

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 8, 2015 appellant, then a 54-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that, on July 4, 2015, she was assaulted by a hospital resident and sustained "a left chest contusion and right lower arm/wrist bruise/swelling." She did not initially stop work.

By development letter dated August 7, 2015, OWCP advised appellant that the evidence received was insufficient to support her claim. It noted that the evidence was insufficient to establish that she actually experienced the incident alleged to have caused injury, and that no diagnosis of any condition resulting from her injury had been provided. OWCP requested that appellant submit additional factual and medical evidence in support of her claim and provided a questionnaire for her to complete. It afforded her 30 days to submit the requested evidence.

In a medical report dated July 5, 2015, Dr. Mohammad F. Siddiqi, a specialist in internal medicine, diagnosed right wrist bruise/abrasion and left rib cage bruise/contusion.

In a medical report dated July 6, 2015, Dr. Jeffrey M. Goller, Board-certified in emergency medicine, related that appellant's right arm had been pulled and twisted. He indicated that she did not suffer an acute fracture or dislocation of her wrist, but that she had a bruised right wrist.

In a report dated September 4, 2015, Dr. Eleanor Jenkins-Alford, a specialist in family medicine, indicated that she had treated appellant on July 22, 25, August 5, and 17, 2015. She noted that appellant was injured when she moved a patient which caused a disc compression and neural impingement. Dr. Jenkins-Alford related that appellant's magnetic resonance imaging (MRI) scan showed that a neural impingement.

By decision dated September 11, 2015, OWCP denied appellant's claim. It found that she had not established that the diagnosed medical conditions were causally related to the accepted July 4, 2015 employment incident. OWCP noted that the medical evidence submitted was unclear and appeared to relate to another incident unrelated to appellant's claim. It notified her that since the evidence of record referred to a separate incident, she should consider filing another claim.

OWCP subsequently received additional evidence. In a medical report dated August 19, 2015, received by OWCP on October 13, 2015, Dr. Jason M. Highsmith, Board-certified in neurosurgery, examined appellant, reviewed her diagnostic imaging, and diagnosed lateral L2-3 disc herniation. He noted that her condition arose "after wrestling a patient" while in the performance of duty.

In a report dated September 2, 2015, received by OWCP on October 13, 2015, Dr. Highsmith again diagnosed a far lateral disc herniation at L2-3. In a report dated September 30, 2015, received by OWCP on October 13, 2015, he indicated that appellant was doing much better with improved function. Dr. Highsmith noted that she continued to have a dull, aching pain, and indicated that the pain stemmed from two different injuries when she was injured

in the performance of duty after being assaulted by a patient on July 4, 2015 and a second injury on August 7, 2015.

Appellant, in an October 7, 2015 statement, related that on July 4, 2015 she responded to a bed alarm at the employing establishment. She indicated that as she attempted to turn off the alarm, the resident struck her in the chest, dug his nails into her arm, and pulled, twisted, and jerked her wrist and arm until a police officer was able to wring her free. Appellant noted that she went to the emergency room as a result of the incident, and she was told not to return to work until July 6, 2015 because of the pain in her upper chest, arm, and shoulder. She indicated that she received a diagnosis of “acute right wrist pain/occupational injury,” but that nothing else was recorded. Appellant related that her pain became worse and on July 16, 2015, she went to her primary care physician for an examination. She noted that in her original statement, she reported a subsequent assault that occurred on August 7, 2015 when a resident kicked her in the lower left rib area. Appellant indicated that this subsequent incident furthered the previous injury, but her initial injury on July 4, 2015 was the cause of her present condition.

In an undated medical report received by OWCP on October 13, 2015, Henry Spradlin, a certified physician assistant, indicated that he first saw appellant on July 16, 2015 when she complained of back pain and pain radiating down her right leg. He noted that he saw her again on “August 5, 2015” for a presumed new condition after she was kicked in her chest. Mr. Spradlin related that this chest injury exacerbated the original back injury.

