

**United States Department of Labor
Employees' Compensation Appeals Board**

A.C., Appellant

and

**U.S. POSTAL SERVICE, INSPECTION
SERVICE, Washington, DC, Employer**

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**Docket No. 17-1111
Issued: November 28, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 15, 2017¹ appellant filed a timely appeal from an October 18, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from October 18, 2016, the date of OWCP's nonmerit decision, was April 16, 2017. As this fell on a Sunday, the appeal would have been due the following business day, which was Monday, April 17, 2017. Since using April 28, 2017, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 15, 2017 rendering the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 14, 2007 appellant, then a 46-year-old postal police officer, filed a traumatic injury claim (Form CA-1) alleging that she was involved in a rear-end automobile accident on February 11, 2007, resulting in trauma to her upper and lower extremities, head, neck, back, and chest. She stopped work on February 11, 2007. On April 24, 2007 OWCP accepted appellant's claim for the following diagnoses: sprain of the lumbosacral joint ligament; bilateral sprain of the knee and leg; bilateral sprain of the shoulder and upper arm; closed fracture of the ribs; sprain of the neck; and sprain of the thoracic back region. Appellant received wage-loss compensation benefits on the supplemental rolls as of March 29, 2007, and on the periodic rolls as of January 19, 2008. On April 30, 2008 OWCP accepted a consequential condition of depression. On June 20, 2008 it again expanded acceptance of the claim to include post-traumatic stress disorder.

In a report dated June 5, 2013, Dr. Justin D. Saliman, a Board-certified orthopedic surgeon, examined appellant and observed that she had continuing neck pain, migraines, lower extremity paresthesias, burning sensations, and numbness. He opined that the new onset of these symptoms may be related to a neurogenic source, such as a Chiari malformation, or lumbar/thoracic disc disease.

By letter dated June 27, 2013, OWCP referred appellant to a second opinion examiner to determine whether she was eligible for a vocational rehabilitation program and whether she continued to have residuals from her diagnosed orthopedic conditions.

In a report dated July 23, 2013, Dr. Frederic G. Nicola, Board-certified in orthopedic surgery and serving as an OWCP second opinion physician, reviewed appellant's medical records and conducted a physical examination. He diagnosed neck pain caused by radiculopathy with Chiari malformation and syrinx and also lumbar degenerative disc disease. Dr. Nicola opined that appellant's diagnosed neck pain with radiculopathy with Chiari malformation and syrinx, as well as her lumbar degenerative disc disease, were all medically unrelated to the February 11, 2007 work-related injury. He noted that these diagnoses were not established earlier because they became symptomatic as time progressed, after a magnetic resonance imaging (MRI) scan of appellant's cervical spine was obtained. Dr. Nicola reported that appellant had no physical limitations from the February 11, 2007 employment injury, and concluded that, while her Chiari syrinx malformation rendered her temporarily totally disabled, it was not on an industrial basis.

In a supplemental report dated August 12, 2013, Dr. Nicola noted his opinion that appellant was not a candidate for vocational rehabilitation due to her Chiari malformation. He noted that appellant's conditions of bilateral shoulder sprain, lumbosacral sprain, bilateral knee sprain, fractured ribs, neck sprain, and thoracic sprain had resolved. Dr. Nicola noted that if she was able to enter a sedentary vocational rehabilitation program, she may be eligible for vocational rehabilitation.

On December 18, 2013 Dr. Saliman diagnosed appellant with Chiari malformation. He noted that appellant had been consistent from the start of her medical treatment that she had no symptoms until the employment injury of February 11, 2007. Dr. Saliman also noted that, to his knowledge, she had not been evaluated with Chiari malformation prior to her employment

injury. He opined that her symptoms were caused by the employment incident of February 11, 2007.

In a report dated February 24, 2014, Dr. Saliman reiterated his diagnosis of Chiari malformation. He further reiterated his opinion that her symptoms were caused by her work-related injury.

On March 26, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits for the accepted orthopedic conditions, finding that the weight of the medical evidence established no continuing work-related residuals from these conditions. It noted that her claim remained open for payment of medical and wage-loss compensation benefits based on her accepted conditions of depression and post-traumatic stress disorder. OWCP based its proposed termination on the medical reports of Dr. Nicola.

In a statement dated April 25, 2014, appellant argued that the direct cause of her conditions was the motor vehicle incident of February 11, 2007. She reviewed the history of her conditions and noted that she still suffered chronic pain, migraines, unequal balance, and herniated discs as a result of that incident. Appellant disagreed with the proposed termination and stated that she had not been diagnosed with Chiari malformation prior to the employment incident.

Appellant submitted an April 16, 2014 report from Dr. Saliman in which he diagnosed Chiari malformation directly related to a work-related injury in 2007. Dr. Saliman noted that she continued to participate in physical therapy and was ataxic. He provided his opinion that appellant's original diagnoses were in error, and that the Chiari malformation had caused all her symptoms to date. Dr. Saliman opined that because she had not been evaluated for Chiari malformation prior to the date of injury, he believed that her symptoms were related to the employment incident of February 11, 2007.

In a report dated May 22, 2014, Dr. Saliman reiterated his opinion on the cause of her symptoms as being work related and reiterated his diagnosis of Chiari malformation. He further noted that physical therapy was beneficial for management of her symptoms.

