

By letter dated March 31, 2014, appellant's counsel requested reconsideration. He argued that Dr. Cadier, the impartial medical examiner, had not provided a conclusive opinion to resolve the conflict. Counsel also argued that leading questions had been presented to Dr. Cadier, who then changed his original position. He further contended that Dr. Cadier's report was not based upon a proper statement of accepted facts. Counsel argued that the statement of accepted facts was incomplete and did not contain information vital to the claim. He specifically noted the medical history and argued that Dr. Cadier did not account for the fact that appellant was able to perform her full work duties, unrestricted, before her work injury. Additionally, he argued the report was not rationalized and did not explain how the accepted conditions had resolved and became age related. Counsel noted that Dr. Cadier did not refer to any of the treating physician's reports or notes and omitted reference to the medical documentation available from 1987 to the present. He noted that Dr. Cadier did not properly assess the preinjury base line, or compare that with the present status of her injury, which effectively prevented the physician from assessing whether an aggravation of a preexisting condition occurred or contributed to the development of any preexisting condition. Furthermore, counsel argued that appellant had developed additional conditions resulting from the work incident which were not addressed. Additionally, he argued that the medications that had been prescribed for appellant had documented side effects, which should be compensable. Counsel noted that in 1992 appellant attempted to return to work, but was unable to do so and she was found totally and completely disabled by OWCP. He alleged that Dr. Cadier did not acknowledge these reemployment efforts. Counsel argued that OWCP had not met its burden of proof to terminate her compensation and that she remained disabled. He also requested that the claim be expanded and that appellant be referred to a new impartial medical examiner. Counsel also advised that he was submitting new medical evidence from Dr. Justin Bundy, a Board-certified orthopedic surgeon.

In a report dated January 14, 2014, Dr. Bundy noted appellant's history of injury and treatment. He advised that she presented with a history of sharp, shooting, and stabbing pain in

the lumbar region that occurred constantly. Dr. Bundy examined appellant and diagnosed lumbar degenerative disc disease. He recommended additional treatment, which appellant declined. Dr. Bundy opined that she had never recovered from her injury. He explained that appellant's condition had progressed "likely due to age and degenerative changes."

In a decision dated September 24, 2014, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁴ 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 provides 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 which:

“(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.”⁵

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.⁶

ANALYSIS

The Board finds that appellant has submitted new evidence requiring further merit review.

Appellant through counsel disagreed with the April 1, 2013, decision, affirming the termination of her compensation and medical benefits, effective December 1, 2011, and timely requested reconsideration on March 31, 2014. OWCP denied appellant's timely application for reconsideration in a September 24, 2014 decision finding that no new evidence was offered warranting further merit review. OWCP found that the evidence submitted was repetitious and immaterial. It also advised that counsel's arguments on reconsideration were similar to those previously considered.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(b).

The Board notes that counsel submitted a relevant and pertinent new report from Dr. Bundy dated January 14, 2014. This report is relevant as the physician supports that appellant never recovered from her work injury. The Board also finds that counsel presented new argument in support of the requested reconsideration. Because appellant submitted new and relevant argument and evidence in support of her March 31, 2014 reconsideration request, the Board finds that OWCP improperly denied further merit review of her case. The September 24, 2014 decision will be set aside and the case remanded for OWCP to review her claim and issue a merit decision.

On appeal, counsel argued that at the very least she should have been given a merit review. The Board has remanded the claim for a merit review.

CONCLUSION

The Board finds that OWCP improperly 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 September 24, 2014 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: June 21, 2016
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