

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an injury due to a January 27, 2016 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 18, 2016 OWCP received a traumatic injury claim (Form CA-1) which indicated that appellant, then a 53-year-old facilities services worker, injured her lower back at work on January 27, 2016. Appellant was reportedly working outdoors on Jefferson Drive adjacent to the employing establishment's National Air and Space Museum. The Form CA-1 noted that she "[was pushing a salt spreader ... up the steps]." Appellant then cut a bag (of salt) open with a key, and when she went to lift the bag her "knees went out." She stopped work on January 27, 2016.⁴

Appellant submitted a March 15, 2016 report from Dr. Brittany Harris, an attending chiropractor, who listed a date of injury of January 27, 2016 and reported examination findings regarding her low back. Dr. Harris indicated that appellant was not cleared to return to work. In a separate March 15, 2016 report, she advised that she was treating appellant for a spinal condition and that she would not be able to return to work. In a March 22, 2016 notation on this report, Dr. Ghulam Abbas, an attending Board-certified family practitioner, indicated, "I agree with Dr. Harris."⁵

In an April 13, 2016 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim. It asked her to provide further details regarding the circumstances of the claimed January 27, 2016 injury.⁶

Appellant submitted a February 18, 2016 report from Dr. Rashida Cohen, an attending chiropractor, who indicated that she had reported experiencing left low back pain and posterior thigh pain after engaging in heavy lifting at work during the last week of January 2016.⁷ Dr. Cohen reported examination findings and diagnosed low back pain, myalgia, muscle spasm of back, and segmental and somatic dysfunction of the lumbar, pelvic, and sacral regions. She treated appellant with a low-volt electronic muscle stimulation machine. Dr. Cohen produced reports dated

⁴ Appellant's portion of the claim form is unsigned. She later advised that the Form CA-1 was completed by her supervisor, E.W., whose name/signature appears under item 38. As discussed *infra*, appellant takes issue with the accuracy of some of the information reported by E.W. on the Form CA-1.

⁵ Appellant also submitted a March 11, 2016 report in which Nancy Shinozuka, a registered nurse and case manager for the employing establishment, requested that Dr. Abbas submit an updated work status report.

⁶ OWCP advised appellant that chiropractors are only considered physicians under FECA to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.

⁷ Appellant reported that she went to the emergency room on January 27, 2016 and received an injection. The record does not contain a report of such an emergency room visit.

February 22, 24, 29, March 9, 15, 16, 23, April 4 and 6, 2016 in which she provided the same diagnoses.⁸

In a report dated May 12, 2016, Dr. Abbas indicated that he had been treating appellant for chronic back pain since February 2016. He discussed appellant's pain symptoms and described her participation in physical therapy sessions.

By decision dated May 17, 2016, OWCP denied appellant's claim for a January 27, 2016 work injury. It found that appellant had not established fact of injury because the evidence submitted did not establish that the claimed injury and/or event occurred as alleged. OWCP noted that appellant did not respond to the request in its April 13, 2016 development letter to submit additional factual evidence.⁹

On June 1, 2016 appellant requested reconsideration of the May 12, 2016 decision.

Appellant submitted April 20 and 25, 2016 reports in which Dr. Cohen again diagnosed low back pain, myalgia, muscle spasm of back, and segmental and somatic dysfunction of the lumbar, pelvic, and sacral regions.

A May 13, 2016 lumbar magnetic resonance imaging (MRI) scan revealed a central extruded disc at L5-S1 without definite neural compression or spinal stenosis.

In a May 23, 2016 disability certificate, Dr. Janaki Kalyanam, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant had been under her care since May 23, 2016. She diagnosed "back injury January 27, 2016," L5-S1 disc extrusion, lumbar radicular symptoms bilaterally, and back muscle spasm. Dr. Kalyanam indicated that appellant was unable to return to work.

Appellant also submitted a May 23, 2016 narrative report in which Dr. Kalyanam indicated that appellant reported that she lifted a bag of salt on January 27, 2016 and experienced excruciating pain which radiated down both legs. Dr. Kalyanam advised that appellant was being seen for a lumbar injury which occurred at work and diagnosed several back conditions, including intervertebral disc extrusion and lumbar radiculopathy.

