United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 17-0876**
	)	**Issued: November 21, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Louisville, KY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 13, 2017 appellant filed a timely appeal from a September 28, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated November 18, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.[2]

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

[2] Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated August 1, 2017, the Board denied the request as her arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0876 (issued August 1, 2017).

FACTUAL HISTORY

On June 8, 2015 appellant, then a 50-year-old driver, filed a traumatic injury claim (Form CA-1) alleging that at 3:00 p.m. on April 18, 2015 she injured her wrists when she was pushed to the ground by a coworker. She indicated that she fell backwards from a standing position. Appellant stopped work on April 18, 2015.

Appellant attached an April 18, 2015 statement to her claim in which she discussed the events that occurred at work on that date. She indicated that she was using a hustler vehicle to move a trailer from Door 13 to Door 9 in the dock area when a coworker, L.A., "flew by" her going to Door 3 with the business mail. Appellant noted that L.A. backed into Door 2 because Door 3 was occupied and that he then got out of his truck. She turned off her truck and grabbed her radio in order to tell a coworker, J.V., to advise L.A. that, if he waited, he could drop off his trailer in Door 3. Appellant indicated that L.A. came by her hustler vehicle yelling, "You almost hit me!" She then called out to J.V., "[T]ell [L.A.] to wait a second and he can put his trailer in Door 3!" Appellant advised that she could hear L.A. spinning his landing gear down so fast that she thought the handle was going to fly off and that she then saw L.A. backing out of the hustler doorway. L.A. had her keys in his left hand, yelling something about her driving recklessly and she "flew up there" telling him, "Give me my keys! Give me my keys!" Appellant indicated that he put her keys either in his left shorts pocket or on his key ring clip and then came down the steps toward her. She noted that she stepped backwards towards the driver's door of her hustler vehicle and that L.A. hit her in her shoulder/chest area with both of his palms and knocked her backwards to the ground. L.A. then went around to his truck and appellant rolled over, got up, and went around to where he was backing down the steps of his truck. Appellant indicated that she then grabbed his key ring and got it off after the two struggled. She did not see her keys on the key ring and yelled at L.A. to give her back her keys. L.A. was saying something about going to the Motor Vehicle Operator office and he bent over to pick something up. Appellant indicated that she hit him with his keys and then went inside and told coworkers what happened. She noted that her hand was bleeding and that a man came and put a gauze pad and tape over the cut on her palm. Appellant advised that she waited to be taken to the hospital and that, the longer she waited, the more swollen and painful her arm/hand became. She indicated that she had to drive herself to Norton Audubon Hospital.

Appellant submitted an unsigned administrative document from her April 18, 2015 visit to the emergency room of Norton Audubon Hospital. The document indicated that she was diagnosed with a right wrist sprain by Dr. Jared L. Bayless, a Board-certified emergency medicine physician, and that she would receive follow-up care on April 22, 2015 from Dr. Thomas Gabriel, a Board-certified orthopedic surgeon.

In an April 22, 2015 note, Dr. Gabriel diagnosed bilateral hand sprains and recommended physical therapy treatment. In another April 22, 2015 note, he indicated that appellant was unable to return to work until an unspecified date and recommended restrictions of no commercial driving, lifting no more than 10 pounds with her left hand, and no repetitive lifting with either hand.

In a May 18, 2015 narrative report, Dr. Gabriel indicated that appellant reported that on April 18, 2015 she was pushed backwards and fell on both hands/wrists. He diagnosed "bilateral wrist/hand" and "pain in joint, hand" (ICD-9 code 719.44) and noted that she was able to drive

herself to the appointment.[3] In a May 19, 2015 note, Dr. Gabriel diagnosed bilateral hand/wrist sprains and indicated that appellant could work with restrictions of no commercial driving, lifting no more than 10 pounds with her left hand, and no repetitive lifting with either hand.[4]

In a June 15, 2015 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. It requested that she submit a narrative medical report from her physician containing an opinion explaining how the reported April 18, 2015 work incident caused or aggravated a diagnosed medical condition. On June 15, 2015 OWCP also requested additional information from the employing establishment.

