

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. On February 6, 2013 appellant, then a 39-year-old field representative, filed a traumatic injury claim (Form CA-1) alleging that she was injured in an employment-related motor vehicle accident on January 20, 2013. The employing establishment indicated that she worked a variable job averaging 3.87 hours a day for the 52 weeks prior to her employment injury. OWCP accepted appellant's claim for disturbance of skin sensation on the left, sprain of the pelvis, wrist sprain on the left, sprain of the left hip and thigh, displacement of cervical intervertebral disc without myelopathy, sprain of the chest wall muscle, and sprain of the lumbar back on February 22, 2013.

Dr. Edgar A. Figueroa, a Board-certified family practitioner, completed a report on February 22, 2013 and indicated that appellant could return to work with restrictions four hours a day on that date. Appellant returned to part-time light duty on February 24, 2013 working four hours a day.

Dr. Jonathan J. Wilson, an osteopath, completed a note dated March 7, 2013 and determined that appellant could work four hours a day with restrictions from February 22 through April 8, 2013. On April 8, 2013 he noted that she was experiencing increasing pain. Appellant had returned to work and was also working as a noxious weed inspector. She reported difficulty driving and stated that everything got much worse after a long car ride to the coast for vacation from March 28 through 30, 2013. Dr. Wilson completed a duty status report and indicate that appellant could perform part-time light-duty work. He indicated that her disability was unchanged on April 23, 2013.

Appellant filed additional claims for compensation requesting wage-loss compensation from March 7 through April 20, 2013. On her claim form, she indicated that she worked as a noxious weed inspection on April 1 through 5, April 8 through 12, and April 15 through 18, 2013. In a letter dated May 10, 2013, OWCP requested additional medical information supporting appellant's disability for her federal employment during the periods claimed.

Dr. Wilson completed a report dated May 20, 2013 and noted that appellant worked hard in her home garden over the weekend and that a six-hour drive to Sullivan Lake made things worse. On May 28, 2013 he indicated that she could work three to four hours a day with restrictions. Dr. Wilson completed a note on June 19, 2013 and noted that on May 20, 2013 appellant became overwhelmed with telephone interviews and hurt her neck and arm. Appellant stated that bouncing down dirt roads caused her pain and that driving was still scary to her. She stated that she was having trouble with the activities of daily living. Appellant reported that she had returned to full-time four-hour-a-day work at the employing establishment.

Appellant submitted a copy of her job description as a noxious weed inspector, which included driving her personal vehicle through the inspection area, stopping to note weeds, and

making personal contact with property owners. She frequently aided the owners in removing weeds with a shovel. Appellant was responsible for 500 property owners in her inspection area. In April 2013, she worked 64 hours and in May 2013 she worked 91 hours earning \$12.50 an hour.

By decision dated June 20, 2013, OWCP denied appellant's claim for intermittent periods of compensation commencing March 7, 2013 and continuing. It stated that she submitted evidence dated through May 29, 2013, but found that she had not submitted the necessary medical opinion evidence to establish that she was totally disabled for the periods in question. Appellant, through counsel, requested an oral hearing before an OWCP hearing representative on July 11, 2013.

OWCP referred appellant for a second opinion evaluation on May 14, 2013 with Dr. James Schwartz, a Board-certified orthopedic surgeon. In his June 24, 2013 report, Dr. Schwartz noted her history of injury and reported her symptoms of leg and back pain. He diagnosed cervical and lumbar strain related to the January 20, 2013 employment injury. Dr. Schwartz found that appellant had no residuals of her employment injury in that her physical examination was strikingly normal. He opined that she had no restrictions for her job duties and could work an eight-hour day. Dr. Schwartz noted that with extended driving appellant might need to stop every hour to get out and move around the car. He further noted that her complaints were areas of tenderness which was consistent with cervical and lumbosacral strain injuries.

Dr. Wilson examined appellant on June 26, 2013 and continued to find that she could work four hours a day or full time at the employing establishment. He also completed a duty status report of the same date with the same findings.

Dr. T. Daniel Dibble, a Board-certified anesthesiologist, examined appellant on July 9, 2013 and noted that she received epidurals on May 7 and 28, 2013. He also noted that she performed physical labor for an hour, stretched, worked for four hours, and sat for four hours.

