

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).

On appeal counsel asserts that in its March 31, 2017 decision, OWCP applied an incorrect legal standard and that the medical evidence established that appellant was no longer capable of performing the light-duty position she was offered following the February 9, 2010 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances outlined in the prior decision are incorporated herein by reference. The facts relevant to the current appeal are set forth below.

Appellant, then a 47-year-old computer assistant, injured her lumbar spine when an elevator she was riding in suddenly dropped on February 9, 2010. She stopped work, and OWCP accepted appellant's traumatic injury claim (Form CA-1) for lumbar radiculitis. Appellant received continuation of pay, and wage-loss compensation benefits beginning April 1, 2010.

Appellant returned to limited part-time duty on April 26, 2010.⁴ She worked intermittently on a part-time basis through June 4, 2010. Appellant received wage-loss compensation for four hours a day through May 23, 2010. On July 9, 2010 she filed a claim for compensation (Form CA-7) beginning June 21, 2010.

In a decision dated October 27, 2010, OWCP denied appellant's claim for wage-loss compensation for the period June 21 through July 11, 2010. By decision dated January 14, 2011, it denied her claim that she sustained a recurrence of disability beginning June 8, 2010 as the medical evidence of record did not establish that she was totally disabled from work due to the accepted condition. Appellant, through counsel, timely requested a review of the written record with OWCP's Branch of Hearings and Review from both decisions.

In decisions dated March 17 and May 16, 2011 respectively, OWCP hearing representatives affirmed the October 27, 2010 and January 14, 2011 decisions.⁵ Following an October 18, 2011 request for reconsideration, in a merit decision dated January 19, 2012, OWCP

³ Docket No. 12-859 (issued September 7, 2012).

⁴ The physical requirements of the modified position were described as sitting in a chair, working on a desktop computer intermittently, not to exceed four hours per day, with the terminal at eye level. There was no reaching above shoulder level. Walking short distances on an intermittent basis was required, not to exceed one hour per day, with intermittent bending, stooping, lifting, pulling, and pushing limited to one hour a day with a 10-pound weight restriction. Appellant was allowed to sit or stand at her convenience.

⁵ At this time appellant was represented by other legal counsel.

denied modification of the May 16, 2011 decision. Appellant then filed an appeal with the Board from the January 19, 2012 decision.

In a September 7, 2012 decision, the Board found that appellant had not established a recurrence of disability on June 8, 2010 caused by the accepted lumbar radiculitis, and affirmed the January 19, 2012 OWCP decision. The Board discussed the medical evidence of record and denied the recurrence claim because appellant did not establish that the nature and extent of her injury-related condition changed so as to prevent her from continuing to perform her limited-duty assignment. The Board found the reports of Dr. John C. Verstraete, an osteopath and a Board-certified internist, insufficient to establish appellant's recurrence claim as the physician did not provide a sufficient explanation as to how the mechanics of the February 9, 2010 employment injury, accepted for lumbar radiculitis, caused her complaints of unrelenting back pain such that she could not perform the essentially sedentary duties of the modified assignment. The Board noted that Dr. Verstraete did not demonstrate specific knowledge of the assignment or provide an explanation with sufficient rationale as to why appellant could not perform the modified work duties.⁶

Subsequent to the Board's September 7, 2012 decision, on January 24, 2013 appellant, through counsel, requested reconsideration.⁷ In a January 7, 2013 report, Dr. Verstraete described the duties of the modified position and opined that appellant's nerve damage and pain medications prevented her from any work. In a merit decision dated March 11, 2013, OWCP denied modification of the September 7, 2012 decision.

In correspondence dated September 10, 2013, counsel requested that appellant's claim be expanded to a consequential injury to include compression fracture of the lumbar spine. In an attached statement, appellant indicated that she fell down 12 steps on February 13, 2013 when her right leg gave out. She related that this caused severe pain, and she was taken by ambulance to a hospital emergency room and was discharged later that day. Appellant noted being bedridden for weeks, and that Dr. Verstraete ordered a magnetic resonance imaging (MRI) scan.

By letter dated October 4, 2013, OWCP advised appellant of the medical evidence needed to establish a consequential injury claim and asked her to forward all medical evidence from February 13, 2013 to present.

Additional medical evidence submitted included an April 13, 2013 MRI scan of the lumbar spine that demonstrated a compression fracture at L3. A June 24, 2013 MRI scan of the sacrum also demonstrated the L3 compression fracture with an L2-3 disc bulge and asymmetry of the piriformis musculature.

In treatment notes dated June 26 to September 17, 2013, Dr. Verstraete noted the history of appellant's February 2013 fall, indicated that appellant was in severe discomfort, and described examination findings of right leg calf muscle atrophy. He diagnosed lumbago, myalgia and myositis, and depressive disorder. On July 31, 2013 Dr. Verstraete noted that

⁶ *Supra* note 3.