Appellant submitted an unsigned June 19, 2015 progress note from a person who indicated that appellant had reported that a coworker pushed/shoved her down and she caught herself with her hands. The note contained an impression of wrist pain.

In an undated statement, a coworker, J.V., indicated that on April 18, 2015 there was some sort of physical confrontation between L.A. and appellant, but that there were no witnesses to the incident and all information regarding the incident was obtained from the parties involved. He noted that she reported to him that L.A. pushed her to the ground after she confronted him as to why he took the keys to her postal vehicle. J.V. indicated that L.A. reported to him that he was confronted by appellant after he removed her keys and informed her that he was taking them to the Motor Vehicle Operator office, and that she lost her balance and fell to the ground after making several tugs on the keys attached to his belt loop. L.A. further reported that she finally got the keys from him and that a picture was taken of the broken belt loop on his pants. J.V. advised that, after an investigation, L.A. was restored to full duty without disciplinary action being taken against him. Appellant was initially put in for removal, but the matter was later settled.

In an April 23, 2015 report, an inspector from the U.S. Postal Inspection Service indicated that he received a call on February 18, 2015 regarding a physical altercation between two employees at a postal facility in Louisville, Kentucky, and that, when he arrived at the facility, he was advised that both parties were at Norton Audubon Hospital. He noted that another inspector interviewed appellant at the hospital on February 18, 2015 at which time she reported about the events of that date. Appellant indicated that L.A. yelled and screamed at her that she was driving too fast when parking her truck and that L.A. grabbed the keys from the ignition of her truck. She noted that she tried to reach for her keys and he pushed her to the ground, resulting in her hitting her palms on the ground and hurting her arms. Appellant then grabbed L.A.'s keys off his belt and struck him one time in the head with the keys. She indicated that she has had issues with him for the past year, including instances when he cut her off with his truck.

An inspector also interviewed L.A. on April 18, 2015 at which time he indicated that he took appellant's keys out of her truck because she created a safety hazard by getting out of her

[3] The report was also signed by Roger L. Behrman, an attending physical therapist.

[4] Appellant also submitted a Duty Status Report (Form CA-17) that was partially completed and unsigned. In an April 29, 2015 document, appellant's health care provider advised her of its determination that requested physical therapy treatment was medically necessary.

truck with the engine running. L.A. advised that she called him a vulgar name, threw his belongings from his truck, and attempted to take his keys from his belt. When his belt loop broke after a second tug, appellant fell to the ground. L.A. noted that she got up and then hit him at least two times in his head with his keys, causing a good amount of blood to come down his forehead. He noted that he has had issues with appellant for about one year and that she filed a harassment claim against him and other drivers.

In a July 22, 2015 decision, OWCP denied appellant's claim for an April 18, 2015 work injury. It determined that the evidence of record supported that the April 18, 2015 event occurred as described, *i.e.*, being pushed down by a coworker and falling backwards from a standing position. However, OWCP further found that appellant failed to establish the medical component of the fact of injury because she did not submit any medical evidence containing a medical diagnosis in connection with the accepted April 18, 2015 work event. Thus, "[f]act of injury, has not been met."

On August 19, 2015 appellant requested reconsideration of her claim.

Appellant submitted an April 22, 2015 narrative report from Dr. Gabriel who noted that she reported that on April 18, 2015 she fell on her right hand when a coworker pushed her during an argument. Dr. Gabriel reported findings of his physical examination on that date, noting that she exhibited moderate and generalized bilateral palmar hand pain with mild ecchymosis of the right palm. The wrists exhibited no instability or laxity and sensation was normal in both upper extremities. Dr. Gabriel diagnosed bilateral hand/wrist strains. In a May 19, 2015 narrative report, he reported findings of his physical examination on that date which were similar to those obtained on April 22, 2015. Dr. Gabriel again diagnosed bilateral hand/wrist strains.

