United States Department of Labor
Employees' Compensation Appeals Board

E.O., Appellant	)	
and	)	**Docket No. 18-0054**
	)	**Issued: March 28, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Windsor, CT, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 9, 2017 appellant, through counsel, filed a timely appeal from a September 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated August 1, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

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).

FACTUAL HISTORY

On February 25, 2015 appellant, then a 55-year-old legal administrative assistant, filed a traumatic injury claim (Form CA-1) alleging a back injury on February 13, 2015 due to lifting a bag of shredded paper while at an employing establishment worksite in New York City. She stopped work on February 13, 2015.[3]

Appellant received treatment for her medical condition from Dr. Luis A. Dias, Jr., an attending Board-certified internist. In reports dated February 19 and March 10, 2015, Dr. Dias found appellant to be disabled from work between mid-February and early-March 2015 due to the February 13, 2015 accident at work.

In a March 23, 2015 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim.

Appellant submitted an April 7, 2015 report in which Dr. Dias discussed an April 2, 2015 magnetic resonance imaging (MRI) scan which showed disc herniation at L4-5. Dr. Dias indicated that appellant would be seen by a specialist for the "on-the-job injury to her back." He continued to find that appellant was disabled from work.

In an April 23, 2015 decision, OWCP denied appellant's claim for a work-related February 13, 2015 injury. It found that appellant had not established the occurrence of an employment incident as alleged because she had failed to submit additional factual information regarding the incident. OWCP also found that she failed to submit medical evidence relating a diagnosed condition to a specific incident/event at work.

On June 2, 2015 appellant, by undated letter and the submission of an appeal request form, requested reconsideration of OWCP's April 23, 2015 decision. Appellant further discussed the claimed February 13, 2015 employment incident, indicating that she felt a sharp pain in her lower back, which radiated down into her right leg, after lifting a 10 -to 15-pound bag of shredded paper out of a bin on that date.

In several narrative reports dated between March and May 2015, Dr. Dias briefly detailed the circumstances of the February 13, 2015 lifting incident and discussed the findings of his physical examinations of appellant. In his March 2015 reports, he diagnosed lumbar sprain and sciatica, but after receiving the April 2, 2015 MRI scan he also diagnosed herniated disc at L4-5 and intervertebral lumbar disc disorder with myelopathy. Dr. Dias continued to find disability from work.

[3] Appellant received continuation of pay through late-March 2015 and filed claims for compensation (Form CA-7) alleging disability for the period March 31 to April 17, 2015.

In a May 13, 2015 report, Dr. David M. Shein, an attending Board-certified orthopedic surgeon, indicated that appellant presented complaining of severe low back pain that started on February 13, 2015 when she was picking up a heavy bin from a shredding machine. Appellant reported that, as she stood up from the flexed position, she felt sudden searing pain in her low back with shooting, sharp pain radiating down her right lower extremity. Dr. Shein detailed the findings of his May 13, 2015 physical examination of appellant, noting that the sciatic stretch test was negative. He indicated that the MRI scan brought to him by appellant showed two desiccated discs at L4-5 and L5-S and an annular tear at L5-S1, and he found that appellant was 100 percent disabled from work.

In an August 3, 2015 decision, OWCP modified its April 23, 2015 decision to reflect that appellant had established the occurrence of an employment incident on February 13, 2015 in the form of lifting a bag of shredded paper. However, it also found that appellant failed to submit medical evidence sufficient to establish causal relationship between a diagnosed medical condition and the accepted February 13, 2015 employment incident, and thus it denied her claim for a February 13, 2015 work injury on this basis.

On November 2, 2015 appellant requested reconsideration of OWCP's August 3, 2015 decision through submission of an appeal request form.

In an October 5, 2015 report, Dr. Shein noted that appellant presented with the "preposterous situation in which she asks me to provide definite assessment of her development of backache from a work-related injury." He asserted that it was clear-cut from his May 13, 2015 report that eight months prior appellant was picking up a heavy bin after shredding, felt sudden wrenching pain in her lower back, and ruptured a disc in her lower back. Dr. Shein noted that this was a straightforward, uncomplicated problem which was causally related to her work. He reported the physical examination findings he obtained on October 5, 2015, noting that the motor examination was fully intact and that the sciatic stretch test was strongly positive. Dr. Shein diagnosed "lumbar dis[c] prolapse, work-related injury" and indicated that, if epidural injections in the low back do not help, he would recommend surgery at L5-S1.