By decision dated August 18, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits related to her lumbosacral, shoulder, knee, ribs, neck, and thoracic conditions effective that date. It noted that Dr. Saliman did not provide support for his opinion that appellant continued to have work-related bilateral shoulder sprains, lumbosacral sprain, bilateral knee sprain, fractured ribs, neck pain, or thoracic sprain conditions. OWCP found that Dr. Saliman's explanation of causation was deficient, as he merely noted that the Chiari malformation must be related to the employment injury of February 11, 2007 because she had not been evaluated for Chiari malformation prior to that date. It also noted that Dr. Saliman did not respond to Dr. Nicola's reports. OWCP found that the weight of medical evidence rested with Dr. Nicola.

On September 18, 2014 appellant requested a review of the written record by an OWCP hearing representative.

In a report dated August 6, 2014, Dr. Saliman reiterated his diagnosis of Chiari malformation and referred her to a neurologist for evaluation.

On December 17, 2014 OWCP denied appellant's request for a review of the written record as it was untimely filed. By letter dated June 10, 2015, received on June 16, 2015, appellant requested reconsideration of the termination of her medical and wage-loss compensation benefits for her orthopedic injuries. She argued that Dr. Nicola had been prejudiced in his evaluation of her condition and made false allegations. Appellant stated that she still had residuals from the February 11, 2007 employment injury and never had any medical problems prior to that injury related to her back, herniated discs, and shoulder strain. She argued that she was entitled to a referee examination because there was a conflict of medical opinion in her case.

In a report dated September 18, 2014, Dr. Saliman reiterated his opinion that appellant's symptoms were related to the employment injury of February 11, 2007, because appellant did not suffer any symptoms and she had not been evaluated for Chiari malformation prior to the date of injury.

By decision dated October 18, 2016, OWCP denied appellant's request for reconsideration. It found that appellant had not submitted sufficient evidence to demonstrate that OWCP's determination that the weight of medical evidence rested with Dr. Nicola was in error.³ Furthermore, OWCP found the report of September 18, 2014 was cumulative of the other evidence of record, because it presented the same opinion and rationale as in the reports of April 16 and August 6, 2014, which had already been reviewed by OWCP.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), 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 Section 10.608(b) of OWCP's regulations provide that 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.⁵

ANALYSIS

The last merit decision on the relevant issue in this appeal was OWCP's decision dated August 18, 2014, in which it terminated appellant's wage-loss compensation and medical

³ On February 16, 2017 OWCP informed appellant that federal regulations required her to report any earnings and employment during the previous year, enclosing a Form CA-1032 for that purpose. It notified her that she had to fully answer all questions on the Form CA-1032 and return the statement within 30 days or her benefits would be suspended. The letter was sent to appellant's last known address. Appellant did not respond. By decision dated March 28, 2017, OWCP suspended appellant's compensation benefits, effective April 1, 2017, for failing to submit the Form CA-1032 as requested. It noted that if she completed and returned an enclosed copy of the Form CA-1032, her compensation benefits would be restored retroactively to the date they were suspended. The March 28, 2017 decision has not been appealed to the Board and is not considered within this appeal.

⁴ 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

⁵ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

benefits related to her lumbosacral, shoulder, knee, ribs, neck, and thoracic conditions effective that date. The issue on reconsideration was whether appellant submitted sufficient evidence and/or argument to warrant merit review of OWCP's decision to terminate her medical and wage-loss compensation benefits on August 18, 2014.

The Board finds that OWCP properly denied appellant's request for reconsideration without further merit review of the claim.

With her request for reconsideration, which OWCP received on June 16, 2015, appellant attached a letter in which she argued that Dr. Nicola had been prejudiced in his evaluation of her condition and made false allegations. She asserted that she still had residuals from the February 11, 2007 employment injury and never had any medical problems prior to the date of injury related to her back, herniated discs, and shoulder strain. Appellant argued that she was entitled to a referee examination because there was a conflict of medical opinion as to whether she had residuals of the accepted orthopedic conditions.

As appellant did not provide any additional evidence or legal argument in support of her assertions regarding Dr. Nicola, her arguments have no reasonable color of validity and are thus insufficient to require OWCP to reopen her claim for merit review.⁶ The issue of whether there was a conflict of medical opinion on the issue of remaining residuals from her accepted orthopedic conditions had already been considered in OWCP's August 18, 2014 decision in which OWCP found that the weight of medical evidence rested with Dr. Nicola. Appellant's argument is, therefore, not a relevant legal argument not previously considered by OWCP.⁷

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue is whether appellant has submitted sufficient evidence to establish that OWCP's termination decision of August 18, 2014 was incorrect. A claimant may also be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence in support of her claim.

Appellant attached a medical report from Dr. Saliman dated September 18, 2014 in which he reiterated his opinion that appellant's symptoms were related to the employment injury of February 11, 2007 because appellant did not suffer any symptoms, and she had not been evaluated for Chiari malformation prior to the date of injury. Dr. Saliman's explanation of his medical opinion on causation was identical to his explanation in the reports of April 16 and August 6, 2014. As such, Dr. Saliman's report dated September 18, 2014 did not qualify as relevant and pertinent new evidence, because it was duplicative to reports that had already been considered at the time of the August 18, 2014 termination decision. Evidence or argument which

⁶ See *Lovetta V. Brown*, Docket No. 00-1097 (issued April 26, 2002).

⁷ *Supra* note 3.

repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁸

As 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 submit relevant and pertinent new evidence not previously considered, 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).

ORDER

IT IS HEREBY ORDERED THAT the October 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 28, 2017
Washington, DC

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

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

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

⁸ See *S.E.*, Docket No. 16-1077 (issued October 26, 2016).