In a May 31, 2016 report, Dr. Abbas noted that appellant developed a back injury at work by lifting heavy salt bags. He indicated that appellant's MRI scan showed L5-S1 disc extrusion and noted that physical examination revealed tenderness in the lumbar and paraspinal areas. Dr. Abbas recommended that appellant resume physical therapy. On June 16, 2016 he advised that appellant presented due to a flare-up of her chronic low back pain. Dr. Abbas noted that her "pain gets exacerbated by lifting heavy objects."

In a July 28, 2016 report, Dr. Oladunni Filani, an attending Board-certified family practitioner, indicated that appellant was currently undergoing treatment for recurrent low back pain which was secondary to herniation of a lumbar vertebral disc. He noted that this problem was

⁸ In some of the reports, Dr. Cohen indicated that appellant had "daily objective findings" of spinal subluxations.

⁹ OWCP also indicated that appellant did not submit medical evidence relating a diagnosed condition to an employment factor.

aggravated by another injury at work that occurred while appellant was lifting a heavy object, and that it continued to cause her recurrent low back pain with numbness and occasional weakness of her right lower extremity. Dr. Filani advised that appellant would continue to experience intermittent flare-ups which might make it difficult for her to continue to do any work that involved lifting. Appellant was advised to continue with physical therapy.¹⁰

By decision dated August 26, 2016, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It indicated that the evidence submitted by appellant was immaterial to the main issue of her claim.

In an August 29, 2016 report, Dr. Filani noted that appellant reported that at work on January 27, 2016 she was attempting to lift a bag of salt into a snow spreader when she developed sudden onset low back pain radiating to her right leg. He indicated that appellant had since experienced recurrent flare-ups and difficulty with walking, bending, and lifting. Dr. Filani advised that a lumbar spine MRI scan showed evidence of a herniated lumbar disc.

By decision dated October 6, 2016, OWCP vacated its August 26, 2016 decision, noting that it had not adequately reviewed the evidence submitted by appellant in connection with her June 1, 2016 reconsideration request. It conducted a merit review of her claim, but denied modification of its May 17, 2016 decision, noting that she had not established fact of injury because the evidence submitted did not establish that the claimed injury and/or event occurred.

On October 24, 2016 appellant requested reconsideration of the October 6, 2016 decision.

In a May 11, 2016 statement, appellant indicated that while at work on January 27, 2016 she was lifting a bag of salt out of a salt spreader and experienced an excruciating, sharp pain in her lower back which radiated down the back of her legs. She advised that she dropped to her knees and fell into a sitting position. Appellant then rested on her left side until the ambulance arrived.

In an October 10, 2016 report, Dr. Filani indicated that he examined appellant on July 18, August 29, and October 10, 2016. He noted that she reported that at work on January 27, 2016 she was attempting to lift a bag of salt into a snow spreader when she developed sudden onset low back pain radiating to her right leg. Appellant reported that she had experienced recurrent flare-ups and difficulty with walking, bending, and lifting. Dr. Filani detailed the findings of his October 10, 2016 examination and found that appellant was unable to return to work. He indicated that appellant had a lumbar MRI scan which showed evidence of a herniated lumbar disc and he recommended that she undergo physical therapy.

By decision dated November 29, 2016, OWCP denied appellant's claim for a January 27, 2016 work injury. It modified its prior decisions to reflect that appellant had established the January 27, 2016 employment incident occurred as alleged. However, OWCP further found that she failed to submit rationalized medical evidence relating a diagnosed condition to the accepted employment incident.

¹⁰ Appellant also submitted a June 23, 2016 letter in which Ms. Shinozuka requested that Dr. Kalyanam submit an updated report detailing appellant's present medical condition.

On January 23, 2017 appellant requested reconsideration of the November 29, 2016 decision. In a January 19, 2017 letter, she indicated that her supervisor incorrectly completed the Form CA-1 because she suggested that she injured herself on January 27, 2016 by pushing a salt spreader. Appellant asserted that her January 27, 2016 injury occurred when she lifted a bag of salt.

In a December 6, 2016 report, Dr. Filani indicated that he examined appellant on July 18, August 29, October 10, and December 6, 2016. He noted that she reported that at work on January 27, 2016 she was attempting to lift a bag of salt into the snow spreader when she developed sudden onset low back pain radiating to her right leg. Appellant reported that she had experienced recurrent flare-ups and difficulty with walking, bending, and lifting. Dr. Filani detailed the findings of his December 6, 2016 examination and found that appellant was unable to return to work. He indicated that appellant had a lumbar MRI scan which showed evidence of a herniated lumbar disc and he recommended that she undergo physical therapy.