Appellant filed additional claims for compensation dated May 4 and 27, and June 1, 2013 requesting wage-loss compensation from April 21 through June 1, 2013. She indicated that she worked as a field inspector on April 23, 24, 29, and 30, 2013. Appellant also worked as a field inspector on May 5, 2013 and from May 7 through 14, 2013 and May 15 and 18, 2013 as well as from May 20 through 25 and May 28 through 31, 2013.

In a decision dated July 15, 2013, OWCP again denied appellants' claim for intermittent wage-loss compensation beginning March 7, 2013.⁴ It found that the medical evidence dated through July 5, 2013 did not support her disability for work. Appellant, through counsel, requested an oral hearing on July 19, 2013.

Dr. Wilson completed a report on July 29, 2013 and noted that appellant was working four hours a day. Appellant worked hard in her home garden over the weekend and took a six-hour drive which increased her pain. Dr. Wilson noted that she was stable, but in pain with her current work regimen. He provided a duty status report and indicated that appellant was

⁴ OWCP did not further reference the specific period of disability denied and did not mention the June 20, 2013 decision.

unchanged and working four hours a day. Dr. Wilson provided similar reports dated September 13 and October 29, 2013.

Appellant testified at the oral hearing on December 2, 2013 regarding both the decisions issued by OWCP and stated that it was impossible for her to work only four hours a day and complete both of her jobs. In a report dated December 2, 2013, Dr. Wilson indicated that she was not capable of driving or using a computer. He noted that appellant could not focus on work during periods of increased pain which made driving unsafe.

Appellant filed additional claims for compensation dated November 13, 2013 claiming periods of total disability from June 16 through November 16, 2013. She provided the dates that she worked as a noxious weed inspector. The employing establishment indicated on these forms that appellant had requested a lower case load. In a letter dated December 16, 2013, OWCP requested that she supply additional medical evidence explaining how her claimed disability was caused or aggravated by her employment injuries.

By decision dated January 14, 2014, an OWCP hearing representative noted both OWCP decisions, June 20 and July 14, 2013, and found that appellant had not established that she was totally disabled from March 7 through June 1, 2013. She found that the medical evidence did not support appellant's disability for work due to her accepted employment-related condition for the claimed dates.

In a decision dated January 21, 2014, OWCP denied appellant's claims for compensation on or after June 16, 2013. It found that Dr. Wilson provided work restrictions based on subjective complaints and did not provide contemporaneous medical evidence to support temporary total disability. Counsel requested an oral hearing from OWCP's Branch of Hearings and Review on January 24, 2014.

In a report dated February 24, 2014, Dr. Wilson noted that appellant reported subjective complaints on October 8 and 29, 2013 including pains and muscle spasms. Appellant requested two to three months to recuperate. On February 24, 2014 she informed Dr. Wilson that she had quit her position at the employing establishment and had not worked since early October 2013.

Appellant, through counsel, requested reconsideration on April 17, 2014 of the January 14, 2014 decision and submitted an additional report from Dr. Wilson dated March 24, 2014. Dr. Wilson reviewed her history of injury and the conditions for which he provided treatment. He noted that in late April and early May 2013 appellant attempted to return to work on a part-time basis for four hours a day, which escalated her pain level and paresthesia. In a note dated February 24, 2014, Dr. Wilson noted that on February 22, 2013 she did not return to work as she tried to go hiking and experienced left side pain. Appellant also drove for one hour and experienced tingling down her left leg and arm as well as low back and cervical pain.

By decision dated June 23, 2014, OWCP declined to reopen appellant's claim for consideration of the merits finding that the evidence submitted was irrelevant as it did not address her disability for work on or after March 7, 2013.

Dr. Wilson completed a report on July 2, 2014 and noted that appellant was still working for the noxious weed board and having continued issues with her neck and left arm.

Appellant testified at the oral hearing, regarding the January 21, 2014 OWCP decision, on August 8, 2014. She stated that she was employed four and a half months out of the year with the local noxious weed board. Appellant stated that she was no longer working at the employing establishment. She stopped in October 2013 because of difficulty using her computer and driving so that she could not perform her normal field representative duties. Appellant described her preinjury employment as working for the employing establishment for 14 days a month eight hours a day and then worked an additional eight hours on those days for the noxious weed board. After she completed the employing establishment assignment, she worked the remaining days of the month as a noxious weed inspector for eight hours a day. Following her injury and in keeping with Dr. Wilson's restrictions, appellant earned only half her wages from both employing establishments. She stated that the employing establishment gave her only 10 cases rather than the 25 she received before her accident. Appellant testified that she worked four hours a day almost every day so that she could get her work done for both employing establishments, but she never worked more than four hours a day for either employing establishment.

