

FACTUAL HISTORY

On July 22, 2014 appellant, then a 54-year-old financial technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained an injury at work on July 22, 2014 when a chair slipped out from under her and she fell to the floor. She stopped work on that day and she initially received continuation of pay.

OWCP accepted appellant's claim for a lumbar sprain. Appellant received disability compensation on the daily rolls beginning November 30, 2014 and on the periodic rolls beginning May 3, 2015.²

In April 2015, OWCP referred appellant for a second opinion examination with Dr. Dowse D. Rustin, a Board-certified orthopedic surgeon. It requested that Dr. Rustin provide an opinion regarding whether appellant continued to have residuals of her July 22, 2014 employment injury.

In a May 5, 2015 report, Dr. Dowse discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that appellant exhibited weakness in her right lower extremity. Dr. Dowse determined that appellant continued to have residuals due to her July 22, 2014 employment injury which prevented her from performing any work.

In a June 19, 2015 report, Dr. Charles Nivens, a Board-certified physical medicine and rehabilitation physician, indicated by checkmark that appellant could return to sedentary work on a full-time basis.

In a July 13, 2015 notice, OWCP advised appellant that it proposed to terminate her wage-loss compensation because she no longer had residuals due to her July 22, 2014 employment injury. It advised appellant that the proposed termination action was supported by Dr. Niven's June 19, 2015 report which found her capable of sedentary work on a full-time basis. OWCP indicated that appellant's regular work as a financial technician was mainly sedentary in nature. It afforded appellant 30 days to submit additional evidence and argument challenging the proposed action.

Appellant submitted reports from several attending physicians, including a July 27, 2015 report from Dr. Nivens, a June 24, 2015 report of Dr. Peter Munson, a Board-certified family practitioner, and a June 29, 2015 report from Dr. Pamela Edwards, a Board-certified family practitioner.

By decision dated September 23, 2015, OWCP terminated appellant's wage-loss compensation effective September 23, 2015 because she had no residuals of her July 22, 2014 employment injury after that date. It determined that the weight of the medical opinion evidence rested with Dr. Niven's June 19, 2015 report. OWCP noted that Dr. Niven provided an opinion

² Appellant received leave buy back before she received disability compensation on the daily rolls.

finding that appellant no longer had disability due to her July 22, 2014 employment injury. It advised that this decision did not terminate her medical benefits.

On October 5, 2015 appellant requested reconsideration of OWCP's September 23, 2015 decision. In a September 28, 2015 report, Dr. Edwards opined that appellant was totally disabled from work until she underwent an orthopedic evaluation.

By decision dated September 23, 2015, OWCP vacated its September 23, 2015 decision because the medical evidence of record, including Dr. Rustin's May 5, 2015 report and Dr. Edward's September 28, 2015 report, established that appellant was still disabled due to her July 22, 2014 employment injury.

In a July 20, 2016 report, Dr. Nivens indicated that, upon examination, appellant exhibited paresthesias in her right leg and weakness in both legs. He diagnosed degenerative arthritis of the lumbar spine and described his application of median nerve blocks to appellant's low back.

In early August 2016, OWCP referred appellant for a second opinion examination with Dr. Henry C. Deriso, a Board-certified orthopedic surgeon. It requested that Dr. Deriso provide an opinion regarding whether appellant continued to have residuals of her July 22, 2014 employment injury.

Prior to her appointment with Dr. Deriso, in an August 16, 2016 report, Dr. Nivens diagnosed degenerative arthritis of the lumbar spine and described his application of injections to the facet joints of appellant's low back.

In an August 19, 2016 report, Dr. Deriso detailed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that a magnetic resonance imaging (MRI) scan of appellant's low back from 2016 showed various degenerative changes.³ Dr. Deriso noted that appellant complained of back pain upon right straight leg raising to 90 degrees, but complained of the same amount of pain when flexing her right knee. The neurological examination of appellant's back and lower extremities revealed no focal deficits and there was no muscle atrophy upon visual inspection. Dr. Deriso opined that appellant had no ongoing disabling residuals of her accepted July 22, 2014 lumbar sprain. He noted that there were no objective findings to support the chronicity of appellant's complaints. Appellant only had a history of a sprain and there was nothing seen upon physical examination or diagnostic testing that would not have resolved within a matter of weeks.

