

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On December 4, 1984 appellant, then a 21-year-old secretary, sustained a traumatic injury while in the performance of duty. There was no activity in the record from December 4, 1984 until December 4, 1994.³ On March 26, 1999 OWCP received appellant's September 30, 1997 claim for recurrence of disability (Form CA-2a). Appellant noted that she had experienced seizures since the 1984 injury. She submitted an undated report from Dr. Samuel J. Potolicchio, Jr., a Board-certified psychiatrist and neurologist, who noted that she had undergone a left frontal temporal craniotomy and temporal lobectomy, in November 1997, for uncontrolled seizures that were diagnosed as being the result of a head trauma in December 1984. The traumatic injury claim was originally denied by OWCP on April 20, 1999. However, OWCP, by decision dated May 19, 1999, accepted appellant's claim for contusion to the face or scalp from blunt trauma.

On April 2, 2002 OWCP denied appellant's claim for recurrence of disability as the evidence of record was insufficient to establish that her seizure condition was causally related to the accepted injury claim.

On October 4, 2002 appellant requested reconsideration. Medical evidence included reports from Dr. William R. Leahy, Jr., a Board-certified neurologist, dated 1994 to 1997, who detailed a history of appellant's head injury and subsequent treatment. Dr. Leahy's April 11, 1994 report noted that appellant had not had a seizure in six months. Also provided was an April 28, 1999 report from Dr. Peter M. Schissler, a Board-certified internist.

Appellant also submitted reports from Dr. Potolicchio dated from 1997 to 2000. In his July 15, 1997 report, Dr. Potolicchio opined that appellant developed seizures after a minor head trauma at work 12 years prior and had her first seizure the night of her injury, but did not lose consciousness. In a discharge summary dated July 20, 1997, he noted a history of seizure disorder beginning 12 years earlier with apparent generalized seizures while sleeping and diagnosed complex partial seizures. In a February 4, 1999 report, Dr. Potolicchio noted that appellant had a breakthrough seizure once she had been off anticonvulsant drugs for three months. It was a complex partial seizure and she returned to the prescription Tegretol. On September 28, 2000 he noted that appellant was status post left temporal lobectomy. Appellant continued to take Tegretol. Dr. Potolicchio noted that appellant's work hours had been reduced to 20 hours a week. His reports of June 7 and September 3, 2002 noted that the onset of seizures occurred immediately following her head trauma in 1984 and that she experienced no seizure before this event. Dr. Potolicchio advised that appellant's condition progressively worsened and she underwent a left craniotomy and temporal lobectomy to surgically remove the seizure focus. He recommended medical disability retirement.

³ The employing establishment acknowledged, in a letter to OWCP on March 2, 1999, that the original Form CA-1 had to be retrieved from appellant's official personal folder which had been sent to St. Louis record center after appellant left the employing establishment in 1986. The claim for recurrence (Form CA-2a) had been held pending receipt of the original Form CA-1.

Appellant retired on medical disability on July 12, 2002.

In a decision dated October 1, 2002, OWCP denied modification of the April 2, 2002 decision.

On October 4, 2002 appellant requested reconsideration. She submitted a November 8, 2002 statement which advised that, while Dr. Leahy was unable to confirm that her epilepsy was the result of the head trauma in 1984, Dr. Potolicchio reported that 15 percent of the damaged tissue on the right rear side of her brain required removal due to the December 4, 1984 injury. Appellant noted retiring on medical disability.

Appellant submitted a December 9, 1985 medical report from Dr. Leahy who noted that she had experienced a seizure several hours after she struck her head while at work; however, the injury was not severe and she did not experience nausea, vomiting, or loss of consciousness. Dr. Leahy opined that there was a possibility that appellant developed an idiopathic seizure versus post-traumatic seizures.

By decision dated January 22, 2003, OWCP denied appellant's reconsideration request as the evidence was insufficient to warrant a merit review of the prior decision.

Appellant appealed to the Board. In a September 30, 2004 decision, the Board affirmed the October 1, 2002 and January 22, 2003 decisions, finding that appellant had failed to establish that her seizure disorder was caused by the accepted December 4, 1984 work incident and that OWCP had properly denied her request for reconsideration.⁴

On July 16, 2005 appellant requested reconsideration. She submitted an August 16, 2005 report from Dr. Potolicchio who summarized appellant's history noting that on December 4, 1984 she struck her head at work and that same night she had her first generalized convulsion. Dr. Potolicchio noted since that time she had a number of generalized convulsions as well as complex partial seizures. He noted that appellant was followed by Dr. Leahy and that he had referred appellant to him in July 1997 for uncontrolled seizures and possible surgery. In November 1997, appellant underwent a left temporal lobectomy, which resulted in better control of her seizures although she was left with memory issues. Dr. Potolicchio opined that the only source for her seizures was the original head trauma in 1984.

In a decision dated November 2, 2005, OWCP denied modification of its prior decisions.