⁷ The law firm of Steven E. Brown, Esquire began representing appellant on April 13, 2012.

appellant continued to have problems with pain and weakness associated with the February 9, 2010 employment injury. He advised that she had fallen numerous times due to this weakness which further aggravated her injuries, noting that the most recent fall in February 2013 caused a compression fracture in the lumbar spine which required vertebroplasty for repair. Dr. Verstraete further indicated that appellant had well-documented progressive atrophy of her calf muscle, and asymmetry of her piriformis muscle, as documented on the June 24, 2013 MRI scan. He concluded that appellant had a permanent nerve injury which caused the weakness and muscle abnormalities, opining she should have never been released to return to work following the employment injury.

In a November 13, 2013 report, Dr. Daniel D. Zimmerman, a Board-certified internist and OWCP medical adviser, noted his review of the record. He indicated that, prior to accepting a compression abnormality, all medical records since the February 9, 2010 employment injury should be reviewed.

Following a request by OWCP, appellant thereafter submitted additional medical evidence. This included an ambulance report that appellant was transported to a hospital for severe back and hip pain after a fall. A February 13, 2013 emergency room report noted appellant's complaint of increased right hip and lower body pain after a fall down steps. She was discharged home with diagnoses of back pain.

In reports dated April 1 and May 11, 2014, Dr. Zimmerman, an OWCP medical adviser, noted his review of the submitted records. He advised that additional conditions should not be accepted.

In May 2014 OWCP referred appellant to Dr. William O. Hopkins, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Hopkins was asked to comment on what conditions should be accepted due to the February 9, 2010 employment injury and February 13, 2013 fall. In a June 30, 2014 report, he advised that his review of the record supported preexisting lumbar radiculopathy on the right side that was exacerbated by the February 2010 employment injury, which led to progressive deterioration and progressive neurological deterioration that had not resolved. Dr. Hopkins continued that appellant's progressive weakness caused the February 2013 fall which created the compression fracture, noting that she had also developed an additional compression fracture at T12.

On August 28, 2014 OWCP additionally accepted T12 compression fracture.

Additional evidence submitted on October 10, 2014 included an August 21, 2014 MRI scan of the cervical spine that demonstrated multilevel degenerative change. An MRI scan of the thoracic spine that day demonstrated a compression fracture at T12.

On December 2, 2014 appellant filed claims for compensation (Form CA-7) for the period February 9 to October 28, 2010 and November 1, 2010 to November 21, 2014.

On December 12, 2014 OWCP accepted L3 compression fracture.

On March 16, 2015 appellant filed a notice of recurrence (Form CA-2a), noting that the recurrence occurred on February 13, 2013 when she fell down stairs at home. She indicated that

she stopped work in June 2010 under Dr. Verstraete's instruction, and retired on November 3, 2010.

In an April 15, 2015 letter, OWCP informed appellant of the evidence needed to support her recurrence claim. On an OWCP development questionnaire, appellant described the February 13, 2013 fall. In an April 29, 2015 report, Dr. Verstraete indicated that he had never returned appellant to work after the February 9, 2010 work injury, but that she was forced to return to work in 2010. He provided examination findings and noted the accepted conditions and appellant's physical limitations. Dr. Verstraete concluded that appellant's objective studies showed a worsening of her medical problems, all of which stemmed from her work injury and led to a progressive decline in her stability which impacted her later injuries.

In a merit decision dated May 28, 2015, OWCP denied appellant's recurrence claim because there was insufficient evidence to establish that she was disabled solely due to the conditions accepted after the February 13, 2013 fall.

Appellant, through counsel, requested reconsideration on September 11, 2015. In a September 3, 2015 report, Dr. Verstraete reviewed the record, including objective testing. He reiterated his opinion that the February 2010 employment injury led to progressive muscle deterioration and progression neurological deterioration such that appellant could never work, and should have never returned to work.

In a merit decision dated November 19, 2015, OWCP denied modification of the prior decision, finding the evidence submitted insufficient to establish that she was disabled due to the conditions accepted after the February 13, 2013 fall.

Appellant, through counsel, again requested reconsideration on November 1, 2016. An October 11, 2016 functional capacity evaluation (FCE) indicated that appellant was incapable of a sustained level of sedentary work for an eight-hour workday. In an October 19, 2016 report, Dr. Verstraete advised that appellant's condition had progressively deteriorated. He noted that this opinion was shared by Dr. Hopkins in his June 30, 2014 report. Dr. Verstraete indicated that he had ordered the FCE, advising that it was reliable and valid. He compared it with an FCE done on June 1, 2010, noting that the latter study showed that her ability to do work tasks had diminished such that she could no longer work an eight-hour day. In an attached work capacity evaluation (OWCP Form 5c), Dr. Verstraete provided permanent restrictions based on the FCE, indicating that appellant was totally disabled. He commented that appellant took pain medication daily, needed to lie down frequently throughout the day, and that activity exacerbated her constant pain.