In a September 4, 2015 Form CA-17, Dr. Bryan M. Honaker, an attending Board-certified family practitioner, listed the date of injury as April 18, 2015 and the mechanism of injury as being pushed from a standing position and falling backwards on both wrists. He provided diagnoses of contusion and wrist pain due to the reported injury and recommended work restrictions. In an October 12, 2015 narrative report, Dr. Honaker indicated that appellant complained of bilateral wrist pain and bilateral wrist parethesias from an injury received during an altercation at work. He advised that he anticipated that she could return to full-duty work within the next six months.

In an unsigned July 20, 2015 progress note, a provider indicated that appellant reported that a coworker pushed/shoved her down and she caught herself with her hands. The note contained an impression of wrist pain. In a June 19, 2015 duty status report (Form CA-17), a provider with an illegible signature listed the date of injury as April 18, 2015 and the mechanism of injury as being pushed down by a coworker and falling backwards, hitting the concrete ground. The Form CA-17 contained a diagnosis of wrist pain and provided work restrictions. Appellant submitted a July 21, 2015 administrative document concerning her physical therapy sessions and an August 5, 2015 letter from M.G., an attending physical therapist, to Dr. Gabriel.

In a May 21, 2015 statement, appellant's immediate supervisor indicated that on February 18, 2015, L.A. came to her with blood on his left brow and stated that appellant had attacked him. She then located appellant and observed that she was bleeding profusely from her right hand. Appellant asserted that L.A. took her keys and pushed her down. The supervisor

noted that L.A. made unprofessional comments about appellant on an almost daily basis and indicated that she gave appellant permission to start work at 2:00 p.m. on February 18, 2015, but did not give L.A. such permission. In an undated statement, the supervisor provided additional comments. She noted that L.A. seemed to be overly concerned with appellant's daily activities and indicated that, prior to April 18, 2015, L.A. had told appellant that he would take her keys if she left her truck running without being inside it.

In a November 18, 2015 decision, OWCP denied appellant's claim for an April 18, 2015 work injury. It found that she had now established the medical component of fact of injury because Dr. Gabriel had diagnosed her with a hand/wrist strain condition related to the April 18, 2015 work incident.[5] OWCP noted, however, that Dr. Gabriel's diagnosis was not based on a complete and accurate factual and medical background given that the medical evidence of record did not contain any objective medical opinion that appellant sustained an injury as a result of her April 18, 2015 fall.[6] It determined therefore that she failed to establish causal relationship between a diagnosed condition and the work incident of April 18, 2015.

In a letter dated September 13, 2016 and received on September 19, 2016, appellant requested reconsideration of OWCP's November 18, 2015 decision. In her letter, she repeated her earlier assertion that L.A. pushed her backwards to the ground on April 18, 2015. Appellant also provided a discussion of a portion of the medical evidence of record. She alleged that she had been harassed by him on previous occasions and after April 18, 2015. Appellant discussed the attached witness statements which she believed supported the existence of such harassment.

Appellant submitted an undated statement in which she described confrontations she had with coworkers, including L.A., between March and May 2014. She also submitted several statements of coworkers. In a May 5, 2015 statement, a coworker, D.R., indicated that in May 2014 he observed that L.A. refused appellant's request to move and then walked toward her and bumped her. He noted that, after she had left, L.A. called her a vulgar name. In a May 28, 2015 statement, a coworker, G.W., noted that, prior to April 18, 2015, L.A. openly discussed his desire to use a new rule (requiring that hustler vehicle engines be turned off and ignition keys be taken away when unattended) to document infractions by appellant and to compel management to take severe disciplinary action against her. In another May 28, 2015 statement, a coworker, M.C., noted that, about one week prior to the confrontation between L.A. and appellant, he heard L.A. call appellant a vulgar name when she was not present. In an undated statement, a coworker, B.P., indicated that on April 17, 2015 appellant advised that she was being harassed by L.A.

[5] OWCP characterized Dr. Gabriel as only diagnosing a left hand strain, but this appears to be an inadvertent error on the part of OWCP as Dr. Gabriel, in his April 22 and May 19, 2015 reports, actually diagnosed appellant with bilateral hand/wrist strains.

