

ISSUE

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

FACTUAL HISTORY

On July 25, 2012 appellant, then a 50-year-old lead transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on July 23, 2012 she was lifting a passenger's bag from a table and felt a pop in her lower back.³ She complained of lower spine pain and shooting pain down her left leg and foot. Appellant first received medical treatment and stopped work on July 23, 2012, the date of injury.

In a July 23, 2012 note, Dr. Christian Rickman, Board-certified in emergency medicine, reported that appellant was unable to work due to a July 23, 2012 injury. He advised that she could return to work on July 27, 2012 and restricted her from lifting more than 10 pounds until August 3, 2012.

On July 31, 2012 Dr. Dale Fanney, a treating physician, reported that appellant sustained a back injury one week prior when working at the airport. He diagnosed low back pain due to work injury. Dr. Fanney also provided OWCP-5c forms dated August 2 to 31, 2012 finding appellant temporarily disabled. In an August 22, 2012 attending physician's report (Form CA-20), he diagnosed acute low back injury with radicular component. Dr. Fanney checked the box marked "yes" when asked if the condition was caused or aggravated by the employment activity.

In physical therapy reports, work status notes, Forms CA-20, and work capacity evaluations (Form OWCP-5c) dated July 25 to August 16, 2012, David Eberdt, a certified physician assistant, reported that on July 23, 2012 appellant was working and lifted a piece of luggage when she felt a pop in her back and immediate low back pain. Mr. Eberdt diagnosed low back strain and restricted her from returning to work.

By letter dated August 24, 2012, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence necessary to establish her claim and was afforded 30 days to submit this additional evidence.

OWCP thereafter received notes dated August 6 to 31, 2012 from Mr. Eberdt documenting treatment for appellant's lower back injury. Mr. Eberdt noted that she remained off work, had been referred to physical therapy, and would remain temporarily totally disabled pending further evaluation.

In a magnetic resonance imaging (MRI) scan report dated September 12, 2012, Dr. Douglas R. Andrews, a Board-certified diagnostic radiologist, interpreted findings pertaining to the lumbar spine. He noted that the September 12, 2012 MRI scan was unchanged from a

³ The Board notes that appellant has filed prior traumatic injury claims from March 6, 2003 through January 3, 2007. The record before the Board contains no other information pertaining to these prior claims.

prior July 23, 2012 MRI scan which showed bulging discs at L3-4 and L4-5 with no disc herniation, root compromise, or central canal stenosis.

In September 14 and 21, 2012 notes, Dr. Fanney restricted appellant from returning to work.

Appellant accepted a limited-duty assignment on September 24, 2012.

By decision dated October 1, 2012, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish an injury because she did not submit medical evidence containing a medical diagnosis in connection with the accepted July 23, 2012 employment incident. It noted that the medical evidence submitted contained a diagnosis of "pain" which is a symptom and not a diagnosed medical condition.

On October 15, 2012 appellant, through counsel, requested a telephone hearing before a Branch of Hearings and Review hearing representative.

OWCP thereafter received additional medical evidence. In a September 21, 2012 medical report, Dr. William S. Bodemer, a Board-certified orthopedic surgeon, reported that appellant was seen in orthopedic consultation for evaluation and treatment of a workplace injury. He noted appellant's history of injury, she was referred for an immediate MRI scan, had undergone physical therapy, and remained off work. Dr. Bodemer provided findings on physical examination and reviewed diagnostic studies. He noted that the MRI scan revealed minimal disc bulge on the left at L3-4 and L4-5. Dr. Bodemer released appellant to light-duty work and referred her for electromyography (EMG) and nerve conduction velocity (NCV) testing.

In an October 2, 2012 EMG study, Dr. William Fowler, Board-certified in physical medicine and rehabilitation, reported that appellant's left lower extremity revealed normal findings with no evidence to suggest a lumbar radiculopathy, peripheral nerve entrapment, generalized peripheral neuropathy, or other specific neurogenic cause of appellant's reported symptoms.

In an October 3, 2012 operative report, Dr. Bodemer noted a diagnosis of left-sided L3-4 and L4-5 small disc bulges with radiculopathy. He provided appellant an L4 transforaminal epidural steroid injection.

In a December 26, 2012 report, Dr. Fanney repeated the history as related by appellant and noted the referral to Dr. Bodemer. He opined that appellant was doing well and had complete resolution of her spine condition.

At the February 6, 2013 hearing, appellant described her employment injury and medical treatment, having since returned to work on a part-time basis. She noted no prior issues related to her back and no back injuries prior to July 23, 2012. The record was held open for 30 days.

