

FACTUAL HISTORY

On August 5, 2015 appellant, then a 48-year-old labor custodian, filed an occupational disease claim (Form CA-2) alleging that he sustained stress injuries to the hands and wrists as a result of repetitive gripping and grasping required by his employment duties. A supervisor noted that appellant had not stopped work.

In an attached statement dated July 24, 2015, appellant explained that his current condition was caused by daily work duties requiring four to five hours of gripping, grasping a dust mop, wiping down surfaces, and folding cardboard boxes into a recycling compactor. He stated that he had been performing these tasks since August 2005 and that prior to that time he worked as a letter carrier for 15 years.

In a statement dated August 5, 2015, a supervisor contended that appellant's workload did not consist of four to five hours of consistent gripping, grasping, and dust mopping. He stated that appellant may take one to two hours cleaning a work area, using the remainder of his time to pick up loose paper and trash with a "toy broom" and maintaining a clean workspace. The supervisor noted that appellant would normally have to wipe mirrors "maybe once a week," consisting of seven mirrors at three minutes a piece; and that recycling of cardboard boxes would take up to 20 minutes.

By letter dated August 11, 2015, OWCP informed appellant of the evidence needed to establish his claim. It requested that he submit additional factual and medical evidence, and to respond to a claim development questionnaire. OWCP afforded appellant 30 days to submit the additional information.

In a report dated June 5, 2015, Dr. Maliheh Massih, Board-certified in physical medicine and rehabilitation, examined the results of an electrodiagnostic report of the upper extremities. She stated an assessment of a slight probability of the early onset of bilateral carpal tunnel syndrome, due to median nerves appearing to be somewhat more delated with the ipsilateral ulnar nerves.

On July 24, 2015 appellant responded to OWCP's questionnaire. He explained that duties of his federal employment as a letter carrier, including all aspects of preparing and delivering mail involving working with his hands, from October 1990 through August 2005, contributed to his condition. Appellant noted that all of the duties of his position involving working with his hands as a labor custodian also contributed to his condition. He stated that he did not have any hobbies outside of work, such as playing sports or using the computer.

In a report dated July 24, 2015, Dr. Edward Mittleman, a family practice physician, diagnosed appellant with aggravation of early bilateral arthritis of the hand, and bilateral chronic sprain/strain of the hands. He described the duties of appellant's employment as a letter carrier and as a labor custodian involving the use of his hands. Dr. Mittleman opined that appellant's constant use of his hands in his work resulted in aggravation of early hand osteoarthritis, chronic sprain/strain, and inflammation of the ligaments and tendons of his hands.

On September 21, 2015 OWCP directed appellant to attend a second opinion examination in order to determine the causal relationship between his diagnosed conditions and factors of his federal employment.

In a report dated October 12, 2015, Dr. Jacob Rabinovich, a Board-certified orthopedic surgeon, reviewed appellant's medical history, conducted a physical examination, and diagnosed appellant with early signs of bilateral arthritis of the hands. He indicated that appellant's diagnosis was not causally related to his federal employment, noting that his diagnosed condition was in its very early stages with limited objective findings. Dr. Rabinovich concluded that appellant's physical activities did not have an etiological relationship to the diagnosis.

By decision dated October 26, 2015, OWCP denied appellant's claim. It found that the weight of medical evidence rested with Dr. Rabinovich, because he was a Board-certified orthopedic surgeon of the appropriate specialty, was given an opportunity to review appellant's medical history and performed an in-person examination. As such, OWCP found that appellant had not submitted sufficient evidence to establish a causal relationship between his diagnosed condition and factors of his federal employment.

On January 16, 2016 appellant requested reconsideration of OWCP's October 26, 2015 decision. With his request for reconsideration, he attached a December 1, 2015 report from Dr. Mittleman. Dr. Mittleman disputed Dr. Rabinovich's report dated October 12, 2015, relating that "I do think [that] there is an argument for some relationship in the development of early degenerative changes in [appellant's] bilateral hands considering that he spent the first 15 years as a city letter carrier and then the last 9 years as a custodian." He argued that appellant's claim should be accepted for aggravation of early bilateral arthritis of the hands and bilateral chronic sprain/strain of the hands.

By decision dated April 12, 2016, OWCP reviewed the merits of appellant's claim and declined to modify its prior decision. It found that his description of duties of his federal employment was inaccurate, based on the August 5, 2015 statement of the employing establishment; and that as Dr. Mittleman's medical opinion was based on that inaccurate history of injury, it was of little probative value in establishing a causal relationship.

