



## **FACTUAL HISTORY**

On March 17, 2015 appellant, then a 38-year-old vocational nurse, filed a traumatic injury claim (Form CA-1) alleging that on February 14, 2015 he sustained a lower back injury due to repetitively lifting, pulling, pushing, and standing at work. He stopped work that day.

By letter dated April 1, 2015, OWCP advised appellant that no evidence had been submitted to establish his claim. It requested that he respond to the attached questionnaire in order to substantiate the factual elements of his claim and provide a medical report to establish a diagnosed condition as a result of the employment incident. Appellant was afforded 30 days to submit the additional evidence.

Appellant provided various medical reports from 2011, including psychological progress notes dated May 10, 2011 from Dr. Daniel Gutkind, a clinical psychologist, a July 6, 2011 progress note signed by Dr. Nina Ramchandani, a Board-certified internist, and by Dr. Cheryl Bates, a Board-certified internist, for treatment of chronic low back pain, and an April 17, 2011 magnetic resonance imaging (MRI) scan report of the lumbar spine by Dr. Raghav Raman, a diagnostic radiologist, which showed very mild multilevel degenerative changes with no evidence of significant foraminal narrowing.

Dr. Ramchandani continued to treat appellant. In progress notes dated February 16 to March 27, 2015, she related his complaints of lower back and right foot pain and swelling in his legs. Dr. Ramchandani noted that appellant had a history of chronic back pain and that he had a recent flare-up. She explained that his job required lifting and turning patients, which he believed worsened his back pain. Dr. Ramchandani recommended that appellant continue to use a back brace and take medication for back pain.

Appellant submitted various e-mails dated February 19 and 20, 2015 regarding his current back symptoms and his request for reassignment to a light-duty position as a reasonable accommodation under the Americans with Disabilities Act. He explained that he was not ready to return to work yet because returning to work would just exacerbate his symptoms. Appellant related that he initially injured his back in 1999-2000 during military service and was last treated for his back injury in March 2012.

In letters dated February 20 and March 3, 2015, Dr. Ramchandani indicated that appellant was currently under her care for chronic low back pain, which was significantly worsened by repetitive heavy lifting, heavy pulling, prolonged standing, or prolonged repetitive bending. She opined that his condition would improve if he did not stand more than 30 minutes at a time without a break, lift or pull heavy objects over 20 pounds, or repetitively bend for more than 10 percent of his eight-hour workday. Dr. Ramchandani requested as a reasonable accommodation for appellant to allow him to work with the above-mentioned restrictions.

On April 9, 2015 the employing establishment offered appellant a position as a medical support assistant in order to accommodate his disabilities.

In an April 16, 2015 letter, Dr. Ramchandani indicated that she had been appellant's primary care provider since April 28, 2011 for treatment of a service-connected lumbosacral strain injury. She related that on February 16, 2015 he contacted the VA due to a recent episode of worsening back pain. Dr. Ramchandani reported that upon examination on February 23, 2015

she observed significant paraspinal muscle tenderness to palpation and positive deep tendon reflexes of appellant's bilateral lower extremities. She noted a diagnosis of lumbosacral strain -- myofascial in etiology. Dr. Ramchandani opined that appellant had "preexisting lumbosacral strain that was aggravated by the repeated pushing, pulling, and lifting of patients that was required of [appellant] in his job." She explained that repeated lifting, pushing, and pulling of objects greater than 10 pounds, as well as repeated bending, could cause muscular strain in the back.

On April 23, 2015 OWCP received appellant's response to its April 1, 2015 development letter. Appellant described the employment factors that he believed were responsible for his condition, specifically assisting and repositioning patients and residents. He alleged that the past year he had performed the work comparable to a certified nursing assistant instead of as a vocational nurse. Appellant also explained that he first experienced muscle spasms and lower back pain in the military in 1999. He noted that he was awarded a 10 percent disability rating for lumbosacral strain with degenerative joint disease and an additional 10 percent disability rating for chronic abductor tendonitis from the VA. Appellant described the medical treatment he received for his lumbar and lower extremity conditions. He indicated that he continued to experience pain, tenderness, and soreness in his lower back despite physical therapy treatment and medication. Appellant related that on February 14, 2015 he was in excruciating pain at work so he set up an appointment with his treating physician. He noted that he did not sustain any other injury, either on or off duty, between the date of injury and the date he reported his claim. Appellant included letters from the VA regarding his entitle to benefits for his service-connected injuries.

OWCP issued a decision denying appellant's claim on May 11, 2015. It accepted that the February 14, 2015 incident occurred as alleged and that he had a diagnosed lumbar condition, but denied his claim because the medical evidence of record was insufficient to establish that his lumbar condition was causally related to the accepted February 14, 2015 incident. OWCP noted that Dr. Ramchandani's medical opinion did not adequately explain how appellant's work activities on February 14, 2015 aggravated or contributed to his preexisting lumbar condition.

