

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On October 19, 2012 appellant, then a 34-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) for a lumbar condition that allegedly arose while in the performance of duty on or about August 21, 2012.³ By decision dated November 28, 2012, OWCP accepted appellant's claim for lumbar sprain under File No. xxxxxx047.⁴ It paid her wage-loss compensation beginning August 28, 2012, and placed her on the periodic compensation rolls, effective November 18, 2012. In an April 2, 2014 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective April 2, 2014.⁵ It subsequently denied modification by decisions dated January 5 and September 28, 2015.

On October 26, 2015 appellant returned to work in a limited-duty capacity.

On December 29, 2015 appellant again requested reconsideration. She submitted a December 16, 2015 report by Dr. Bruce J. Montella, a Board-certified orthopedic surgeon, who found that appellant had ongoing residuals from her prior lumbar injury. Dr. Montella also indicated that the acceptance of her claim should be expanded to include lumbar disc herniation.

OWCP declared a conflict in medical opinion, and referred appellant for an impartial medical evaluation.

In a May 1, 2016 report, Dr. Donald W. Kucharzyk, a Board-certified orthopedic surgeon and impartial medical examiner, opined that appellant suffered from preexisting degenerative joint disease with degenerative facet arthropathy that was exacerbated by her August 21, 2012 employment injury. He concluded that appellant had completely recovered from these conditions and could return to full duty.

On May 8, 2016 appellant stopped work and filed a separate claim for a low back injury. She allegedly felt a pull in her lower back while loading mail from an all-purpose container (APC)

² Docket No. 17-0025 (issued July 6, 2017).

³ Appellant previously injured her lower back in the performance of duty on June 21, 2015. Under File No. xxxxxx420, OWCP accepted appellant's traumatic injury claim (Form CA-1) for lumbar sprain. By decision dated January 28, 2008, it terminated wage-loss compensation and medical benefits effective January 25, 2008. In a decision dated June 24, 2008, OWCP denied modification of its January 28, 2008 decision terminating FECA benefits.

⁴ The November 28, 2012 decision also noted that the medical evidence of record included findings of mild spondylitic changes and L5-S1 foraminal stenosis with mild disc dessication, but no formal diagnosis other than lumbar sprain. OWCP advised appellant to submit additional medical evidence for further consideration of any additional diagnoses.

⁵ OWCP based its decision to terminate compensation benefits on the October 14, 2013 report of Dr. Allan M. Brecher, a Board-certified orthopedic surgeon and second opinion physician, who found that appellant had no residuals of her lumbar sprain and was capable of resuming her regular duties as a mail processing clerk.

to a delivery bar code sorter machine. OWCP assigned that claim File No. xxxxxx688, and accepted appellant's traumatic injury claim for lumbar sprain.⁶

In a decision dated May 23, 2016, OWCP denied modification of its prior decision terminating appellant's compensation benefits under File No. xxxxxx047. It also denied further merit review in a September 20, 2016 decision.

Appellant appealed to the Board, and by decision dated July 6, 2017, the Board found that OWCP met its burden of proof to terminate appellant's compensation benefits, effective April 2, 2014. However, the Board further found that the case was not in posture for decision regarding whether appellant met her burden of proof to establish any continuing employment-related disability or residuals on or after April 2, 2014. The Board determined that Dr. Kucharzyk's May 1, 2016 report was insufficient to resolve the conflict in medical opinion. Consequently, the Board remanded the case for further medical development.⁷

Following the Board's decision, OWCP provided an updated statement of accepted facts (SOAF) to Dr. Kucharzyk and requested that he provide a supplemental report and clarify whether appellant continued to suffer residuals of her accepted lumbar sprain. In an October 31, 2017 report, Dr. Kucharzyk provided a history of appellant's lumbar sprain injury and related her complaints of soreness, stiffness, and sharp pain in her lower back radiating into her bilateral lower extremities. Examination of appellant's lumbar spine showed normal alignment and tenderness diffusely over the L4-5, S1 midline, both SI joints, paraspinal muscles, and the iliac crest. Straight leg raise testing in the supine and sitting positions were negative. Dr. Kucharzyk opined that based on his examination and review of the medical records, including the SOAF, appellant's work-related lumbar sprain had resolved. He explained that appellant's facet arthropathy and SI joint arthropathy were not caused by or related to her August 21, 2012 employment injury. Dr. Kucharzyk noted that appellant could return to work.

By decision dated January 11, 2018, OWCP denied modification of the September 28, 2015 decision. It found that Dr. Kucharzyk's opinion was sufficiently well rationalized to carry the special weight of medical evidence.

On April 26, 2018 appellant requested reconsideration and submitted additional medical evidence. She explained that she was sending information that a doctor had written for another claim since he wrote on behalf of both cases. Appellant requested that OWCP accept her claim for compensation and benefits. She further asserted that the second opinion physician evaluation was not reliable and had cases of medical malpractice.

OWCP received a February 6, 2018 magnetic resonance imaging (MRI) scan of the lumbar spine, which showed two mm posterior disc protrusion/herniation at the vertebral surface of the thecal sac.

⁶ OWCP combined appellant's two prior lumbar injuries with her May 8, 2016 injury, and designated the latter claim as the master file.

⁷ *Supra* note 2.