By decision dated March 9, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It noted that the evidence she submitted in support of her reconsideration request was cumulative in nature.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA¹¹ has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.¹² These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.¹³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.¹⁴ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.¹⁵

¹¹ *Supra* note 2.

¹² *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹³ *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. §§ 10.5 (q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

¹⁴ *Julie B. Hawkins*, 38 ECAB 393 (1987).

¹⁵ *John J. Carlone*, 41 ECAB 354 (1989).

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁶

Under section 8101(2) of FECA, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.¹⁷ OWCP's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.¹⁸

ANALYSIS -- ISSUE 1

Appellant claimed that on January 27, 2016 she sustained injury to her back with pain radiating into her legs due to lifting a bag of salt. OWCP denied her claim for a January 27, 2016 work injury in several decisions. In a November 29, 2016 decision, it found that appellant had established the occurrence of a January 27, 2016 employment incident as alleged. However, OWCP further found that she failed to submit rationalized medical evidence relating a diagnosed condition to the accepted employment incident.

The Board finds that appellant has failed to meet her burden of proof to establish an injury due to a January 27, 2016 employment incident.

Appellant submitted a March 15, 2016 report from Dr. Harris, an attending chiropractor, who listed a date of injury of January 27, 2016 and reported examination findings for her low back. Dr. Harris indicated that appellant was not cleared to return to work. This report of Dr. Harris does not constitute probative medical evidence because Dr. Harris did not indicate that appellant had a spinal subluxation as demonstrated by x-rays to exist.¹⁹ Appellant also submitted several reports dated between February and April 2016 of Dr. Cohen, an attending chiropractor, but these

¹⁶ See *I.J.*, 59 ECAB 408 (2008); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

¹⁷ 5 U.S.C. § 8101(2). See *Jack B. Wood*, 40 ECAB 95, 109 (1988).

¹⁸ 20 C.F.R. § 10.5(bb); see also *Bruce Chameroy*, 42 ECAB 121, 126 (1990).

¹⁹ See *supra* notes 17 and 18. In another March 15, 2016 report, Dr. Harris advised that she was treating appellant for a spinal condition and that she would not be able to return to work. In a March 22, 2016 notation on this report, Dr. Abbas, an attending Board-certified family practitioner, indicated, "I agree with Dr. Harris." Although Dr. Abbas affirmed Dr. Harris' opinion on disability, this affirmation is of limited probative value on the relevant issue of the present case because Dr. Abbas did not provide any opinion on the cause of appellant's disability. The Board has held that medical evidence which does not offer a clear opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. See *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

reports also would not constitute probative medical evidence because Dr. Cohen did not indicate that appellant had a spinal subluxation as demonstrated by x-rays to exist.²⁰

In a May 23, 2016 report, Dr. Kalyanam indicated that appellant had been under her care since May 23, 2016. She diagnosed “back injury January 27, 2016,” L5-S1 disc extrusion, lumbar radicular symptoms bilaterally, and back muscle spasm. Dr. Kalyanam indicated that appellant was unable to return to work. In a separate May 23, 2016 report, she noted that appellant reported that she lifted a bag of salt on January 27, 2016 and experienced excruciating pain which radiated down both legs. Dr. Kalyanam advised that appellant was being seen for a lumbar injury which occurred at work and diagnosed several back conditions, including intervertebral disc extrusion and lumbar radiculopathy.

The Board finds that the submission of these reports do not establish appellant’s claim for a January 27, 2016 work injury. Although Dr. Kalyanam suggested that appellant sustained an injury on January 27, 2016 due to lifting, she did not provide a clear, rationalized medical opinion on causal relationship. She did not describe the January 27, 2016 employment incident in any detail or explain how it could have caused a diagnosed medical condition. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition.²¹ Dr. Kalyanam’s reports are of limited probative value on the relevant issue of this case for the further reason that she did not provide a detailed factual and medical history.²²

In a July 28, 2016 report, Dr. Filani indicated that appellant was currently undergoing treatment for recurrent low back pain which was secondary to herniation of a lumbar vertebral disc. He noted that this problem was aggravated by another injury at work which occurred while appellant was lifting a heavy object and that it continued to cause her recurrent low back pain with numbness and occasional weakness of her right lower extremity. Dr. Filani advised that appellant would continue to experience intermittent flare-ups which might make it difficult for her to continue to do any work that involved lifting. In August 29 and October 10, 2016 reports, he noted that appellant reported that at work on January 27, 2016 she was attempting to lift a bag of salt into a snow spreader when she developed sudden onset low back pain radiating to her right leg. Dr. Filani advised that a lumbar MRI scan showed evidence of a herniated lumbar disc.