By decision dated March 31, 2017, OWCP denied review of the merits of the case. It listed the medical evidence submitted and the requirements to establish a recurrence of disability. OWCP indicated that, as appellant stopped work on June 8, 2010, voluntarily retired, never returned to work, and the light-duty assignment was not withdrawn or altered, there could be no recurrence without a previous return to work.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁸ Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(3).⁹ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.¹⁰ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS

The only decision before the Board on this appeal is the nonmerit decision of OWCP dated March 31, 2017 denying appellant's application for review.

The underlying merit issue in this case is whether appellant established a recurrence of disability. The Board notes that by its September 7, 2012 decision, it affirmed a January 12, 2012 OWCP decision, finding that appellant had not established a recurrence of disability on June 8, 2010.¹² OWCP subsequently accepted compression fractures at T12 and L3.

On December 12, 2014 appellant filed a recurrence claim, indicating that she sustained a recurrence of disability on February 13, 2013 when she fell down stairs, causing the accepted compression fractures. In merit decisions dated May 28 and November 19, 2015, OWCP denied the recurrence claim. Counsel again requested reconsideration on November 1, 2016 and submitted additional medical evidence including an October 11, 2016 FCE and an October 19, 2016 report from Dr. Verstraete.

The Board notes that, although OWCP indicated that it denied merit review in its March 31, 2017 decision, it did not mention the requirements found in OWCP's regulations at section 10.608 described above.¹³ OWCP procedures require that a nonmerit decision should

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.608(a).

¹⁰ *Id.* at § 10.606(b)(3).

¹¹ *Id.* at § 10.608(b).

¹² *Supra* note 3. The Board also notes that by decision dated March 11, 2013 OWCP affirmed the September 7, 2012 decision.

¹³ 20 C.F.R. § 10.608.

include a discussion of the evidence submitted, or lack thereof, and should explicitly state the basis for the finding of insufficiency. The decision should explain that the application for reconsideration is denied on the basis that the evidence submitted in support of the application is not sufficient to warrant review.¹⁴ In its March 31, 2017 decision, OWCP merely listed the evidence presented and did not discuss the sufficiency of the evidence submitted on reconsideration, *i.e.*, whether the newly submitted evidence constituted relevant and pertinent new evidence not previously considered by OWCP.¹⁵

The Board, however, finds that as appellant did not assert, in the November 1, 2016 reconsideration request, that OWCP erroneously applied or interpreted the law or advance a relevant legal argument not previously considered by OWCP, she was 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).¹⁶

With respect to the third above-noted requirement under section 10.606(b)(3), as noted, appellant submitted additional medical evidence including Dr. Verstraete's October 19, 2016 report in which he advised that he had ordered the October 11, 2016 FCE and found it reliable and valid, noting that it indicated that appellant could not work eight hours of sedentary duty. He opined that he had compared the recent FCE with an FCE done on June 1, 2010, noting that the October 2016 study showed that appellant's ability to do work tasks had diminished such that she could no longer work an eight-hour day. In an attached work capacity evaluation, Dr. Verstraete provided permanent restrictions based on the FCE, indicating that appellant was totally disabled. He commented that appellant took pain medication daily, needed to lie down frequently throughout the day, and that activity exacerbated her constant pain.

The Board finds that Dr. Verstraete's report, together with the October 11, 2016 FCE ordered and deemed reliable by Dr. Verstraete, constitute new, relevant, and pertinent evidence in regard to the matter of whether appellant established a recurrence of disability. It is not necessary that the evidence be sufficient to establish the claim, only that it is new, relevant, and pertinent to the issue presented.¹⁷

As OWCP did not follow its procedures regarding the content of a nonmerit decision,¹⁸ and as appellant submitted pertinent evidence on reconsideration that was not previously considered by OWCP, appellant is entitled to a review of the merits of her claim under section 10.606(b)(3) of OWCP's regulations. The case shall therefore be remanded to OWCP to review the merits of the claim including Dr. Verstraete's October 19, 2016 report, together with the October 11, 2016 FCE. The Board will, therefore, set aside OWCP's March 31, 2017 decision.

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Non-Merit Decisions*, Chapter 2.1602.7b

¹⁵ 20 C.F.R. § 10.606(b)(3).

¹⁶ *Id.* at § 10.606(b)(3); *see R.M.*, 59 ECAB 690 (2008).

¹⁷ *C.L.*, Docket No. 14-1904 (issued May 18, 2015).

¹⁸ Federal (FECA) Procedure Manual, *supra* note 14.

After this and such further development deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to section 8128(a) of FECA.

ORDER

IT IS HEREBY ORDERED THAT the March 31, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: November 13, 2017
Washington, DC

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

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

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