In a February 20, 2018 letter, Dr. Montella referenced both claims under OWCP File Nos. xxxxxx688 and xxxxxx047 and indicated that his letter was to clarify the causal relationship between appellant's work injuries, including lumbar disc herniation and lumbar strain. He noted that the most recent MRI scan demonstrated that she still had ongoing lumbar disc herniation, which was consistent with her ongoing work-related lumbar disc herniation that initially occurred on August 21, 2012 and was aggravated on May 8, 2016. Dr. Montella opined that appellant suffered from a prior work-related injury to her back, lumbosacral disc herniation, which occurred on August 21, 2012 when she loaded mail out of the APC and because of the repetitive motions of her job. He related that when she returned to limited duty on May 8, 2016 she felt a pull on her back and sharp pain while unloading mail out of APCs. Dr. Montella explained that appellant sustained a lumbar sprain and an aggravation of her preexisting work-related lumbar disc herniation. He noted that ever since that incident, she had ongoing spasms, weakness, and sharp and radiating pains in her lower back. Dr. Montella concluded that appellant had sustained a lumbosacral disc herniation on August 21, 2012 with current ongoing residuals today and had an aggravation of this disc herniation with the same mechanism of injury on May 8, 2016.

In an April 24, 2018 letter, Dr. Montella reiterated that appellant sustained a lumbar sprain and aggravation of a work-related back injury, including lumbar disc herniation on May 8, 2016. He indicated that his examination findings on May 13, 2016 showed an overall worsening of objective findings. Dr. Montella described his examination findings and related that the excess friction caused by the repetitive nature of appellant's job, along with heavy lifting and muscular tension, produced swelling and pressure to the nerve that led to limited range of motion and decreased motor function at her L5-S1 level, which was consistent with an aggravation of the previous disc herniation. He indicated that appellant was not medically capable of returning to work because of ongoing pain and difficulty.

Appellant submitted a handwritten statement dated June 14, 2018, which noted her disagreement with various aspects of Dr. Kucharzyk's October 31, 2017 examination. She also questioned his professional credentials. Appellant asserted that Dr. Kucharzyk's examination findings support that she continued to have residuals of her lumbar sprain condition.

In a July 23, 2018 statement, appellant requested that the condition of disc herniation be added to her claim. She alleged that initial medical reports show that she was diagnosed with both lumbar sprain and disc herniation from her 2012 employment injury.

By decision dated July 24, 2018, OWCP denied reconsideration of the merits of appellant's claim under 5 U.S.C. § 8128(a). It found that her reconsideration request neither raised substantive legal questions, nor included new and relevant evidence sufficient to warrant further merit review of appellant's claim.

LEGAL PRECEDENT

Section 8128(a) of FECA⁸ vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁹

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.¹⁰

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.¹¹ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹² 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.¹³

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).

Along with her most recent April 26, 2018 reconsideration request, appellant submitted statements dated June 14 and July 23, 2018, which noted her disagreement with Dr. Kucharzyk's medical opinion. She also alleged that initial medical reports showed that she was diagnosed with both lumbar sprain and disc herniation from her 2012 employment injury. The Board finds that in her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and she did not advance a new and relevant legal argument not previously considered. Consequently, she is not entitled to review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁴

Appellant also submitted medical evidence not previously considered by OWCP. In letters dated February 20 and April 24, 2018, Dr. Montella indicated that a recent MRI scan showed that

⁸ *Supra* note 1.

⁹ 5 U.S.C. § 8128(a).

¹⁰ 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).

¹¹ *Id.* at § 10.607(a).

¹² *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹³ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁴ 20 C.F.R. § 10.606(b)(3)(i), (ii); *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

appellant still had ongoing disc herniation, which initially occurred on August 21, 2012 and was aggravated on May 8, 2016. He described his examination findings from a May 13, 2016 evaluation and noted that the findings showed an overall worsening of appellant's condition. Dr. Montella reported that since the May 8, 2016 incident she had ongoing spasms, weakness, and sharp and radiating pains in her lower back. He concluded that appellant had sustained a lumbosacral disc herniation on August 21, 2012 with current ongoing residuals. Dr. Montella indicated that she was not medically capable of returning to work because of ongoing pain and difficulty.

The Board finds that Dr. Montella's letters did not include any discussion regarding whether appellant continued to suffer residuals of her accepted lumbar sprain. Although he opined that she remained disabled from work due to ongoing residuals, Dr. Montella attributed appellant's current conditions to a lumbosacral disc herniation, which was aggravated on May 8, 2016. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵ Likewise, the February 6, 2018 MRI scan, which showed two mm posterior disc protrusion/herniation at the vertebral surface of the thecal sac, is also irrelevant to the issue of ongoing residuals or disability of appellant's accepted lumbar sprain as it does not mention appellant's lumbar sprain. None of the medical evidence submitted provided objective findings to establish that appellant still had residuals or disability causally related to her accepted lumbar sprain injury. Accordingly, appellant has not established a basis for further merit review under 20 C.F.R. § 10.606(b)(3)(iii).

On appeal appellant again notes her disagreement with Dr. Kucharzyk and asserted that the medical evidence of record established that she sustained a lumbar sprain and disc herniation as a result of her employment. As explained above, however, the Board lacks jurisdiction to review the merits of the claim. The only decision properly before the Board on this appeal is the July 24, 2018 nonmerit decision, which denied appellant's request for further merit review.

As appellant's request for reconsideration did not meet any of the three requirements enumerated under 20 C.F.R. § 10.606(b)(3), the Board finds that OWCP properly denied her request for reconsideration without reopening the case for review on the merits.¹⁶

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).

¹⁵ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁶ *R.C.*, Docket No. 17-0595 (issued September 7, 2017); *M.E.*, 58 ECAB 694 (2007).

ORDER

IT IS HEREBY ORDERED THAT the July 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2019
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