On July 7, 2008 appellant requested reconsideration. In a February 9, 2007 report, Dr. Potolicchio noted that appellant had her first on-the-job head trauma at work on December 4, 1984. On the same day, after the head trauma, she had a generalized convulsion and has been treated by Dr. Leahy for epilepsy since 1985. When her seizures became more uncontrolled, appellant had a left temporal lobectomy on November 19, 1997 to control her seizure disorder. This was successful, but left her with short-term memory deficits and some cognitive impairment. Dr. Potolicchio opined that appellant's seizure disorder was causally

⁴ Docket No. 03-1123 (issued September 30, 2004).

related to her initial head trauma at work and the underlying cause for her epilepsy and need for brain surgery.

In a decision dated August 12, 2008, OWCP denied appellant's reconsideration request, finding that the request was not timely filed and did not present clear evidence of error. On August 26, 2008 appellant again requested reconsideration.

In a decision dated November 21, 2008, OWCP denied appellant's reconsideration request because she neither raised substantive legal questions nor included new and relevant evidence and; therefore, it was insufficient to warrant a review of the prior decision.

On January 24 and 25, 2009 appellant's representative requested an oral hearing with regard to the April 2, 1999 and April 2, 2002 OWCP decisions. In a February 6, 2009 decision, OWCP denied appellant's hearing request, finding that the matter had previously been reviewed and that she was not entitled to a hearing as a matter of right.⁵

On May 15, 2009 appellant requested reconsideration. On May 27, 2009 OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

Appellant again requested reconsideration on February 3, 2010. She asserted that her case file had been destroyed in 2002 and that her records were not complete. Appellant requested a historical breakdown of her case file. She asserted that additional medical evidence had been submitted from 2004 to 2009, with the most recent report from Dr. Leahy. Appellant submitted evidence previously of record, including reports from Dr. Potolicchio dated June 7, 2002 to February 9, 2007. She also submitted an April 22, 2010 case summary.

In letters dated January 22 to March 22, 2010, OWCP noted that appellant's claim for benefits for a seizure disorder had been denied based on the evidence contained in the record. It noted that appellant had been afforded multiple appeals including to the Board and the denial of expansion of her claim to include a seizure disorder had been affirmed.

In a May 7, 2010 decision, OWCP denied appellant's reconsideration request, finding that the request was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board. In an April 5, 2011 decision, the Board affirmed OWCP's decision dated May 7, 2010, finding that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.⁶

On October 11, 2011 appellant requested reconsideration. She reiterated that her case file had been destroyed, that her records were not complete, and that her case had been unjustly closed. Appellant submitted copies of e-mails sent to OWCP dated August 6 to December 19, 2011, asserting that her case file had been destroyed in error. She reasserted that OWCP should

⁵ Appellant appealed to the Board. In a December 16, 2009 decision, the Board affirmed the February 6, 2009 OWCP decision. Docket No. 09-1461 (issued December 16, 2009).

⁶ Docket No. 10-2091 (issued April 5, 2011).

have expanded her claim, noting that Dr. Potolicchio supported her claim for a traumatic brain injury.

In an October 28, 2011 decision, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant a merit review. Appellant appealed to the Board. In a January 3, 2013 decision, the Board affirmed the October 28, 2011 decision.⁷

In an undated letter received January 15, 2014, appellant requested reconsideration and restated contentions regarding her claim. On February 27, 2014 OWCP denied the request finding that it was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board on October 29, 2014. In a January 27, 2015 order, the Board dismissed the appeal as untimely filed.⁸

On August 11, 2015 appellant filed a notice of recurrence (CA-2a) alleging that she had a recurrence of disability on March 23, 2004 causally related to the December 4, 1984 accepted work injury. She indicated that she became epileptic eight hours after the closed-head trauma injury of December 4, 1984, which resulted from a lack of ergonomics in the workplace. Appellant believed that her current condition was related to her original injury because Dr. Potolicchio confirmed after she underwent brain surgery on November 21, 1997 that the closed-head trauma was 100 percent the cause of her neurological disorder of epilepsy. She indicated that she was partially disabled from January 29, 2000 and became fully disabled on July 12, 2002.

On September 10, 2015 OWCP advised appellant of the type of evidence needed to establish her recurrence claim and requested that she submit such evidence.

Appellant submitted reports from Dr. Potolicchio dated June 7, 2002 to February 12, 2007, all previously of record.

By decision dated November 10, 2015, OWCP denied appellant's claim for a recurrence of disability because the evidence submitted did not establish that she had a return of disability or increased disability as a result of a consequential injury or condition stemming from her accepted work-related conditions.

On March 30, 2016 appellant requested reconsideration. She submitted a report from Dr. Potolicchio dated February 9, 2007, previously of record. Also submitted was a December 16, 2015 report from Dr. Potolicchio noting examination of appellant in follow up for her seizure disorder and memory disturbance. Dr. Potolicchio noted following appellant for several years since her brain surgery for uncontrolled epilepsy. He referenced his letter of February 9, 2007 and indicated that appellant continued to have the same issues including seizures and significant memory and cognitive impairments. Dr. Potolicchio noted medications

⁷ Docket No. 12-1083 (issued January 3, 2013).