On November 29, 2016 appellant requested reconsideration of OWCP's April 12, 2016 decision. With his request for reconsideration, he attached a November 4, 2016 report from Dr. Mittleman. Dr. Mittleman referred to a July 5, 2016 letter from a coworker of appellant, noting that appellant's position as a tour two custodian performed cleaning routes involving thorough cleaning, while the custodians on other tours performed policing routes, which entailed far less thorough cleaning. The coworker noted that appellant had requested work assignment sheets from the employing establishment on two occasions, but had not received a response. Based upon this July 5, 2016 letter, Dr. Mittleman contended that the history of injury as related to him by appellant was accurate, and the history of injury accepted by OWCP in its April 12, 2016 decision was inaccurate. He reiterated that his diagnosis was for aggravation of early hand arthritis and that Dr. Rabinovich had not addressed his second diagnosis of chronic sprain/strain of the bilateral hands.

Appellant submitted an employee work assignment sheet dated September 8, 2015, demonstrating that he was scheduled to clean for four hours and recycle cardboard, plastic, and paper for zero hours. He also resubmitted his description of all of the duties involving use of his hands as a letter carrier and as a custodian.

By decision dated February 24, 2017, OWCP denied appellant's request for reconsideration. It found that the employee work assignment sheet and his description of duties of his federal employment were already reviewed in prior decisions. OWCP found that the statement of a coworker dated July 7, 2016 did not provide any direct evidence regarding appellant's duties. It found that Dr. Mittleman's report of November 4, 2016 was based on an inaccurate account of appellant's duties, and that therefore it had little probative value with regard to proving a causal relationship.

On April 11, 2017 appellant requested reconsideration of OWCP's April 12, 2016 decision. He stated his belief that the weight assigned to his supervisor's August 5, 2015 statement describing duties of his federal employment was in error. Appellant described in detail the duties of a tour two custodian. He arrived at work at 5:00 a.m. and began cleaning, continuing in all areas while employees reported to work, with the latest arriving at noon. Appellant noted that, prior to September 2015, the entire work floor had to be swept and mopped before employees reported to work, and that currently it had to be vacuumed. Surfaces had to be wiped down and dusted, and bathrooms cleaned, including sweeping and mopping floors, scrubbing toilets, and wiping down all surfaces with disinfectant. Appellant noted that the supervisor's statement only referenced that it took 21 minutes to clean seven mirrors, minimizing the amount of work he had to perform. He also submitted images of six cleaning routes.

Appellant submitted employee work assignment sheets from various dates. In a work assignment sheet dated April 5, 2017, it was noted that he cleaned workrooms on route 4, which was estimated to take 3.06 hours. Appellant also was assigned to clean workrooms on route 3, which was estimated to take 2.51 hours. On April 6, 2017 he was assigned to police workrooms on route 1, which was estimated to take 6.98 hours. The remainder of appellant's duties included recycling, which was estimated to take zero hours. On April 7, 2017 he was assigned to clean workrooms on route 4 and route 3, which were estimated to take 3.06 and 2.51 hours, respectively. The remainder of appellant's duties included recycling and attending a safety talk, which were estimated to take zero hours. On April 8, 2017 he was assigned to clean workrooms on routes 1 and 2, which were estimated to take 3.50 hours each.

In an undated statement, a coworker who was also a custodian explained that tour two custodians are known as "the cleaning tour."

In a report dated January 5, 2017, Dr. Mittleman noted that appellant continued to have symptoms in his right hand during work, but that they could be ignored if he was really involved in his work. In appellant's left hand, the symptoms were distractingly painful.

By decision dated June 28, 2017, OWCP denied appellant's request for reconsideration. It found that the evidence submitted by him was irrelevant or immaterial because it had no bearing on the issue of causal relationship.

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.² 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.³

ANALYSIS

OWCP issued a decision dated April 12, 2016, in which it found that appellant's description of duties of his federal employment was inaccurate, based on the August 5, 2015 statement of a supervisor; and that as Dr. Mittleman's medical opinion was based on that, inaccurate history of injury, it was of little probative value in establishing a causal relationship. On November 29, 2016 and April 11, 2017 appellant requested reconsideration.

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 her claim. The Board finds that he met the requirements of 20 C.F.R. § 10.606(b)(3) in both his November 29, 2016 and April 1, 2017 requests for reconsideration and OWCP incorrectly denied merit review in both decisions.

In his November 29, 2016 and April 11, 2017 requests for reconsideration, 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, he is not entitled to a review of the merits of his 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 his alleged employment duties as a letter carrier and custodian caused his diagnosed bilateral hand conditions. A claimant may be entitled to a merit review by submitting new and relevant evidence, and in the present claim, appellant submitted new and relevant evidence that was mischaracterized as irrelevant or repetitive by OWCP.