Dr. Filani’s reports do not establish appellant’s claim for a January 27, 2016 work injury because he did not provide a rationalized medical opinion relating a diagnosed condition to the accepted January 27, 2016 employment incident. The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal

²⁰ In some of the reports, Dr. Cohen indicated that appellant had “daily objective findings” of spinal subluxations, but she did not indicate that they were demonstrated by x-rays to exist.

²¹ See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017); *D.R.*, Docket No. 16-0528 (issued August 24, 2016).

²² See *supra* note 16. In a May 31, 2016 report, Dr. Abbas noted that appellant developed a back injury at work by lifting heavy salt bags. He indicated that an MRI scan showed L5-S1 disc extrusion and noted that physical examination revealed tenderness in the lumbar and paraspinal areas. However, Dr. Abbas did not provide a clear opinion that appellant sustained a diagnosed condition due to the specific, accepted January 27, 2016 employment incident and his May 31, 2016 report is of limited probative value regarding the claimed work injury. See *Charles H. Tomaszewski*, *supra* note 19.

relationship which is unsupported by medical rationale.²³ Dr. Filani only provided a general description of the January 27, 2016 employment incident and he provided no explanation of how this incident caused or aggravated a diagnosed medical condition. In fact, it appears that he merely referenced appellant's belief that she sustained an injury due to the January 27, 2016 employment incident, rather than provided his own opinion relative to causal relationship. Dr. Filani did not provide a clear, unequivocal opinion that he believed that she sustained a diagnosed medical condition due to the January 27, 2016 employment incident.²⁴

On appeal appellant argues that a Form CA-1 was submitted on her behalf by her supervisor which contained many inaccuracies.²⁵ She also argues that she submitted medical evidence showing that she sustained an injury at work on January 27, 2016 which exacerbated her back condition and affected her ability to work. The Board notes that appellant later clarified the nature of her claimed injury and OWCP has accepted the occurrence of a January 27, 2016 employment incident as alleged, *i.e.*, lifting a bag of salt. Moreover, the Board has explained the deficiencies of the medical evidence submitted by appellant.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.²⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.²⁷ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.²⁸ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.²⁹ When a timely application for reconsideration does not meet at least one

²³ *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

²⁴ The Board has held that an opinion which is equivocal or speculative is of limited probative value regarding the issue of causal relationship. See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

²⁵ Appellant also asserts, without explanation, that her "claim was never submitted correctly."

²⁶ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

²⁷ 20 C.F.R. § 10.607.

²⁸ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

²⁹ 20 C.F.R. § 10.606(b)(3).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.³⁰

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record³¹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.³²

ANALYSIS -- ISSUE 2

OWCP issued a decision on November 29, 2016. Appellant requested reconsideration of that decision on January 23, 2017.

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 the claim. In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted, nor did she advance a new and relevant legal argument not previously considered by OWCP. The underlying issue in this case is whether the medical evidence establishes a back or leg injury due to the accepted January 27, 2016 employment incident, *i.e.*, lifting a bag of salt. That is a medical issue which must be addressed by relevant medical evidence.³³ 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.

On reconsideration appellant submitted a December 6, 2016 report of Dr. Filani. However, the submission of this report would not require reopening of her claim for merit review because this report is substantially similar to reports she previously submitted and already considered by OWCP. In particular, Dr. Filani's December 6, 2016 report is strikingly similar to his October 10, 2016 report which OWCP had previously deemed to be insufficient to establish appellant's claim for a January 27, 2016 work injury.³⁴ As noted, 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.³⁵

³⁰ *Id.* at § 10.608(a), (b).

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

³² *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

³³ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

³⁴ In both reports, Dr. Filani indicated that appellant reported she was attempting to lift a bag of salt into the snow spreader at work on January 27, 2016 when she developed sudden onset low back pain radiating to her right leg. He advised that an MRI scan showed a herniated lumbar disc, but he did not provide an opinion on the cause of this condition in either report.

³⁵ *See supra* note 31.

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 appellant has not met her burden of proof to establish an injury due to a January 27, 2016 employment incident. 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 March 9, 2017 and November 29, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 7, 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