In a medical report dated October 8, 2015, received by OWCP on October 13, 2015, Dr. Patrick Leonard, a chiropractor, examined appellant and took lumbosacral x-rays. He diagnosed low back pain, lumbar disc syndrome, lumbar subluxation, muscle spasms, sacral subluxation, and pelvic subluxation. Dr. Leonard indicated that her conditions resulted from the claimed July 4 and August 7, 2015 employment incidents.

On October 13, 2015 appellant requested a review of the written record by an OWCP hearing representative.

OWCP subsequently received additional medical evidence. In a report dated February 26, 2016, Dr. Leonard examined appellant, took lumbosacral x-rays, and again diagnosed with low back pain, lumbar disc syndrome, lumbar subluxation, muscle spasms, sacral subluxation, and pelvic subluxation. He related that appellant could not work due to the severe damage to her lumbar spine and disc herniation at L2-3 caused by an assault at work.

By decision dated March 23, 2016, an OWCP’s hearing representative reversed in part and affirmed in part the September 11, 2015 decision. She found that the medical reports from Dr. Siddiqi were sufficient to accept the diagnoses of a right wrist bruise/abrasion and a left rib cage bruise/contusion.³ However, with regard to the diagnosed lumbar disc herniation, the hearing representative indicated that the medical records were speculative on the issue of causal relationship because the medical evidence appeared to attribute appellant’s condition to both the

³ On March 30, 2016 OWCP formally accepted appellant’s claim for the abrasion of right wrist and contusion of left front wall of thorax based on the hearing representative’s decision.

July 4, 2015 employment incident and the subsequent August 7, 2015 employment incident. Thus, she affirmed the September 11, 2015 decision with regard to the lumbar disc herniation diagnosis.

On October 24, 2016 appellant requested reconsideration of the hearing representative's March 23, 2016 decision and submitted further additional evidence.

In a letter dated December 1, 2015, received by OWCP on October 24, 2016, Dr. Highsmith opined that appellant's conditions were most probably caused by her employment-related injury.

Dr. Highsmith, in a letter dated May 18, 2016, clarified his diagnoses for appellant's conditions indicating that she had a herniated lumbar disc at L2-3 and lumbar radiculopathy.

On June 2, 2016 Dr. Highsmith performed a lateral discectomy at L2-3.

In a letter dated July 5, 2016, Dr. Jenkins-Alford indicated that appellant had been under her care since July 5, 2015 for back pain brought on by an assault. She noted that an August 5, 2015 MRI scan showed that appellant had an acute disc herniation and neural impingement. Dr. Jenkins-Alford also related that appellant was attacked later on August 7, 2015 and suffered further injury to her back, and has continued to suffer from severe pain with radiculopathy since that time.

In a letter dated July 28, 2016, Dr. Jenkins-Alford indicated that the July 4, 2015 assault on appellant caused disc compression and neural impingement. She noted that appellant was incapable of carrying out her duties as a nurse because she was unable to walk for an extended period, and was also restricted from lifting because it exacerbated her condition.

In a letter dated September 20, 2016, Dr. Highsmith indicated that appellant was first injured during an assault on July 4, 2015. He related that her injury was then aggravated in a separate incident on August 7, 2015. Dr. Highsmith noted that more likely than not the July 4, 2015 incident was the direct cause of appellant's disc herniation at L2-3. He indicated that trauma, such as appellant's from the July 4, 2015 employment incident, often caused herniations of the lumbar discs resulting in neurologic impingement and subsequent neurologic deficits. Dr. Highsmith related that the August 7, 2015 employment incident likely worsened the spinal injury with additional pain and damage.

In a report dated October 3, 2016, Dr. Leonard diagnosed lumbar disc syndrome, lumbar subluxation, muscle spasms, sacral subluxation, and pelvic subluxation. He again indicated that appellant's conditions were a direct result of the July 4, 2015 employment incident.

By decision dated December 28, 2016, OWCP denied modification of the March 23, 2016 decision. It found that the evidence provided was not sufficiently rationalized to establish that appellant's back condition was causally related to the July 4, 2015 employment incident.

On June 22, 2017 appellant requested reconsideration of OWCP's December 28, 2016 decision.