In a statement dated August 5, 2015, a supervisor contended that appellant's workload did not consist of four to five hours of consistent gripping, grasping, and dust mopping. He stated that appellant may use one to two hours cleaning a work area, using the remainder of his time to pick up loose paper and trash with a "toy broom" and maintaining a clean workspace. The supervisor noted that appellant would normally have to wipe mirrors "maybe once a week,"

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

³ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

consisting of seven mirrors at three minutes a piece; and that recycling of cardboard boxes would take up to 20 minutes.

By decision dated April 12, 2016, OWCP reviewed the merits of appellant's claim and declined to modify its prior decision. It found that his description of duties of his federal employment was inaccurate, based on the August 5, 2015 statement from the supervisor; and that as Dr. Mittleman's medical opinion was based on that inaccurate history of injury, it was of little probative value in establishing a causal relationship.

With his November 29, 2016 request for reconsideration, appellant submitted a November 4, 2016 report from Dr. Mittleman. Dr. Mittleman referred to a July 5, 2016 letter from appellant's coworker, stating that, as a tour two custodian, appellant performed cleaning routes involving thorough cleaning, while the custodians on other tours performed policing routes, which entailed far less thorough cleaning. Based upon this July 5, 2016 letter, he contended that the history of injury as related to him by appellant was accurate, and the history of injury accepted by OWCP in its April 12, 2016 decision was inaccurate. Dr. Mittleman reiterated that his diagnosis was for aggravation of early hand arthritis, and that Dr. Rabinovich had not addressed his second diagnosis of chronic sprain/strain of the bilateral hands.

Appellant also submitted an employee work assignment sheet dated September 8, 2015, demonstrating, contrary to the supervisor's statement of August 5, 2015, that he was scheduled to clean for four hours and recycle cardboard, plastic, and paper for zero hours.

Dr. Mittleman's November 4, 2016 report, the employee work assignment sheet, and the account of appellant's duties by a coworker were new and relevant pieces of evidence. OWCP denied the probative value of Dr. Mittleman's report based on an inaccurate description of appellant's duties. Because the reason for finding that Dr. Mittleman's opinion on causation was not probative was wholly based on the supervisor's August 5, 2015 statement, the evidence submitted by appellant regarding his duties is relevant to the claim. Furthermore, although OWCP may have considered Dr. Mittleman's November 4, 2016 report to be of little probative value based on the supervisor's August 5, 2015 statement, it was still a medical report from a qualified physician containing an opinion on causal relationship. As such, both the evidence regarding appellant's actual duties of federal employment and Dr. Mittleman's November 4, 2016 report were relevant evidence not previously considered by OWCP. OWCP erred in denying merit review in its February 24, 2017 decision.

For similar reasons, OWCP also erred in denying merit review in its June 28, 2017 decision. Evidence not previously considered relative to appellant's duties in the supervisor's August 5, 2015 statement would be relevant to establishing causal relationship. On reconsideration, appellant submitted work assignment sheets from various dates, demonstrating that the account of his duties in the supervisor's statement was not correct. Thus, OWCP was incorrect in finding that he had not submitted relevant evidence not previously considered with his April 1, 2017 request for reconsideration, because OWCP's finding that Dr. Mittleman's opinion on causal relationship was of little probative value was based entirely on the supervisor's August 5, 2015 statement, and work assignment sheets casting doubt on that statement are therefore relevant evidence to the issue of causal relationship.

As such, the Board finds that OWCP improperly declined to reopen appellant's claim for a review of the merits in its February 24 and June 28, 2017 decisions. Dr. Mittleman's report of November 4, 2016; the work assignment sheet dated September 8, 2015; the statements of coworkers on appellant's duties; and the work assignment sheets dated between April 5 and 8, 2017 were relevant to the underlying issue of whether appellant's alleged employment duties caused his diagnosed conditions. OWCP was required to reopen the case for merit review upon reconsideration.

The Board accordingly finds that appellant met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3) in his reconsideration requests of November 29, 2016 and April 1, 2017. Appellant submitted relevant and pertinent evidence not previously considered. Thus, pursuant to 20 C.F.R. § 10.608, OWCP improperly denied merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 28 and February 24, 2017 decisions of the Office of Workers' Compensation Programs are vacated and this case is remanded for further proceedings consistent with this opinion, to be followed by an appropriate decision.

Issued: February 2, 2018
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