On March 26, 2016 appellant filed a request for reconsideration. He explained that he had a chronic back condition since 2005 and had been able work until he was injured as a nurse at the employing establishment due to the pulling, pushing, lifting, bending, and walking at a high level on the floor. Appellant asserted that his back still gave him ongoing problems since the injury from the exacerbations of his job at the employing establishment. He related that his earlier physician statements explained that his back pain was caused by his job so he did not understand why OWCP found that there was no causal relationship. Appellant contended that his work was an aggravating factor that accelerated his chronic back pain, and that this was obvious from his medical treatment. He noted that physicians encouraged him to find another job if he wanted his back condition to improve.

Appellant resubmitted Dr. Ramchandani's February 20 and March 3, 2015 letters.

OWCP also received a March 5, 2015 report from Dr. Raymond Hsieh, a pain management specialist. Dr. Hsieh related that appellant had a history of low back pain and complaints of increased back pain over the past year because of more manual, laborious work at his job. He noted that appellant also complained of pain radiating to the bottom of his right foot with no numbness or tingling. Upon physical examination of appellant's lumbar spine,

Dr. Hsieh reported limited range of motion to extension with moderate pain and tenderness to pressure bilaterally at L5-S1 and laterally at the same level. Straight leg raise testing was negative bilaterally and motor strength was within normal limits. Sensation examination was also within normal limits in the lower extremities bilaterally. Dr. Hsieh diagnosed low back pain, likely myofascial, with possible discogenic etiology. He continued to treat appellant and provided progress reports dated May 26 to July 7, 2015 for treatment of low back pain, likely myofascial, and foot pain, likely plantar fasciitis.

Appellant also provided various physical therapy notes dated March 4 and 10, 2016.

By decision dated April 5, 2016, OWCP denied further merit review of appellant's claim. It found that the medical reports submitted were repetitive of previous evidence or immaterial to the issue of causal relationship.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.<sup>3</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>7</sup>

### **ANALYSIS**

Appellant alleged that he sustained an aggravation of his preexisting back condition as a result of a February 14, 2015 employment incident. OWCP denied his traumatic injury claim in a decision dated May 11, 2015 because the medical evidence failed to establish that his lumbar condition was causally related to the accepted February 14, 2015 employment incident. On March 31, 2016 it received appellant's request for reconsideration. In a decision dated April 5,

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

2016, OWCP denied further merit review of his case because the evidence submitted on reconsideration was not sufficient to warrant merit review.

The Board finds that OWCP appropriately denied further merit review as appellant had not submitted any evidence with his reconsideration request to warrant merit review under 5 U.S.C. § 8128(a).

In his letter requesting reconsideration, appellant also offered no relevant legal argument which had not previously been considered by OWCP nor did he show that OWCP had erroneously applied or interpreted a specific point of law.

Along with his reconsideration request, appellant resubmitted Dr. Ramchandani's February 20 and March 3, 2015 letters. The Board has found that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>8</sup> These reports therefore do not warrant further merit review.

Appellant also submitted new medical reports by Dr. Hsieh dated March 5 to July 7, 2015. Dr. Hsieh reviewed appellant's history and provided findings on examination. Dr. Hsieh diagnosed low back pain, likely myofascial, with possible discogenic etiology. The critical issue on which OWCP denied his claim, however, was regarding the causal relationship between appellant's diagnosed condition and the accepted February 14, 2015 employment incident. These medical reports, however, did not address the issue of whether causal relationship existed, and therefore do not present pertinent and relevant new evidence. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>9</sup> Accordingly, Dr. Hsieh's progress notes are insufficient to require further merit review of appellant's claim.

Similarly, the new reports OWCP received from appellant's physical therapist did not require merit review of the claim. Reports of physical therapists have no probative value regarding the medical issue of causal relationship as physical therapists are not considered physicians as defined by FECA.<sup>10</sup> Therefore, the reports of appellant's physical therapist do not constitute relevant and pertinent new medical evidence.<sup>11</sup>

Because he failed to meet any of the standards enumerated under 20 C.F.R. § 10.606(b)(3), appellant was not entitled to further merit review of his claim.<sup>12</sup>

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<sup>8</sup> *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

<sup>9</sup> *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>10</sup> The term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8102(2); *J.G.*, Docket No. 15-251 (issued April 13, 2015); *A.C.*, Docket No. 08-1453 (issued November 18, 2008) (records from physical therapists do not constitute competent medical opinion in support of causal relation, as physical therapists are not physicians as defined under FECA)

<sup>11</sup> *R.V.*, Docket No. 16-0099 (issued March 2, 2016).

<sup>12</sup> See *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); (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); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

On appeal, appellant alleges that he was appealing the May 11, 2015 decision regarding his work-related back injury and provides arguments relating to his traumatic injury claim. As noted above, however, the only issue before the Board is whether OWCP properly denied further merit review of his case in its April 5, 2016 decision. Because the Board lacks jurisdiction to review the underlying merits of appellant's claim, it cannot review his arguments regarding his traumatic injury claim on appeal.<sup>13</sup>

Because he did not meet any of the necessary requirements, the Board finds that OWCP properly refused to reopen his case for further consideration of the merits of his claim under 5 U.S.C. § 8128.

### **CONCLUSION**

The Board finds that OWCP properly denied reconsideration of appellant's claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2017  
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

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<sup>13</sup> See 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).