

FACTUAL HISTORY

On March 12, 2014 appellant, then a 49-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 10, 2014 he sustained an injury to his neck when his employing establishment vehicle was struck by a plow truck while he was working. Appellant stopped work on March 12, 2014.

In March 12, 2014 reports, a physician with an illegible signature, noted that appellant related that he was a city carrier and the truck he was driving was struck by a snow plow. He diagnosed acute chronic neck strain, prescribed Motrin and referred appellant for further treatment. The physician indicated that appellant could return to work with restrictions which included no lifting over 10 pounds.

On March 21, 2014 OWCP advised appellant of the type of evidence needed to establish his claim and afforded him 30 days to reply.

In March 12 and April 16, 2014 duty status reports (Form CA-7), Dr. Richard F. Tonzola, a Board-certified neurologist, advised that appellant had a neck injury. He diagnosed acute cervical sprain and advised that appellant was unable to perform all of his work duties.

By decision dated April 24, 2014, OWCP denied appellant's claim finding that, while he had proven the work incident occurred as alleged and resulted in a diagnosed medical condition, the medical evidence of record did not establish causal relationship.

On May 6, 2014 appellant requested reconsideration. He provided a March 12, 2014 narrative report from Dr. Tonzola who noted treating appellant that day for effects of a March 10, 2014 work-related motor vehicle accident. Dr. Tonzola noted appellant's previous treatment for chronic cervical and lumbar sprains with radicular symptoms. He diagnosed acute cervical sprain due to a motor vehicle accident at work. In an April 16, 2014 narrative report, Dr. Tonzola noted appellant's status and advised that appellant's acute cervical sprain was causally related to the March 10, 2014 motor vehicle accident. On March 21, 2014 he noted appellant's status and reiterated his diagnosis and his opinion on causal relationship. OWCP also received additional evidence including physical therapy notes.

By decision dated August 11, 2014, OWCP denied modification of its prior decision. It noted that while Dr. Tonzola diagnosed an "acute cervical sprain due to motor vehicle accident at work" on March 10, 2014, he also indicated that appellant was treated for "chronic cervical and lumbar sprains with radicular symptoms." OWCP explained that Dr. Tonzola did not provide a well-reasoned medical explanation with supportive objective findings as to how the March 10, 2014 work incident caused or aggravated the diagnosed condition.

On September 5 and November 20, 2014 appellant, through counsel, again requested reconsideration. He noted that his physician acknowledged that he had preexisting cervical sprain and radiculopathy and now had an acute cervical sprain caused by the work incident.

Counsel provided a May 7, 2014 report from Dr. Tonzola who noted that appellant came in for a reevaluation because of worsening neck pain. He explained that appellant was previously treated for neck and back injuries from a prior work-related injury and was involved

in a second work-related motor vehicle accident on March 10, 2014. Dr. Tonzola advised that appellant developed neck stiffness, which worsened the following day. He examined appellant and found severe pain with neck extension at 20 degrees, and turning bilaterally at 20 degrees. Dr. Tonzola found normal flexion and explained that raising both shoulders above 120 degrees abduction increased his neck pain. He also found significant spasm of cervical paraspinal muscles and upper trapezius muscles. Dr. Tonzola also determined that the neurological examination was normal, the cranial nerves were normal, and the sensory reflexes were normal. He diagnosed acute cervical sprain dating back to the employment-related accident of March 10, 2014 with prior cervical sprain and radiculopathy from prior injury.

In a November 3, 2014 report, Dr. Tonzola noted appellant's history of injury and treatment and advised that appellant was under his care for several injuries since February 14, 2011, his initial visit. He diagnosed cervical and lumbar sprains related to his initial injury in 2010. Dr. Tonzola explained that appellant had an acute cervical sprain with primarily left-sided bilateral and left-sided pain and symptoms which was different from the March 10, 2014 incident. He advised that both conditions improved. Dr. Tonzola noted that the cervical magnetic resonance imaging (MRI) scans were basically unchanged although the radiologists reported the additional findings of the small foraminal disc extrusions on the left at C3-4 on the June 7, 2014 MRI scan. He opined that appellant had chronic cervical and lumbar sprains with chronic pain and muscle spasm and had lifting restrictions due to his pain as described. Dr. Tonzola explained that the March 10, 2014 incident "was documented and caused different symptoms which compounded the problems from the first accident as well and these are all work related." OWCP also received an April 3, 2014 physical therapy note.

In a decision dated February 19, 2015, OWCP denied modification of its prior decision.

On March 13, 2015 counsel for appellant again requested reconsideration and submitted new medical evidence. He argued that the report from Dr. Tonzola emphatically opined "that [appellant] had a new injury on March 10, 2014 and that it was a cervical sprain."