In response to a question regarding the existence of objective findings to support disability as a result of the July 22, 2014 employment injury, Dr. Deriso noted, "There are none. [Appellant] has findings on her MRI [scan] that you would see in this age population. I do not think any of these are significant pathological lesions." He indicated that these findings, combined with appellant's examination findings, did not support any condition that would make her disabled and opined that the findings on diagnostic testing were probably the beginning of some degenerative

³ The record contains an April 29, 2016 MRI scan of appellant's low back which contains an impression of mild multilevel degenerative disc changes at L3-4 through L5-S1 without significant anterior or posterior osteophytes, and moderate bilateral facet arthropathy at L2-3 through L5-S1 (worse at L4-5).

discs in her back “which is a normal attritional process.”⁴ Dr. Deriso concluded that appellant had no residuals of her July 22, 2014 employment injury and advised that she could perform her regular work. Appellant had no work restrictions and there was no objective evidence to support her continued subjective complaints of pain. Dr. Deriso also completed a work capacity evaluation form (OWCP-5c form) in which he indicated that appellant did not have any work restrictions.

In a March 8, 2017 notice, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals of her July 22, 2014 employment injury. It advised appellant that the proposed termination action was justified by Dr. Deriso’s August 19, 2016 report. OWCP afforded appellant 30 days to submit additional evidence and argument challenging the proposed action.

Appellant submitted a March 15, 2017 report from Dr. Nivens, who diagnosed several lumbar conditions, including intervertebral disc disorders with radiculopathy, and spondylosis without myelopathy or radiculopathy. Dr. Nivens indicated that appellant did not want to participate in physical therapy and noted that his office would not schedule any further appointments with appellant. Appellant also submitted reports which were already in the case record.

By decision dated May 11, 2017, OWCP terminated appellant’s wage-loss compensation and medical benefits effective May 12, 2017 because she had no residuals of her July 22, 2014 employment injury after that date. It determined that the weight of the medical opinion evidence rested with Dr. Deriso’s August 19, 2016 report. OWCP noted that Dr. Deriso provided a well-rationalized opinion finding that appellant ceased to have residuals of her July 22, 2014 employment injury.

On May 22, 2017 appellant requested reconsideration of the May 11, 2017 decision. She submitted documents which were already in the case record.

By decision dated July 24, 2017, OWCP denied modification of its May 11, 2017 decision. It determined that the weight of the medical opinion evidence still rested with Dr. Deriso’s August 19, 2016 report which showed that appellant ceased to have residuals of her July 22, 2014 employment injury.

On August 10, 2017 appellant requested reconsideration of the July 24, 2017 decision. In an August 4, 2017 statement, she argued that the medical evidence of record showed that she continued to be totally disabled due to residuals of her July 22, 2014 employment injury.

Appellant submitted copies of medical reports from physicians, including Dr. Rustin, Dr. Edwards, and Dr. Nivens, which were previously of record and considered by OWCP. She also submitted administrative documents which were already in the record such as copies of prior OWCP decisions and a July 25, 2016 notice of proposed disability separation.

⁴ Dr. Deriso also indicated that the bulges seen on appellant’s MRI scan were “just due to her age and not to any type of injury.”

By decision dated August 17, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It determined that the evidence and argument that appellant submitted in connection with her timely reconsideration request was repetitive or immaterial to the underlying issue of the case.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 12, 2017 because she had no residuals of her July 22, 2014 employment injury after that date.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Deriso, OWCP's referral physician. The August 19, 2016 report of Dr. Deriso establishes that appellant had no disability due to her July 22, 2014 employment injury after May 12, 2017.

