

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 10, 2008 appellant, then a 50-year-old legal assistant, sustained a traumatic injury in the course of employment. In OWCP File No. xxxxxx276, OWCP accepted appellant's claim for a disc herniation at L4-5 and sciatica, and she was paid schedule award benefits for nine percent permanent impairment of the left lower extremity. On November 16, 2010 appellant filed a recurrence claim (Form CA-2a), alleging that on October 22, 2010 she sustained a recurrence when she was delivering transcripts. She stopped work on October 22, 2010 and did not return. By decision dated February 9, 2011, OWCP denied the recurrence claim. A hearing representative affirmed the denial of appellant's recurrence claim. However, she also instructed OWCP to create a new traumatic injury claim for the October 22, 2010 incident, inasmuch as appellant cited exposure to a new work activity.

By letter dated August 2, 2013, OWCP informed appellant of the new traumatic injury claim, and requested that she submit further information to support the relationship between a medically-diagnosed condition and the incident of October 22, 2010.

In support of her claim, appellant submitted results of diagnostic tests taken on July 28, 2008 and July 3, 2010. She also submitted reports by Dr. Mao H. Chen, an internist, dated August 31 and September 18, 2013. Dr. Chen noted onset of acute left leg pain in July 2008. He also related that two radiologists had described structural changes at appellant's L4-5 with diagnoses of facet arthropathy, mild central stenosis, bilateral foraminal stenosis, greater on the left, as shown on magnetic resonance imaging scan of July 23, 2010, and focal disc bulge or herniation on the left side as shown in computerized tomography scan of July 28, 2008.

By decision dated September 25, 2014, OWCP denied appellant's claim for compensation as she failed to submit evidence containing a medical diagnosis in connection with the incident. It noted that pain was a symptom and not a diagnosis of medical condition. OWCP further noted that appellant must submit evidence of a causal relationship between a medical diagnosis and the accepted employment incident.

On September 30, 2014 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. At the hearing held on March 23, 2015, appellant testified with regard to the circumstances of her injury and noted that she was currently receiving disability retirement benefits.

By decision dated May 7, 2015, the hearing representative denied appellant's claim. He found that appellant failed to establish fact of injury as the evidence did not establish a medical condition diagnosed in connection with the accepted work incident.

By letter dated February 18, 2016 appellant, through counsel, requested reconsideration. In support thereof, counsel submitted a November 19, 2015 report wherein Dr. Charlemagne

Guerrero, a Board-certified internist, diagnosed herniation of lumbar intervertebral disc with radiculopathy, arthritis of facet joints at multiple vertebral levels, intervertebral disc stenosis of neural canal of lumbar region, bilateral low back pain with left-sided sciatica, bilateral low back pain with right-sided sciatica, essential hypertension, major depressive disorder, recurrent episode, mild; morbid obesity due to excess calories, difficulty in walking, and history of humerus fracture. Dr. Guerrero noted that appellant was still having lower back pain, but had no further falls since she fell in a grocery store in November 2014.

By decision dated May 16, 2016, OWCP denied appellant's request for reconsideration, noting that Dr. Guerrero did not address any medical condition related to the accepted employment incident of October 22, 2010.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's 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

When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁵

OWCP has a timeliness goal for issuing reconsideration decisions within 90 days from receipt of the request.⁶ Its procedures provide that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review.⁷ However, there is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request.⁸

ANALYSIS

The most recent decision on the merits of appellant's claim was OWCP's May 7, 2015 decision. As more than 180 days elapsed from the May 7, 2015 decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.

³ 5 U.S.C. § 8128(a). Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.608(b).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (October 2011).

⁷ *Id.* at Chapter 2.1602.7

⁸ *Id.*

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review. The underlying issue in this case is whether appellant has submitted sufficient evidence to establish a diagnosed medical condition causally related to the accepted October 22, 2010 employment incident. This is a medical issue.

Appellant offered no relevant legal argument which had not previously been considered by OWCP, nor did she show that OWCP had erroneously applied or interpreted a specific point of law. Thus, she is not entitled to a merit review of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board also finds that appellant failed to provide relevant and pertinent new evidence not previously considered. The only new evidence submitted on appeal was the November 19, 2015 report by Dr. Guerrero. In this report, Dr. Guerrero does note numerous medical diagnoses. However, he fails to relate these diagnoses to the October 22, 2010 employment incident. In fact, Dr. Guerrero specifically noted a recent fall that took place in November 2014. As his opinion does not address a causal relationship between the employment incident and appellant's diagnosed medical conditions, it is not relevant and pertinent to the underlying issue of causal relationship.⁹

Because appellant failed to meet one of the standards enumerated under 20 C.F.R. § 10.606(b)(3), she was not entitled to further merit review of her claim.⁸

On appeal counsel contends that OWCP delayed issuing its decision on reconsideration, and that this delay cost appellant her appeal rights. He contends that a decision should have been issued that protected appellant's appeal rights. Pursuant to OWCP's procedures, the goal for issuing reconsideration decisions is 90 days from OWCP's receipt of the request.¹⁰ Appellant's reconsideration request was received by OWCP on February 18, 2016. Ninety days from the date of receipt of the reconsideration request would have been May 18, 2016. As the decision on reconsideration was issued on May 16, 2016, the decision was issued within the stated time, and counsel's argument as to a delay is without merit.

CONCLUSION

The Board finds that OWCP properly denied reconsideration of the merits under 5 U.S.C. § 8128(a).

⁹ See *W.W.*, Docket No. 15-1486 (issued November 18, 2015).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(c) (October 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 16, 2016 is affirmed.

Issued: January 6, 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