OWCP subsequently received a report dated July 15, 2016, wherein Dr. Jenkins-Alford indicated that she had twice examined and treated appellant for back pain following the July 4, 2015 employment incident, and had diagnosed an acute disc herniation. She noted that appellant was attacked again on August 7, 2015.

In a report dated November 16, 2016, Dr. Highsmith indicated that appellant had been under his care since August 9, 2015. He related that appellant suffered an employment-related injury on July 4, 2015, and suffered a second employment-related injury on August 7, 2015. Dr. Highsmith related that the second incident caused further damage and aggravation to her already injured spine.

By decision dated September 7, 2017, OWCP denied modification of the December 28, 2016 decision. It found that the evidence submitted was insufficient to establish the present claim because appellant's claimed back injury had been accepted under an August 7, 2015 claim in conjunction with another traumatic injury.⁴ OWCP indicated that the evidence submitted did not support that appellant sustained a back injury in connection with being attacked on July 4, 2015.

On November 20, 2017 appellant requested reconsideration of OWCP's September 7, 2017 decision. She submitted a narrative statement in support of her request.

By decision dated February 9, 2018, OWCP denied further merit review of appellant's claim. It found that the evidence appellant submitted neither raised substantive legal questions nor included new and relevant evidence.

On April 25, 2018 appellant requested reconsideration of OWCP's February 9, 2018 decision. She submitted a narrative statement in support of her request, in which she claimed that she had submitted all of the medical evidence necessary to establish that she had sustained multiple injuries on July 4, 2015.

By decision dated May 30, 2018, OWCP denied further merit review of appellant's claim. It found that the evidence she submitted neither raised substantive legal questions nor included new and relevant evidence to further her claim. OWCP related that for appellant's case to be reopened, she needed to clearly identify the grounds upon which reconsideration was being requested, and she must submit relevant evidence not previously considered or present legal contentions not previously considered.

On August 8, 2018 appellant requested reconsideration of OWCP's May 30, 2018 decision. In a statement dated August 7, 2018, she reiterated that she had submitted all of the medical evidence she could possibly provide and had established that she sustained multiple injuries at work on July 4, 2015.

⁴ The Board notes that appellant had filed a claim for a traumatic injury on August 7, 2015 under OWCP File No. xxxxxx450, which was accepted for aggravation of herniated lumbar disc with radiculopathy at L2-3. OWCP File No. xxxxxx450 has not been administratively combined with the present claim.

By decision dated August 14, 2018, OWCP denied further merit review of appellant's claim. It found her August 7, 2017 letter was similar to her prior letter of record.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁷ 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.⁸ 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.⁹ 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.¹⁰

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹¹ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹² 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.¹³

⁵ This section provides in pertinent part: the 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).

⁶ 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. 20 C.F.R. § 10.607.

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608(b).

¹¹ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹² *P.L.*, *id.*; see *Mark H. Dever*, 53 ECAB 710 (2002).

¹³ *P.L.*, *supra* note 11; *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS

The Board finds that OWCP properly denied appellant's requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

Along with appellant's timely April 25, and August 8, 2018 requests for reconsideration, OWCP received letters wherein she expressed her own belief that she had submitted all possible and necessary medical evidence. However, appellant neither showed that OWCP erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by OWCP. 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).

An appellant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that he or she did not submit any such evidence in this case.¹⁴ Appellant submitted self-authored letters indicating her disappointment in the previous decisions and noting her previous submissions of evidence she deemed to be relevant. The submission of this factual evidence does not require reopening of her claim for review of the merits of the claim because this evidence is not relevant to the underlying issue of the present case. As noted, the underlying issue of the present case is medical in nature, *i.e.*, whether appellant submitted medical evidence sufficient to establish causal relationship between a diagnosed lumbar condition and the accepted July 4, 2015 employment injury. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵

As appellant's application for review 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 the request for reconsideration without reopening the case for a review on the merits.¹⁶

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ *B.T.*, Docket No. 18-1397 (issued January 15, 2019); 20 C.F.R. § 10.606(b)(3); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁵ *B.T.*, *id.*

¹⁶ *P.L.*, *supra* note 11; *R.C.*, Docket No. 17-0595 (issued September 7, 2017); *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 August 14 and May 30, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 2, 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