

**United States Department of Labor
Employees' Compensation Appeals Board**

_____)	
R.S., Appellant)	
)	
and)	Docket No. 18-0684
)	Issued: October 18, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Cincinnati, OH, Employer)	
_____)	

Appearances:
Appellant, pro se
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 February 9, 2018 appellant filed a timely appeal from a December 21, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from the last merit decision, dated June 30, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.³

¹ Appellant timely requested oral argument before the Board pursuant to 20 C.F.R. § 501.5(b). In an order dated July 9, 2018, the Board, after exercising its discretion, denied the request as her arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 18-0684 (issued July 9, 2018).

² 5 U.S.C. § 8101 *et seq.*

³ On appeal, appellant has submitted medical evidence which was not before OWCP at the time it issued its February 9, 2018 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from considering this new evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

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 March 21, 2017 appellant, then a 49-year-old clerk, filed an occupational disease claim (Form CA-2) alleging pain in her left shoulder and low back due to her federal employment duties. Specifically, she noted that the duties of her federal employment included pulling and pushing postal carts and hampers, lifting mail, and repetitive pulling of mail out of trays. Appellant noted that she had worked for the employing establishment for almost 19 years. She did not stop work.

In support of her claim, appellant submitted multiple diagnostic studies. A July 29, 2016 magnetic resonance imaging (MRI) scan of her left shoulder was interpreted by Dr. Jose Irizarry, a Board-certified radiologist, as showing diffuse tendinosis of the rotator cuff with small interstitial partial tear of the supraspinatus tendon. A July 30, 2016 MRI scan of appellant's lumbar spine was interpreted by Dr. Jeffrey Spreitzer, a Board-certified radiologist, as showing no spinal stenosis, mild spondylosis with bulging disc and neural foraminal narrowing, and multilevel facet hypertrophic changes. A May 27, 2017 MRI scan of appellant's lumbar spine was interpreted by Dr. Gregory Goldstein, a Board-certified radiologist, as showing 2 millimeter annual bulging at L4-5 and L5-S1, and lumbar spondylosis and loss of the normal lumbar lordosis.

In a March 27, 2017 report, Dr. Rao P. Ligam, Board-certified in anesthesiology and pain medicine, related that appellant presented with a chief complaint of neck pain. He diagnosed cervical ligaments sprain. Dr. Ligam recommended continuation of conservative treatment.

Appellant submitted progress reports dated from July 5, 2016 through May 27, 2017, from Dr. Orin Hall, Board-certified in occupational medicine. Dr. Hall noted that appellant was being seen for her low back pain and left shoulder pain from an employment-related injury. He diagnosed impingement syndrome of the left shoulder, lumbosacral spondylosis with radiculopathy, and strain of the muscles and tendons of the rotator cuff of the left shoulder.

Appellant was treated on March 28, 2017 by Dr. Mark A. Denny, a physician Board-certified in emergency medicine, who diagnosed "[a]cute on chronic back pain." She was treated on March 29, 2017 by Dr. Ryan Douglas Squier, a physician Board-certified in emergency medicine, who stated that she complained of neck pain which radiated down the back and shoulder blades. Dr. Squier noted that appellant had a history of a neck injury in 1998, but that he denied any current injury. He diagnosed acute on chronic neck pain. A computerized tomography scan taken at the hospital on that date was interpreted by Dr. Jason Hilton Fox, a Board-certified radiologist, as showing no acute abnormality of the cervical spine. Specifically, he noted no evidence of acute cervical spine fracture, normal alignment of the cervical spine, no significant degenerative changes, and the prevertebral soft tissues were unremarkable.

By decision dated June 30, 2017, OWCP denied appellant's claim. It found that the evidence of record was insufficient to establish that appellant's impingement syndrome of the left shoulder, lumbosacral spondylosis with radiculopathy, and strain of muscle and tendons of the

rotator cuff of the left shoulder were causally related to the accepted factors of her federal employment.

On October 20, 2017 appellant requested reconsideration. In support of her reconsideration request, she submitted reports from Dr. Hall dated July 19 and October 11, 2017. In these reports Dr. Hall restated his medical diagnoses of impingement syndrome of the left shoulder, lumbosacral spondylosis with radiculopathy, and strain of muscles and tendons of the rotator cuff of the left shoulder. Appellant also resubmitted a May 30, 2017 report from Dr. Goldstein. In addition, she submitted her own supplemental statement, detailing her duties at the employing establishment. Appellant alleged the repetitive motion, lifting, pushing, pulling, simple grasping, and reaching she did in the performance of her federal duties caused her injuries.

By decision dated December 21, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) finding that the evidence was substantially similar to evidence previously submitted and reviewed in the June 30, 2017 decision. It concluded, therefore, that the evidence was insufficient to warrant further merit review.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation either under its own authority or on application by a claimant.⁴ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁵ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.⁶ Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

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).

As appellant's request for reconsideration did not allege that OWCP erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.605(b)(3).

⁷ *Id.* at § 10.608(b).

OWCP, it did not warrant a review of the merits of her claim based on the first and second requirements under section 10.606(b)(3).⁸

Furthermore, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether the accepted factors of her employment caused her diagnosed medical conditions.

Appellant's lay opinion essentially detailing her employment duties and offering her opinion regarding causal relationship is not relevant to the issue in this case, which is medical in nature, and which can only be resolved through the submission of probative medical evidence from a physician.⁹ Therefore, her lay opinion is insufficient to require OWCP to reopen the claim for further consideration of the merits.¹⁰

The May 30, 2017 report from Dr. Goldstein was already considered by OWCP in its June 30, 2017 decision. As this report is duplicative it does not constitute relevant and pertinent new evidence.¹¹ Appellant also submitted new reports from Dr. Hall. However, these reports merely repeat findings already of record and are therefore cumulative. Cumulative evidence does not constitute relevant and pertinent new evidence.¹²

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(3). Thus, OWCP properly denied her request for reconsideration.

On appeal, appellant discusses the medical evidence and alleges that it supports her case. However, as stated previously, the Board does not have jurisdiction over the merits of the claim.¹³

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).

⁸ See *S.M.*, Docket No. 17-1899 (issued August 3, 2018).

⁹ See *G.C.*, Docket No. 18-0506 (issued August 15, 2018).

¹⁰ *Id.*

¹¹ *D.P.*, Docket No. 17-0450 (issued June 20, 2018).

¹² *Id.*

¹³ *I.B.*, Docket No. 18-0145 (issued June 1, 2018).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 21, 2017 is affirmed.

Issued: October 18, 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