

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

This case has previously been before the Board.³ The facts and circumstances of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On December 19, 2007 appellant, then a 42-year-old computer operator, filed an occupational disease claim (Form CA-2) alleging that she sustained lumbar muscle strain and spasms when she bent down on October 12, 2007 to pick up mail and felt a pull as she stood up. She stopped work on December 4, 2007.

In a report dated February 14, 2008, Dr. Tek Mun Soo, an attending Board-certified neurosurgeon, found limited lumbar flexion. He opined that a magnetic resonance imaging (MRI) scan demonstrated degenerative disc disease at L4-5 and L5-S1 with endplate changes, and an L4-5 disc herniation. Dr. Soo obtained x-rays which demonstrated reduced disc spacing at L4-5 and L5-S1. He diagnosed discogenic back pain due to a herniated L4-5 disc and degenerative disc disease.

Appellant retired from federal employment effective July 14, 2009. Her claim for disability retirement benefits was approved by the Office of Personnel Management (OPM). Appellant continued medical treatment.

In a report dated April 29, 2010, Dr. John H. Traylor III, an attending physician Board-certified in anesthesiology and pain medicine, referred appellant for a series of epidural steroid injections. He provided periodic reports which noted chronic lumbar pain with right-sided radiculopathy, ameliorated by epidural steroid injections.

By decision dated July 7, 2010, OWCP accepted the claim for sciatica, lumbar radiculopathy, and displacement of a lumbar intervertebral disc. It paid appellant compensation for intermittent wage loss for the periods December 3 and 4, 2007, March 14 to April 1, 2008, and April 14 to 21, 2008.

On December 15, 2010 OWCP obtained a second opinion report as to the nature and extent of appellant's condition from Dr. Michael E. Kosinski, a Board-certified orthopedic surgeon. Dr. Kosinski asserted that he could not ascertain whether she had residuals of the accepted sciatica and lumbar conditions, but that her imaging studies were inconsistent with her symptoms of right-sided radiculopathy.

On February 18, 2011 OWCP obtained an updated second opinion report from Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, who opined that the accepted

³ Docket No. 09-0336 (issued July 13, 2009).

conditions had resolved without residuals and that appellant could perform the light-duty position she had begun on April 2, 2008.

In an April 7, 2011 report, Dr. Traylor found continued lumbar pain with right-sided radiculopathy.

OWCP found a conflict of medical opinion between Dr. Obianwu, for the government, and appellant's treating physicians regarding the nature and extent of appellant's injury-related condition. To resolve the conflict, it selected Dr. Mitchell Z. Pollak, a Board-certified orthopedic surgeon. Dr. Pollak provided an August 26, 2011 report in which he reviewed the medical record and a statement of accepted facts (SOAF) and provided his clinical findings on examination. He opined that the accepted sciatica, lumbar radiculopathy, and displaced lumbar intervertebral disc had resolved without residuals. Dr. Pollak found appellant able to perform the light-duty position she had begun on April 2, 2008.

By notice dated April 27, 2012, OWCP notified appellant that it proposed to terminate her wage-loss compensation and medical benefits, based on Dr. Pollak's opinion that the accepted conditions had ceased without residuals. It afforded her 30 days to submit additional evidence or argument.

Counsel responded by May 26, 2012 letter, in which she contended that appellant remained disabled from work due to residuals of the accepted conditions. She argued that Dr. Pollak's opinion supported the presence of injury-related residuals, and that it was insufficiently rationalized to represent the weight of the medical evidence in the claim. Counsel also asserted that the SOAF provided to Dr. Pollak and Dr. Obianwu was erroneous as it characterized appellant's retirement as voluntary, whereas the employing establishment forced appellant from her modified position. She also argued that there was not a true conflict of opinion between Dr. Soo and Dr. Obianwu, as Dr. Soo's professional experience as a hospital chief of neurosurgery and a clinical professor outweighed that of Dr. Obianwu.

Appellant submitted periodic reports from Dr. Traylor dated from May 10, 2012 through September 17, 2014. She underwent a series of lumbar epidural steroid injections through March 13, 2015.

By decision dated April 1, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day, based on Dr. Pollak's opinion as the special weight of the medical evidence afforded an impartial medical specialist.

Appellant, through counsel, requested an oral hearing on the April 1, 2015 decision before an OWCP hearing representative, held November 10, 2015. At the hearing, counsel contended that the April 1, 2015 termination was based on stale medical evidence as Dr. Pollak examined appellant more than three years previously on August 26, 2011. She also argued that there was no conflict of medical opinion between Dr. Traylor and Dr. Obianwu. Appellant testified that the employing establishment did not want her to continue working in the sedentary position, removed her ergonomic chair so she would have to stand while working, and attempted to find her another job. She explained that she instead decided to apply for disability retirement benefits through OPM.