In a January 28, 2016 decision, OWCP denied modification of its August 3, 2015 decision. It found that the submitted medical evidence, including Dr. Shein's October 5, 2015 report, did not contain medical rationale explaining the relationship of appellant's medical condition to the accepted February 13, 2015 employment incident.

On May 3, 2016 appellant requested reconsideration of OWCP's August 3, 2015 decision.

In a March 9, 2016 report, Dr. Shein indicated that he originally reported that appellant had been picking up a heavy bin, but he explained that she felt pain while removing a heavy bag with shredded paper from a bin and suffered a disc prolapse in her lumbar spine. He indicated, "This has been clearly identified both clinically as well as radiologically, evidenced on MRI scan by an L4-5 posterior disc herniation with midline radial annular tearing and thecal sac compression with peripheral components being encroached on by the disc material into the foramen." Dr. Shein reported the findings of his physical examination on March 9, 2016 and found that appellant was 100 percent disabled. He recommended that appellant undergo low back surgery in two or three months.

In an August 1, 2016 decision, OWCP denied modification of its January 28, 2016 decision. It found that the medical evidence submitted, including Dr. Shein's March 9, 2016 report, did not contain adequate medical rationale on causal relationship sufficient to establish appellant's claim for a work-related February 13, 2015 injury.

On June 21, 2017, appellant, through counsel, requested reconsideration of OWCP's August 1, 2016 decision. He argued that January 16, February 20, March 21, and May 23, 2017 reports he was submitting in connection with the reconsideration request established that, due to the February 13, 2015 employment incident, appellant sustained post-traumatic disc degeneration and rupture at L4-5 with associated facet joint misalignment and neural entrapment causing radiculopathy.

In the history portion of a February 20, 2017 report, Dr. Shein reported that appellant's status was two years of ongoing persistent lower backache and radiculopathy. He expressed his amazement and surprise that a colleague who evaluated appellant was paying attention to a 7.5-pound bag.[4] Dr. Shein noted, "Apparently this was weighed but this was one bag and was not the complete picture according to [appellant]. That bag was 7.5 pounds weighed, placed in a bin, and then paper was added to it thus increasing the weight, but whether this be 5 or 7 or 10 pounds more is irrelevant." He indicated that his colleague should know that leverage, even picking up a piece of paper off the floor, can rupture a disc and noted that "this is what has happened to her." Dr. Shein expressed his opinion that appellant remained problematic with her ongoing lower backache and pain in the right buttock and posterior thigh, calf, and foot. He noted that appellant had a work-related post-traumatic disc rupture at L4-5 associated facet joint malalignment and neural entrapment causing radiculopathy. Dr. Shein found that appellant was 100 percent disabled and unfit for work and indicated, "This is causally related to a workers' comp[ensation] related problem." He reported the findings of his February 20, 2017 physical examination noting that appellant remained symptomatic with a positive straight leg raise of about 70 to 80 degrees and a strongly positive sciatic stretch test. Dr. Shein indicated that, despite having days when she was relatively free of discomfort, her pain was more likely to flare up when she was more active. He noted, "This is what has kept her out of work." Dr. Shein recommended that she receive a second opinion regarding the possible need for a lumbar stabilization procedure with reconstitution of disc height, but noted that appellant's current symptoms did not warrant such surgery. He expressed his hope that reactive bone formation would stabilize appellant's facet joints/capsules and he found that she was 100 percent disabled.

In January 16, March 21, and May 23, 2017 reports, Martha Castro, a physician assistant, detailed appellant's factual/medical history and discussed the physical examinations of appellant on those respective dates. She provided diagnoses such as post-traumatic disc degeneration at L4-5 and acute chronic lumbar radiculopathy, and noted that appellant was 100 percent disabled and unfit for work.[5]

[4] Dr. Shein did not identify the colleague to which he referred.

[5] On these reports Ms. Castro provided the notation, "Dictating for Dr. David Shein," but these reports were not signed by Dr. Shein or otherwise adopted by him.