In his August 19, 2016 report, Dr. Deriso detailed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that his neurological examination of appellant's back and lower extremities revealed no focal deficits and there was no muscle atrophy upon visual inspection. Dr. Deriso opined that appellant had no ongoing disabling residuals of her accepted July 22, 2014 lumbar sprain. He noted that there were no objective findings to support the chronicity of appellant's complaints. Appellant only had a history of a sprain and there was nothing seen upon physical examination or diagnostic testing that would not have resolved within a matter of weeks. In response to a question regarding the existence of objective findings to support disability as a result of the July 22, 2014 employment injury, Dr. Deriso noted that she had none and he attributed the findings seen on a recent MRI scan to her age.⁸ He found that appellant did not have any significant pathological lumbar lesions and posited that her lumbar sprain was the type of injury that would have resolved long ago. Dr. Deriso concluded his report by again noting that appellant had no residuals of her July 22, 2014 employment injury and he advised that she could perform her regular work without restrictions.

⁵ *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ Dr. Deriso also indicated that the bulges seen on appellant's MRI scan were "just due to her age and not to any type of injury."

The Board has reviewed the opinion of Dr. Deriso and notes that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Deriso provided a thorough factual and medical history and accurately summarized the relevant medical evidence.⁹ He provided medical rationale for his opinion by explaining that appellant ceased to exhibit objective findings of the accepted employment injury. Dr. Deriso noted that the degenerative changes of appellant's low back were related to her age and were not associated with her July 22, 2014 employment injury.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.¹¹

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (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.¹² If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.¹³ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁴

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁵ For OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System (iFECS).¹⁶ If the last day of the one-

⁹ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁰ The record contains reports from mid-2016 and early-2017 in which Dr. Nivens, an attending physician, indicated that appellant had a degenerative condition of her low back. Dr. Nivens did not provide any indication that this condition was related to the accepted July 22, 2014 lumbar sprain or otherwise discuss the cause of the condition. The Board has held that medical evidence which does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship. See *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(3); see also *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹³ *Id.* at § 10.608(a); see also *M.S.*, 59 ECAB 231 (2007).

¹⁴ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). See also *C.B.*, Docket No. 13-1732 (issued January 28, 2014). For decisions issued before June 1, 1987 there is no regulatory time limit for when reconsideration requests must be received. For decisions issued from June 1, 1987 through August 28, 2011, the one-year time period begins on the next day after the date of the original decision and must be mailed within one year of OWCP's decision for which review is sought.

year time period is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.¹⁷

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁸ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹

ANALYSIS -- ISSUE 2

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).

The Board finds that appellant's request for reconsideration has not met any of the requirements of 20 C.F.R. § 10.606(b)(3), and it does not require OWCP to reopen the case for further review of the merits of the claim. Appellant's request for reconsideration 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 by OWCP. She argued that she had established that she continued to be totally disabled due to residuals of her July 22, 2014 employment injury. However, appellant's own opinion on the cause of her continuing disability would not be relevant to the underlying issue in this case, *i.e.*, whether the medical evidence establishes that appellant ceased to have residuals of her July 22, 2014 employment injury. This is a medical issue which must be addressed by relevant medical evidence.²⁰ As noted above, the submission of argument/evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²¹

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case. Appellant submitted copies of medical reports from physicians, including Dr. Rustin, Dr. Edwards, and Dr. Nivens, which were previously submitted and considered by OWCP.²² The submission of this evidence would not require reopening appellant's case for merit review as the Board has held that 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.²³

¹⁷ *Id.* at Chapter 2.1602.4. *See also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹⁸ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

²⁰ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

²¹ *See id.*

²² Appellant also submitted administrative documents which were already in the record such as copies of prior OWCP decisions and a July 25, 2016 notice of proposed disability separation.

²³ *See supra* note 19.

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 met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 12, 2017 because she had no residuals of her July 22, 2014 employment injury after that date. The Board further 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 August 17 and July 24, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 25, 2018
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