[6] OWCP indicated that documents from the employing establishment showed that appellant attacked her coworker, L.A., after he removed her keys from her truck and that she fell backwards while trying to pull her keys off his belt loop. The documents showed that, when she did secure the coworker's keys, she hit him on the forehead causing a laceration to his head and a small laceration to her right hand. OWCP indicated that the evidence of record supported that appellant cut her right hand on April 18, 2015 when she grabbed her coworker's keys, but noted that the evidence of record did not support that she fell on her hands when she fell after attempting to pull L.A.'s keys off his belt loop.

Appellant also submitted several new medical documents. In an April 22, 2015 note, Dr. Gabriel diagnosed her with bilateral hand sprains. In a November 23, 2015 Form CA-17, Dr. Honaker listed the date of injury as April 18, 2015 and the mechanism of injury as being pushed backwards by a coworker and hitting the ground. He provided diagnoses of contusion and wrist pain due to the reported injury and recommended work restrictions. In a November 23, 2015 note, Dr. Honaker indicated that appellant was incapacitated due to a work injury until November 30, 2015.

Appellant submitted other new documents including an April 27, 2015 report of Roger Behrman, an attending physical therapist; a March 14, 2014 report of Debra Lusk, an attending registered nurse; an undated personal/family history form; a list of medical providers; and employing establishment documents concerning the rules for handling hustler vehicles and trailers. She also submitted administrative documents, dated June 2, July 10, October 13, and September 24, 2015, in which her health care provider advised her of its determination that requested physical therapy treatment was medically necessary.

Supplemental documents concerning disciplinary action were also added to the record. In a May 19, 2015 Notice of Proposed Removal, the employing establishment advised appellant that her actions on April 18, 2015, including striking a coworker on the forehead with keys, warranted her removal from employment. It provided her an opportunity to submit evidence and argument challenging the proposed action to the senior plant manager and/or to file an appeal under Article 15 of the National Agreement. In a June 5, 2015 letter of decision, the employing establishment advised appellant that her return to duty would be contingent upon contacting the Employee Assistance Program for assessment, accepting her assignment to Tour One duties, and withdrawing all grievances and/or Equal Employment Opportunity claims.

Appellant also resubmitted several documents which had previously been considered by OWCP, including a May 12, 2015 statement and an undated statement of her immediate supervisor; April 29 and July 21, 2015 administrative documents concerning physical therapy treatments; an August 5, 2015 letter from M.G., an attending physical therapist, to Dr. Gabriel; April 22, and May 18 and 19, 2015 narrative reports and April 22 and May 19, 2015 disability notes of Dr. Gabriel; and an October 12, 2015 narrative report of Dr. Honaker.

In a September 28, 2016 decision, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence and argument submitted by her in support of her reconsideration request was either repetitious or irrelevant to the main issue of the case.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.[7] OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.[8] One such limitation is that the request for reconsideration

[7] This section provides in pertinent part: "[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." 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.607.

must be received by OWCP within one year of the date of the decision for which review is sought.[9] A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.[10] When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.[11]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[12] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[13]

ANALYSIS

OWCP issued a decision on November 18, 2015. Appellant requested reconsideration of this decision on September 19, 2016.[14]

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 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a new and relevant legal argument not previously considered by OWCP. In connection with her reconsideration request, appellant argued that she sustained a work-related injury on April 18, 2015 because her coworker, L.A., pushed her backwards to the ground following an incident in the loading dock area. She also asserted that she had been harassed by him on dates prior and subsequent to April 18, 2015. The Board notes that the submission of this argument would not require reopening of appellant's claim for merit review because she had already made a similar argument about the mechanism of the alleged April 18, 2015 injury and she did not explain how L.A.'s actions before and after April 18, 2015 were relevant to her claim of an April 18, 2015 work injury. The Board has held

[9] *Id*. at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

[10] 20 C.F.R. § 10.606(b)(3).

[11] *Id*. at § 10.608(a), (b).

