

ISSUE

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

FACTUAL HISTORY

On January 15, 2015 appellant, then a 50-year-old sales/service and distribution associate, filed a traumatic injury claim (Form CA-1), alleging that on January 13, 2015 she was forced to assist and train an employee on dispatch which involved repetitive pushing, pulling, and lifting causing an injury to her lower back, bilateral shoulder, left arm and bilateral knees. She asserted that she was forced to perform these duties against known medical restrictions of no pushing, pulling, and lifting over 20 pounds. Appellant did not stop work.

In letters dated February 4 and 6, 2015, the employing establishment challenged appellant's claim noting that she had a preexisting condition, but was now alleging that her injury was due to repetitive motion of her job duties. It further stated that the evidence was insufficient to establish that appellant experienced the incident or factors alleged to have caused the injury. A sales/service distribution associate job description was submitted.

In an undated note, M.W., supervisor of customer service, noted that on January 13, 2015 appellant informed her that she had a weight restriction and was assigned to dispatch. She advised appellant that she would have a coworker assist with the dispatch. S.R., a coworker, reported to assist appellant and was informed that appellant was unable to lift anything over her weight restriction. In a statement dated January 13, 2015, she noted assisting appellant with dispatch and was informed by management and appellant that she was not permitted to lift anything over 20 pounds. S.R. noted that after appellant's instruction she performed the dispatch. In a statement dated January 13, 2015, J.T., a clerk, noted that on January 13, 2015 she witnessed M.W. inform appellant that she did not have to do any lifting, but rather show another employee how to sort and get items ready for dispatch.

Appellant submitted an attending physician's report (Form CA-20) from Dr. Trishanna Sookdeo, a Board-certified family practitioner, dated February 4, 2015, who noted that on January 13, 2015 appellant was instructed to assist with dispatch which required reaching, pushing, and pulling. Dr. Sookdeo diagnosed lumbar sprain and noted by checking a box marked "yes" that appellant's condition was caused or aggravated by an employment activity. In a duty status report (Form CA-17) dated February 4, 2015, she diagnosed lumbar sprain and questionable cervical radiculopathy and noted that appellant could return to work full time with restrictions on February 9, 2015.

By a February 9, 2015 letter, OWCP advised appellant of the type of evidence needed to establish her claim. It noted that the evidence submitted was insufficient to establish that she actually experienced the incident alleged to have caused the injury and requested appellant substantiate the factual elements of her claim and respond to an attached questionnaire.

In reports dated January 16 and February 4, 2015, Dr. Sookdeo treated appellant for low back pain which began on January 13, 2015 after assisting with dispatch duties requiring

reaching, pushing, pulling, repetitive squatting, kneeling, and twisting. Appellant noted undergoing left knee arthroscopy on December 31, 2013 and was on restricted duty and informed her supervisor of her restrictions. Dr. Sookdeo reported sorting, containing, labeling and arranging mail from the window and collection boxes and clearing the empty hampers from the floor. Appellant indicated that the next morning she had severe back pain and had not returned to work. Dr. Sookdeo diagnosed lumbar sprain and opined that based on appellant's history, job and evaluation she sustained a traumatic injury as a result of prolonged and repetitive motion on January 13, 2015.

In an undated statement, appellant indicated that on January 13, 2015 her supervisor, M.W., forced her to assist with dispatch duties which involved reaching, pushing, pulling heavy equipment, repetitive squatting and kneeling. She advised M.W. of her limitations, but her comments were disregarded. Appellant noted that the other employee was never trained to perform dispatch duties and she had to demonstrate and perform most of the duties. This included sorting, containing, labeling and arranging mail from the window service and collection boxes, processing mail, and clearing empty hampers. Appellant indicated that the next day she had severe low back, left arm and hand, bilateral shoulder and bilateral knee pain.

In a February 10, 2015 work status report, Dr. Zouheir A. Shama, a Board-certified general surgeon, noted that appellant was unable to work until February 19, 2015 due to injuries on the job. On March 5, 2015 he treated appellant for low back pain. Appellant reported "bending down to make a copy of her papers, she was fixing the machine, which was not working well and she started her lower back pain aggravated with this bending" according to her history. Dr. Shama diagnosed lower back pain and sacroiliitis which was aggravated by bending over and fixing a copy machine. She indicated that appellant's injury began on January 13, 2015 while working as a sales and service associate with long hours standing, walking, twisting, turning, lifting and reaching overhead.

In a March 19, 2015 decision, OWCP denied appellant's claim because the evidence of record was insufficient to establish that the events occurred as alleged.

On April 17, 2015 appellant requested reconsideration and reiterated the facts of her claim. She indicated that she did not have the statements of other employees or the challenge of her claim by the employing establishment. Appellant advised that she attempted to perform the job she was assigned and while demonstrating the duties of the dispatch she sustained an injury. She did not knowingly violate her restrictions.