In a February 27, 2013 memorandum, the employing establishment controverted the claim. It noted that appellant was off work from July 24 through September 24, 2012 due to her July 23, 2012 injury. Appellant returned to work with restrictions on September 24, 2012 and resigned from her position effective October 9, 2012. The employing establishment noted that

an internal investigation revealed that she had been riding her motorcycle on or around August 22, 2012 when she was off work for her work-related injury. Additional documentation and investigative reports were received with the employing establishment's comments.

On March 13, 2013 Dr. Bodemer reported that review of a September 12, 2012 MRI scan showed bulging discs at L3-4 and L4-5 to the left without evidence of herniation, root compromise, or stenosis. He noted that the MRI scan revealed a more pronounced disc bulge at the L4-5 level on appellant's left side which could touch her exiting L4 nerve root. Dr. Bodemer explained that the disc herniation was small and performed an L4 nerve root injection which provided some relief.

By letter dated April 2, 2013, appellant responded to the employing establishment's February 27, 2013 memorandum, contending that the ongoing investigation had nothing to do with her work injury. She stated that she did ride her motorcycle when she was off work, but her physician informed her that it would not hamper her progress.

By decision dated April 25, 2013, OWCP's hearing representative affirmed the October 1, 2012 decision, as modified, finding that the evidence of record failed to establish that appellant's diagnosed conditions of disc bulge were causally related to the accepted July 23, 2012 employment incident.

On January 31, 2014 appellant, through counsel, requested reconsideration of OWCP's decision.

Appellant submitted a January 10, 2014 narrative report from Dr. Bodemer. Dr. Bodemer reported that appellant's MRI scan revealed mild disc bulges on the left side at L3-4 and L4-5. He noted that it was challenging to determine whether appellant's work incident would have caused injury. Dr. Bodemer explained that appellant did not have very significant pathology in her back and had an appropriate appearing MRI scan for someone her age. He reported that the radiologist read the MRI scan as disc bulging eccentric to the left, no evidence for discrete disc herniation, and no evidence for central canal or lateral recess stenosis. Dr. Bodemer noted that, if appellant did not have any significant pain before this incident, and subsequently developed back and left leg pain following a pop in her back, there certainly could be some degree of correlation between these two. On the MRI scan, however, he did not see significant pathology in the back and the EMG of the left leg was normal. While appellant did symptomatically improve, Dr. Bodemer had not evaluated her to provide an opinion regarding her current status. He opined that, "I think it is possible that the event at work did cause some of this pain. It did not cause a significant dis[c] bulge, but there may be some degree of correlation between these."

By decision dated September 5, 2014, OWCP denied modification of its April 25, 2013 decision, finding that the evidence of record failed to establish that appellant's diagnosed conditions were causally related to the July 23, 2012 employment incident.

On July 15, 2015 appellant, through counsel, requested reconsideration of OWCP's decision. In support of the reconsideration request, counsel stated that he was submitting a medical report from Mr. Eberdt dated June 24, 2015 not previously considered.

In a June 24, 2015 report, Mr. Eberdt provided a summary of appellant's treatment since her work-related back injury in the summer of 2012. He noted that appellant did not initially respond to conservative measures, but ultimately her condition improved with medication, and epidural steroid injections. Mr. Eberdt reported that appellant had not been seen in follow-up for her condition since her therapeutic intervention as she was subsequently referred to a spinal specialist. Thus, it appeared that she experienced a complete recovery from her injury and was able to resume her activities of daily living without restriction.

By decision dated July 30, 2015, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new pertinent and relevant 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

ANALYSIS

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

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 her July 15, 2015 application for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. She also did not provide new pertinent and relevant evidence not previously considered.

The underlying issue in this case is whether appellant's diagnosed conditions were causally related to the accepted July 23, 2012 employment incident. That is a medical issue which must be addressed by relevant medical evidence.⁶ A claimant may obtain a merit review of an OWCP decision by submitting new pertinent and relevant evidence. In this case, appellant failed to submit such evidence addressing causal relationship in support of her claim.⁷

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

⁶ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁷ *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

While appellant submitted a new report from Mr. Eberdt dated June 24, 2015, this report is irrelevant to establishing causal relationship between appellant's diagnosed conditions and the July 23, 2012 employment incident. Although Mr. Eberdt's report is new evidence and has some connection to appellant's employment, it is not relevant to the issue for which OWCP denied appellant's claim as it does not include a physician's rationalized opinion on causal relationship. Specifically, his report is insufficient to warrant further merit review as the report was not signed by a physician.⁸ Registered nurses, physical therapists, and physician assistants are not considered physicians as defined under FECA and therefore their opinions are of no probative value.⁹ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

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 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 pursuant to 5 U.S.C. § 8128(a).

⁸ *C.B.*, Docket No. 13-1734 (issued November 4, 2013).

⁹ 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also Roy L. Humphrey*, 57 ECAB 238 (2005).

¹⁰ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 2, 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