[12] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[13] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

[14] In its November 18, 2015 decision, OWCP denied appellant's claim for an April 18, 2015 work injury because she failed to establish causal relationship between the conditions diagnosed by her attending physicians and the work incident of April 18, 2015. It noted that she had not established her factual claim that a coworker, L.A., pushed her backwards to the ground, but rather that she fell when she attempted to pull keys off a key ring on his belt.

that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[15] Appellant also submitted several witness statements of coworkers which she believed supported the fact that L.A. harassed her on dates before and after April 18, 2015, but she did not explain how these statements were relevant to her claim of an April 18, 2015 work injury.[16]

The Board notes that the underlying issue in this case was whether appellant submitted medical evidence, based on a complete and accurate factual and medical history, establishing causal relationship between a diagnosed medical condition and the accepted April 18, 2015 work incident. That is a medical issue which must be addressed by relevant medical evidence.[17] A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence,[18] but the Board finds that appellant did not submit any such evidence in this case.

In connection with her reconsideration request, appellant submitted several new medical documents. In an April 22, 2015 note, Dr. Gabriel diagnosed her with bilateral hand sprains. In a November 23, 2015 Form CA-17, Dr. Honaker listed the date of injury as April 18, 2015 and the mechanism of injury as being pushed backwards by a coworker and hitting the ground. He provided diagnoses of contusion and wrist pain due to the reported injury and recommended work restrictions. In a November 23, 2015 note, Dr. Honaker indicated that appellant was incapacitated due to a work injury until November 30, 2015. However, these medical reports are similar to those already submitted and rejected by OWCP as being insufficient to establish causal relationship between a diagnosed condition and the accepted April 18, 2015 work incident. As noted, reopening of a claim for merit review is not required when a claimant submits repetitious evidence in connection with a reconsideration request.[19]

Appellant submitted other new nonmedical documents, including an undated personal/family history form, a list of medical providers, employing establishment documents concerning the rules for handling hustler vehicles and trailers, administrative documents regarding requested physical therapy treatment, and documents concerning disciplinary actions taken against her. The submission of these documents would not require the reopening of

[15] *See supra* notes 12 and 13.

[16] Appellant also submitted an undated statement in which she described confrontations she had with coworkers, including L.A., between March and May 2014. This statement does not address the circumstances of the claimed April 18, 2015 work injury and therefore is not relevant to her present claim.

[17] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[18] *See supra* note 10.

[19] *See supra* note 12. Appellant submitted other new documents including an April 27, 2015 report of Mr. Behrman, an attending physical therapist, and a March 14, 2014 report of Ms. Lusk, an attending registered nurse. However, these documents would not be relevant to the medical issue of the present case because these documents do not constitute probative medical evidence. The Board has held that registered nurses and physical therapists are not considered physicians as defined under FECA and their reports do not constitute probative medical evidence. *R.S.*, Docket No. 16-1303 (issued December 2, 2016). Moreover, the March 14, 2014 report of Ms. Lusk relates to a period prior to the claimed April 18, 2015 work injury.

appellant's claim for merit review because they are not relevant to the above-described medical issue of the present case.[20]

Appellant also resubmitted several documents which had previously been considered by OWCP, including a May 12, 2015 statement and an undated statement of her immediate supervisor; April 29 and July 21, 2015 administrative documents concerning physical therapy treatments; an August 5, 2015 letter from M.G., an attending physical therapist, to Dr. Gabriel; April 22 and May 18 and 19, 2015 narrative reports and April 22 and May 19, 2015 disability notes of Dr. Gabriel; and an October 12, 2015 narrative report of Dr. Honaker. However, the submission of this evidence would not require reopening of her claim for merit review because, as previously noted, the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.[21]

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, 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 reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[20] *See supra* note 13.

[21] *See supra* note 12. On appeal, appellant argues that OWCP did not adequately consider that she was on the clock at the time of her alleged April 18, 2015 work injury, but that L.A. was not authorized to be on the clock at that time. She also asserts that OWCP did not adequately address statements showing ongoing harassment in her workplace and other documents showing that L.A. intended to harm her. However, appellant did not explain how these matters were relevant to the main issue of the present case.

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 21, 2017
Washington, DC

Christopher J. Godfrey, 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