⁸ Docket 15-0211 (issue January 27, 2015).

used in treating appellant. He indicated that he had written a letter to OWCP and opined that appellant's condition was clarified in that letter.

In a June 30, 2016 decision, OWCP denied appellant's March 30, 2016 request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

On November 7, 2016 appellant requested reconsideration. She indicated that Dr. Potolicchio would provide a medical response to her claim and she requested "reinstatement of the justice" he awarded to her on May 19, 1999. Appellant referenced a recent telephone call with an OWCP representative who indicated that Dr. Potolicchio must specify, using full detailed medical terminology, how her accepted employment incident of December 4, 1984 caused her neurological disorder of epilepsy and the need for brain surgery. She indicated that she was ultimately required to retire on full medical disability in 2002.

Appellant submitted a fax form to OWCP dated November 7, 2016, requesting confirmation of receipt of her recurrence of injury fax. She indicated that Dr. Potolicchio would be provided with OWCP's June 30, 2016 decision and would respond to the request for a medical explanation. Appellant indicated that Dr. Potolicchio was a highly rated neurologist. She submitted a copy of a fax form dated November 16, 2016 sent to Dr. Potolicchio requesting that he respond to OWCP as soon as possible. Appellant indicated that she was forwarding reports from Dr. Leahy, Dr. Schissler, and Dr. Potolicchio to OWCP for consideration. She reiterated her contention that her May 19, 1999 case file had been improperly destroyed.

Appellant submitted a report from Dr. Leahy dated December 9, 1985, a report from Dr. Schissler dated April 28, 1999, and reports from Dr. Potolicchio dated 2002 to December 16, 2015, all previously of record. She also submitted a May 19, 1999 OWCP letter of acceptance, an OWCP letter dated June 3, 1999 to appellant's prior counsel, and a copy of her case history summary as of June 2008, all previously of record.

In a November 17, 2016 decision, OWCP denied appellant's November 7, 2016 request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁹ 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 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

⁹ 5 U.S.C. § 8128(a).

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹⁰

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.¹¹

ANALYSIS

OWCP denied appellant’s claim for a recurrence of disability because she failed to submit sufficient medical evidence establishing a recurrence of disability beginning March 23, 2004 causally related to her accepted work-related injury of December 4, 1984. Thereafter, it denied appellant’s reconsideration requests without conducting a merit review.

The issue presented is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen her case for 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, nor did she advance a new and relevant legal argument.

In a November 7, 2016 request for reconsideration, she indicated that Dr. Potolicchio would provide a medical response to her claim and she requested “reinstatement of justice” awarded to her on May 19, 1999. Appellant indicated that, during a telephone call with OWCP, she was advised of the type of medical evidence needed to establish her claim. She related that she had to retire on full medical disability in 2002. Appellant also submitted a November 7, 2016 fax form to OWCP, noting Dr. Potolicchio’s credentials and indicating that he would respond to OWCP. She further generally asserted that there was fraud involved in the destruction of her case file. These assertions do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant submitted sufficient evidence to establish a recurrence of disability on March 23, 2004 causally related to her accepted work-related injury. That is a medical issue which must be addressed by relevant new medical evidence.¹²

Appellant did not submit any relevant and pertinent new medical evidence in support of her claim. She submitted a report from Dr. Leahy dated December 9, 1985, a report from Dr. Schissler dated April 28, 1999, a May 19, 1999 OWCP letter of acceptance, a June 3, 1999 OWCP letter to her prior counsel, reports from Dr. Potolicchio dated 2002 to December 16, 2015, and a case history summary as of June 2008. However, this evidence is duplicative of evidence previously submitted and considered by OWCP in its’ earlier decisions dated November 10, 2015 and June 30, 2016. Evidence that repeats or duplicates evidence already in

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.608(b).

¹² *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

the case record has no evidentiary value and does not constitute a basis for reopening a case.¹³ Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

As noted, appellant also submitted fax forms sent to OWCP on November 16, 2016 regarding her feelings on OWCP's claim development as well as her request that Dr. Potolicchio respond to OWCP. The underlying issue is whether appellant has established a recurrence of disability on March 23, 2004 causally related to her accepted work-related conditions. That is a medical issue which must be addressed by relevant and pertinent new medical evidence.¹⁴ Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

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 evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal appellant contends that she submitted sufficient evidence to support that she sustained a recurrence of disability on March 23, 2004 causally related to her accepted work injury of December 4, 1984. As noted, the Board does not have jurisdiction over the merits of her claim, only has jurisdiction over whether she submitted sufficient evidence to warrant reopening of her claim for a merit review under 20 C.F.R. § 10.606(b)(3). The evidence submitted with appellant's November 7, 2016 reconsideration request was insufficient to warrant a merit review of her decision.

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).

¹³ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

¹⁴ See *Bobbie F. Cowart*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the November 17, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 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