Appellant submitted a March 26, 2015 report from Dr. Shama who noted that appellant initially sustained an injury to her back on January 13, 2015 while training a coworker to perform dispatch duties which included processing outgoing mail, sorting containers, labeling, arranging mail from the window unit and collecting mail from inside and outside collection boxes. This required her to use her hands, arms, and shoulders to arrange equipment, handle mail and mail matter, to collect mail, to perform sorting, and labeling duties. Dr. Shama advised that, as part of the instruction, she demonstrated some of the duties as the individual working with her had not been trained to do the work. He noted at the time of this injury appellant was working light duty on a nonjob-related injury. Appellant reported that while training the employee to perform dispatch duties, she felt pain in her lower back, shoulders, knees, left arm,

and hand. Dr. Shama opined that appellant sustained a traumatic injury when she performed the dispatch duties on January 13, 2015. She opined that the mechanism of injury was consistent with appellant's report of injury and the objective examination findings.

In a decision dated May 18, 2015, OWCP denied modification of the March 19, 2015 decision.

On February 11, 2016 appellant requested reconsideration. She submitted reports dated April 9 and May 14, 2015 from Dr. Shama who treated appellant in follow-up regarding back pain. Dr. Shama noted that appellant was injured on January 13, 2015 while assisting with dispatch. He opined that, based on appellant's job responsibilities, medical history and physical examination, she sustained an occupational injury that directly related to work with the employing establishment.

Appellant submitted an October 21, 2015 report from Dr. Jay B. Bender, a Board-certified physiatrist, who noted that appellant presented with neck pain, left knee pain, and low back pain. Dr. Bender noted findings of limited range of motion of the left knee, cervical spine and lumbar spine, tenderness to palpation medially on the left knee, normal deep tendon reflexes, and intact motor and sensory examination. He diagnosed cervical, shoulder and lumbar pain. Dr. Bender returned appellant to work with restrictions and recommended physical therapy. On November 18, 2015 he saw appellant for a follow-up evaluation. Appellant reported improvement with physical therapy. Dr. Bender noted findings and diagnosed cervical radiculopathy, bilateral carpal tunnel syndrome, lumbar spine pain and bilateral knee pain. He continued appellant's work status. In reports dated December 30, 2015 and February 10, 2016, Dr. Bender noted unchanged findings and diagnosed cervical herniated nucleus, left knee pain and lumbar pain (M51.16). He continued physical therapy and current work restrictions.

Appellant submitted an x-ray of the lumbar spine dated May 21, 2015 which revealed mild L3-4 disc space narrowing. A magnetic resonance imaging (MRI) scan of the cervical spine dated June 22, 2015 revealed degenerative changes of the thoracic and cervical spine at C3-4, C4-5, C5-6, and thoracic scoliosis. An August 6, 2015 left knee MRI scan was normal while an August 13, 2015 lumbar spine MRI scan showed bulging at L3-4 and L4-5. An October 28, 2015 electromyogram (EMG) revealed evidence of entrapment of the left ulnar sensory nerve at Guyon's canal and evidence of moderate bilateral median neuropathy at the wrist. Appellant also submitted physical therapy notes.

In an March 4, 2016 decision, OWCP denied appellant's November 17, 2015 request for reconsideration as the evidence submitted was insufficient to warrant further review of the merits of her claim.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁴ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in

⁴ 5 U.S.C. § 8128(a).

section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

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

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

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁵

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.⁶

ANALYSIS

OWCP denied appellant’s traumatic injury claim because the factual evidence of record was insufficient to establish that the work events occurred as alleged on January 13, 2013. Thereafter, it denied her reconsideration request, without conducting a merit review.

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 further review of the merits of the claim. In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She submitted an appeal request form dated November 17, 2015. This does not show a legal error by OWCP or constitute a new and relevant legal argument. The underlying issue in this case is whether appellant submitted evidence sufficient to establish that on January 13, 2015, she trained an employee on dispatch which involved repetitive pushing, pulling, and lifting items that exceeded 20 pounds. This is a factual issue which must be addressed by relevant new factual evidence.⁷

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by OWCP, appellant submitted reports dated April 9 and May 14, 2015 from Dr. Shama who treated her in follow-up regarding back pain. However, these reports are similar to his reports dated March 5, 10, and 26, 2015 which were previously submitted and considered by OWCP in its earlier decisions dated March 19 and May 18, 2015 and found deficient. Evidence that repeats or duplicates evidence already in the case record has no

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(b).

⁷ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

evidentiary value and does not constitute a basis for reopening a case.⁸ Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

Appellant also submitted new reports from Dr. Bender as well as diagnostic test reports and physical therapy records. This evidence is not relevant, however, as the underlying issue is whether appellant has factually established that she was in the performance of duty on January 13, 2015. While these documents have some connection to his claim, they are not relevant to the issue for which OWCP denied appellant's claim, the failure to establish work incidents on January 13, 2015.⁹ The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰ As such, these documents do not constitute a basis for reopening appellant's claim.

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 constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly denied merit review.

On appeal, appellant asserts that on November 10, 2015 she drafted a letter corroborating the facts of her claim, she provided a letter from her physician, and addressed statements from coworkers submitted on behalf of the employing establishment. She indicated that this information was placed in the wrong claim file and was not considered by OWCP in its March 4, 2016 decision. As explained, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

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

⁸ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁹ See *R.B.*, Docket No. 16-0345 (issued April 21, 2016).

¹⁰ *M.M.*, Docket No. 10-224 (issued October 6, 2010).

ORDER

IT IS HEREBY ORDERED THAT the March 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 16, 2017
Washington, DC

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

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

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