Appellant submitted an undated letter which she originally submitted on June 2, 2015 to effectuate a request for reconsideration of OWCP's April 23, 2015 decision.

In a September 19, 2017 decision, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence appellant submitted in support of her timely reconsideration request was duplicative or irrelevant/ immaterial to the underlying issue of her case.

LEGAL PRECEDENT

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.[6]

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.[7] If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.[8] 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.[9]

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.[10] 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).[11] If the last day of the one-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.[12]

[6] 5 U.S.C. § 8128(a).

[7] 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).

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

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

[10] 20 C.F.R. § 10.607(a).

[11] 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.

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

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record,[13] and the submission of evidence or argument which does not address the particular issue involved, does not constitute a basis for reopening a case.[14]

ANALYSIS

OWCP issued a decision on August 1, 2016 and it received appellant's request for reconsideration on June 21, 2017. Appellant's request was timely filed because it was received within one year of OWCP's August 1, 2016 decision.[15]

The issue presented on appeal is whether appellant's June 21, 2017 request for reconsideration met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim.

The Board finds that 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.

The underlying issue in this case is whether appellant submitted medical evidence sufficient to establish an injury due to the February 13, 2015 employment incident,[16] and this is a medical issue which must be addressed by relevant medical evidence.[17] 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 such evidence in this case.

Appellant submitted a February 20, 2017 report in which Dr. Shein expressed his amazement and surprise that a colleague who evaluated appellant was paying attention to a 7.5-pound bag. Dr. Shein noted, "Apparently this was weighed, but this was one bag and was not the complete picture according to [appellant]. That bag was 7.5 pounds weighed, placed in a bin, and then paper was added to it thus increasing the weight but whether this be 5 or 7 or 10 pounds more is irrelevant." Dr. Shein indicated that his colleague should know that leverage, even picking up a piece of paper off the floor, can rupture a disc and noted that "this is what has happened to her." He noted that appellant had a work-related post-traumatic disc rupture at L4-5 associated facet joint malalignment and neural entrapment causing radiculopathy. Dr. Shein found that appellant was 100 percent disabled and unfit for work and indicated, "This is causally related to a workers' comp[ensation][-]related problem."

The Board finds that submission of Dr. Shein's February 20, 2017 report would not require OWCP to reopen appellant's case for further review of the merits of the claim because the report

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

[14] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[15] *See supra* notes 11 through 13.

[16] OWCP accepted that appellant lifted a bag of shredded paper on February 13, 2015.

[17] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

is similar to earlier reports of Dr. Shein, which appellant submitted and OWCP deemed of limited probative value with respect to the question of whether appellant sustained an injury due to the February 13, 2015 employment incident. As noted above, 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.[18] For example, Dr. Shein's February 20, 2017 report is similar to his October 5, 2015 and March 9, 2016 reports, which had previously been considered by OWCP, in that it contains an opinion, unsupported by medical rationale, that the February 13, 2015 lifting incident caused a back injury. The reports are similar in that their lack of medical rationale on the matter of causal relationship renders them of limited probative value on the underlying issue of this case.[19]

Appellant submitted January 16, March 21, and May 23, 2017 reports of Ms. Castro, an attending physician assistant. The Board notes that these reports do not constitute probative medical evidence because they were not prepared by a physician within the meaning of FECA. Under FECA, the report of a nonphysician, including a physician assistant, does not constitute probative medical evidence.[20] These nonmedical reports would not be relevant to the underlying medical issue of this case and therefore their submission would not require OWCP to reopen appellant's case for further review of the merits of the claim.[21]

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 properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[18] *See supra* note 14.

[19] *See D.R.*, Docket No. 16-0528 (issued August 24, 2016) (finding that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining the relationship between a given employment activity and a diagnosed medical condition).

[20] *R.S.*, Docket No. 16-1303 (issued December 2, 2016); *L.L.*, Docket No. 13-0829 (issued August 20, 2013). *See* 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[21] *See supra* note 15. Appellant also submitted an undated letter which she originally submitted on June 2, 2015 to effectuate a request for reconsideration of OWCP's April 23, 2015 decision. However, 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. *See supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the September 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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