In a March 6, 2015 report, Dr. Tonzola noted that in his November 3, 2014 report, he clearly documented that appellant suffered a new injury in an automobile accident at work on March 10, 2014. He explained that while appellant was being treated for a prior neck and back injury, it had improved and he had stopped physical therapy. Dr. Tonzola noted that because appellant suffered a second cervical sprain which was documented, and there was nothing on the cervical MRI scans, this was a "nonfactor" since most cervical sprains had normal radiologic findings. He explained that the prior cervical MRI scan showed degenerative disc disease and a repeat MRI scan was done later in the course of appellant's treatment because of persistent symptoms and to compare with the prior study. Dr. Tonzola opined that he did "not know how to more clearly state this, but [appellant] did suffer a second injury on [March 10, 2014]...."

Appellant also provided earlier treatment records from Dr. Tonzola. In a June 11, 2013 report, Dr. Tonzola noted that appellant's neck was feeling better with vague tingling in the left arm, but worsening left lower back pain with some tingling of his left leg that occurred "mostly when he is at work." He also advised that appellant had less pain when he was on a recent vacation. Dr. Tonzola explained that while at work, to avoid back pain, appellant usually kneeled to lift small packages and took "Soma" for muscle spasm. He examined appellant and

determined that the back range of motion was impaired and caused mid low back pain. Appellant's neurological examination was normal. Dr. Tonzola diagnosed cervical and lumbar sprains with radicular symptoms with worsening lower back pain. He prescribed work restrictions. On August 26, 2013 Dr. Tonzola advised that appellant's cervical sprain with radiculopathy was improved and his lumbar sprain with radiculopathy was unchanged with additional left lumbar spasm. On November 13, 2013 Dr. Tonzola noted that appellant had worsening back pain in recent weeks due to frequent lifting when he loaded or unloaded his truck at work. He advised that appellant had a weight lifting restriction of 20 pounds. Dr. Tonzola noted that appellant's cervical spasm and radiculopathy was stable to improve but he had persistent worsening of his left lumbar spasm with mild radicular symptoms due to repetitive lifting.

By decision dated April 17, 2015, OWCP denied modification of its prior decision. It explained that Dr. Tonzola did not provide a sufficiently well-reasoned medial explanation with supporting objective findings to explain how the employment incident of March 10, 2014 caused a new cervical sprain, or otherwise worsened preexisting, work related sprain, while showing he fully and accurately considered the preexisting symptoms and condition, or the sequence of events subsequent to the incident of March 10, 2014.

In letters dated July 2 and 9, 2015, appellant's counsel again requested reconsideration. He argued that OWCP misread Dr. Tonzola's medical reports. He explained that Dr. Tonzola originally treated appellant for his neck and his subsequent reports focused on the low back. Counsel argued that the case should be accepted for a cervical sprain, despite the prior neck injury. He also argued that the March 6, 2015 report from Dr. Tonzola "could not be clearer" and provided an adequate "discussion of the preexisting condition, the fact that there was improvement and then the effect of the new injury." Counsel argued that Dr. Tonzola's reports were well reasoned and justified approval of the case. Appellant resubmitted copies Dr. Tonzola's June 11, August 26, and November 13, 2013, March 12, and 21, April 16, and May 7, 2014 reports.

By decision dated October 7, 2015, OWCP denied appellant's request for reconsideration, without conducting a merit review, finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² 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 that:

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

² 5 U.S.C. § 8128(a).

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

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

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.⁴

ANALYSIS

Counsel for appellant disagreed with the denial of his traumatic injury claim and timely requested reconsideration on July 2 and 9, 2015. The underlying issue on reconsideration is medical in nature, whether the March 10, 2014 work incident caused or contributed to an injury.

OWCP denied appellant’s request for reconsideration on October 7, 2015, finding that no new evidence was offered warranting further merit review. It denied the claim because the medical evidence did not contain medical opinion evidence explaining how his neck and back condition was caused or aggravated by the March 10, 2014 work incident. The Board finds that counsel for appellant did not make any arguments that established legal error by OWCP, nor did he advance a relevant legal argument not previously considered by OWCP. His general disagreement with OWCP’s denial of his claim is insufficient to meet one of these two criteria. Additionally, counsel’s lay opinion regarding causal relationship is not probative regarding the issue in this case, which, as noted, is medical in nature.⁵

With regard to medical evidence submitted with his reconsideration request, counsel for appellant provided copies of previously submitted records from Dr. Tonzola. However, this evidence was previously considered by OWCP. Material which is cumulative or duplicative of that already in the record has no evidentiary value in establishing the claim and does not constitute a basis for reopening a case for further merit review.⁶

Appellant 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 constitute relevant and new evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further merit review.

The Board notes that, on appeal, counsel for appellant reiterates his disagreement with the denial of appellant’s claim. As noted, the Board does not have jurisdiction over the merits of the claim. As explained, appellant did not meet any of the necessary requirements for reopening his claim for a merit review.

³ 20 C.F.R. § 10.606(b).

⁴ *Id.* at § 10.608(b).

⁵ *See Gloria J. McPherson*, 51 ECAB 441, 448 (2000).

⁶ *Betty A. Butler*, 56 ECAB 545 (2000).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board