The employing establishment responded on September 11, 2014 and stated that appellant was a permanent employee working intermittent hours. Appellant had no guarantee of hours as a field representative. The employing establishment stated that the lost time was calculated by average hours during the 52 weeks prior to the injury.

By decision dated October 8, 2014, OWCP's hearing representative found that appellant failed to submit the necessary medical evidence addressing the claimed periods of disability to establish entitlement to wage-loss compensation on and after June 16, 2013 and affirmed OWCP's January 21, 2014 decision.

The Board reviewed OWCP's June 23 and October 8, 2014 decisions on April 17, 2015 and found that OWCP properly declined to reopen appellant's claim for consideration of the merits on June 23, 2014 and that she had submitted no medical evidence establishing that she was totally disabled on or after June 16, 2013.⁵

Following the Board's April 17, 2015 decision, appellant submitted additional medical evidence from Dr. Wilson dated November 20, 2014, January 20, March 31, and June 18, 2015. Dr. Wilson noted that she had many subjective complaints, but few objective findings or conditions to "fix." He also reported that appellant quit her Census job, but had returned to her noxious weed position. Dr. Wilson diagnosed chest wall muscle strain and cervical nerve root impingement.

Appellant underwent a nerve conduction velocity study in 2014, which was normal with no electrophysiological evidence for entrapment neuropathy, peripheral polyneuropathy, plexopathy, radiculopathy, or myopathy affecting the left upper or lower extremity.

Dr. Wilson provided appellant's work restrictions on January 2, March 31, June 18, July 28, August 22, and October 30, 2015 as performing modified duty, lifting, pushing, and pulling less than 20 pounds. He did not indicate that she could work less than eight hours a day.

⁵ Docket Nos. 14-1804 and 15-0314 (issued April 17, 2015).

Appellant underwent a lumbar magnetic resonance imaging (MRI) scan on July 14, 2015 which demonstrated a disc herniation at L5-S1 which contacted the right S1 nerve root. On August 19, 2015 he underwent a cervical MRI scan, which demonstrated a C3-4 disc protrusion, C4-5 small annular disc bulge, and C6-7 small right paracentral disc protrusion.

In notes dated September 22 and 27, 2015 as well as October 10, 2015, Dr. Wilson reviewed appellant's electrodiagnostic testing and reported that her L5-S1 disc herniation had increased with inferior migration of the extrusion contacting the right S1 nerve root. He noted that appellant reported that she was experiencing left leg sciatica extending down into her big toe, but that her electromyograph was negative.

In a letter dated March 2, 2016, counsel requested reconsideration. He resubmitted the forms from Dr. Wilson indicating that appellant could perform modified duty lifting less than 20 pounds from July 28 and September 21, 2015 as well as the cervical and lumbar MRI scans.

By decision dated April 11, 2016, OWCP declined to reopen appellant's claim for consideration of the merits. It reviewed the medical reports and forms from Dr. Wilson and found that these records were irrelevant to the issue for which her claim for disability was denied.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁶ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration, which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁷ Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁸ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.⁹

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant's claim for review of the merits.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608.

⁹ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

Appellant, through counsel, submitted a timely request for reconsideration of the October 8, 2014 OWCP decision finding that she had not submitted necessary medical evidence to establish entitlement to wage-loss compensation for total disability on and after June 16, 2013.

In support of her request for reconsideration, appellant submitted a series of new notes and form reports from Dr. Wilson. These reports and notes are insufficient to require OWCP to reopen her claim for consideration of the merits, as the notes are cumulative of those previously considered. Dr. Wilson again failed to support any period of total disability as a result of appellant's accepted employment injury. His reports continued to indicate that she could perform modified duty with no restriction on the number of hours she could work. As these notes and form reports do not address the central issue in the case, a period of total disability on or after June 16, 2013, OWCP properly declined to reopen appellant's claim for consideration of the merits.

CONCLUSION

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT April 11, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 23, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board