Following the hearing, counsel submitted a December 9, 2015 memorandum in which she contended that medical evidence after Dr. Pollak's examination supported that appellant continued to be symptomatic. Additionally, OWCP issued an impairment rating after the termination based on evidence from 2014 and 2015 which demonstrated objective disability. Counsel also asserted that the SOAF provided to Dr. Obianwu and Dr. Pollak erred in noting that appellant retired voluntarily whereas the employing establishment changed appellant's light-duty job to force her into retirement.

By decision dated January 21, 2016, OWCP's hearing representative affirmed OWCP's April 1, 2015 decision. The hearing representative found that OWCP properly accorded Dr. Pollak's well-reasoned report the special weight of the medical evidence. The hearing representative further found that the SOAF provided to Dr. Obianwu and Dr. Pollak was complete and accurate.

On January 20, 2017 counsel requested reconsideration. She asserted that OWCP predicated the termination of appellant's wage-loss compensation and medical benefits on stale medical evidence, that there was no conflict of medical opinion between Dr. Traylor and Dr. Obianwu, and that the employing establishment forced appellant into disability retirement. Appellant submitted additional evidence.

Dr. Alexander Aljouni, Board-certified in anesthesiology and pain medicine, referred appellant for physical therapy treatments on November 6, 2015. Appellant participated in physical therapy on November 4 and 21, 2016. In reports dated February 5 and March 11, 2016, Dr. Aljouni found continued lumbar radiculopathy.

Appellant also provided procedure notes for lumbar epidural injections administered on January 4, June 10, and October 6, 2016.

In a report dated February 11, 2016, Dr. Soo noted that he had not treated appellant between 2008 and 2012. He opined that there was a "reasonable probability that [appellant's] back and right posterior leg pain were a result of her work-related injury" as the L4-5 disc herniation demonstrated by the initial MRI scan study in January 2008 was "suspicious for an acute injury, consistent with the temporal history of her work injury. Any existing degeneration at L4-5 and L5-S1 might have remained silent had the work incident not occurred."

By decision dated April 19, 2017, OWCP denied reconsideration, finding that appellant did not submit new and relevant evidence, or legal argument sufficient to warrant reopening the merits of her claim. It found that counsel's arguments were repetitive of her prior statements, considered by OWCP in its April 1, 2015 and January 21, 2016 decisions. OWCP further found that the reports of Dr. Aljouni and Dr. Soo were cumulative and repetitive of their prior opinions. It also found that the pain management procedure notes were irrelevant as they did not address the critical issue of whether the accepted lumbar conditions continued to disable appellant from work or require additional treatment on and after April 1, 2015.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁰

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered.

On reconsideration counsel argued that OWCP predicated the termination of appellant's compensation benefits on stale evidence, that there was no conflict in medical evidence when appellant was referred to Dr. Pollak for an impartial medical evaluation, and that she had not retired voluntarily. Counsel's January 20, 2017 arguments on reconsideration are repetitive of those in her May 26, 2012 letter contesting the proposed termination, and at the November 10, 2015 oral hearing. The Board has held that submission of argument which repeats or duplicates that already

⁴ 5 U.S.C. § 8128 (a). Under section 8128 of FECA, "[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 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *See Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *Annette Louise*, 54 ECAB 783 (2003).

in the case record does not constitute a basis for reopening a case.¹¹ As appellant did not allege that OWCP erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by OWCP, she is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered in support of her January 20, 2017 request for reconsideration. Dr. Soo's February 11, 2016 report reiterated the diagnoses and general support for causal relationship presented in his earlier February 14, 2008 report which OWCP reviewed in prior merit decisions. Similarly, Dr. Aljouni's February 5 and March 11, 2016 reports which noted continuing lumbar radiculopathy are repetitive of his earlier opinion from March 31, 2010 onward. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case under section 10.606(b)(3).¹²

Treatment notes relative to the lumbar injection procedure do not address the critical issue of whether appellant had continuing residuals of the accepted lumbar conditions on and after April 1, 2015. As such, these documents are irrelevant to the claim and do not comprise a basis for reopening the case on its merits.¹³

As appellant's application for review did not meet any of the three requirements enumerated under 10.606(b)(3), the Board finds that OWCP properly denied the request for reconsideration without reopening the case for a review on the merits.¹⁴

On appeal counsel asserts that there was an unresolved conflict of medical evidence at the time of the termination, that the termination was based on stale medical evidence, that OWCP failed to adjudicate all relevant issues in the claim, and impermissibly shifted the burden of proof to appellant. The Board notes that these arguments pertain to the merits of the claim, which are not before the Board on the present appeal.

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).

¹¹ See *I.B.*, Docket No. 12-1055 (issued November 21, 2012).

¹² *R.C.*, Docket No. 17-0595 (issued September 7, 2017); *C.H.*, Docket No. 17-0074 (issued March 17, 2017); *James W. Scott*, 55 ECAB 606 (2004).

¹³ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁴ *R.C.*, *supra* note 12; *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

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

Issued: May 23, 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