

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

_____)	
O.C., Appellant)	
)	
and)	Docket No. 19-0106
)	Issued: April 26, 2019
U.S. POSTAL SERVICE, SOUTH SUBURBAN PROCESSING & DISTRIBUTION CENTER, Bedford Park, IL, Employer)	
_____)	

Appearances:
Stephanie N. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 17, 2018 appellant, through counsel, filed a timely appeal from a June 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated June 28, 2017, to the filing of this appeal,

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.

pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

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 14, 2015 appellant, then a 52-year-old mail handler, filed an occupational disease claim (Form CA-2) for mid and lower back conditions, which she attributed to repetitive employment duties that included pulling, lifting, pushing, bending, reaching, and twisting. She further indicated that her back pain radiated to her lower extremities. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on November 15, 2014 and has not returned.

In a development letter dated March 26, 2015, OWCP requested that appellant submit additional factual information and medical evidence in support of her claim. It specifically requested that she complete an enclosed questionnaire and submit a comprehensive narrative medical report from her treating physician that included a diagnosis and a reasoned explanation as to how specific work factors and/or incidents caused or contributed to the diagnosed condition(s). OWCP afforded appellant 30 days to submit the necessary evidence.

Dr. Anil Kesani, a Board-certified orthopedist, treated appellant on March 25, 2015 and diagnosed thoracic sprain and strain, degeneration of lumbar or lumbosacral intervertebral disc, low back pain, lumbar sprain and strain, lumbosacral spondylosis without myelopathy, sciatica, thoracic or lumbosacral neuritis or radiculitis, and acquired spondylolisthesis. He noted appellant's symptoms had improved with conservative treatment.

Appellant submitted her position description as a mail handler and a mail rewraper. Also submitted were standard operating procedures for a group leader, loader operator, preparation operator, and sweeper operator.

Dr. Eden D. Brandon, a Board-certified internist, treated appellant on April 27, 2015, for a reported history of back pain as a result of repetitive twisting, turning, and lifting heavy objects at work. He noted that appellant underwent three lumbar epidural injections, but continued to experience radicular symptoms.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the June 14, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

By decision dated June 2, 2015, OWCP accepted that appellant's assigned federal employment duties required repetitive lifting, pushing, bending, and reaching. However, it denied her occupational disease claim finding that the medical evidence of record was insufficient to establish a causal relationship between the accepted employment factors and the claimed lumbar condition. On April 11, 2016 appellant requested reconsideration.

Evidence was received from Dr. Scott E. Glaser, a Board-certified anesthesiologist, who treated appellant on April 7, 2015 and diagnosed thoracic facet syndrome without myelopathy, lumbar radiculopathy, and lumbar facet syndrome without myelopathy. He returned her to work without restrictions.

An electromyogram (EMG) dated July 31, 2015 revealed no abnormalities.

Dr. Brandon treated appellant on February 9, 2016 and noted back pain which developed as a result of repetitive twisting, turning, and lifting heavy objects at work. He explained that conservative treatment had failed and referred her to an orthopedic surgeon. Dr. Brandon opined that appellant continued to have chronic back pain related to the initial injury.

By decision dated November 16, 2016, OWCP denied modification of the decision dated June 2, 2015.

On April 4, 2017 appellant requested reconsideration and submitted additional evidence.

On March 20, 2015 Dr. Glaser performed bilateral L3-4, L4-5, and L5-S1 intra-articular facet joint injections and diagnosed lumbar facet arthropathy. On April 22, 2015 he performed a right T7-8, T8-9, and T9-10 intra-articular facet joint injection and diagnosed thoracic facet arthropathy.

An electrodiagnostic evaluation dated March 1, 2017 revealed evidence suggestive of lumbosacral radiculopathy affecting L4, L5, and S1 lumbar root levels.

Dr. J. Michael Morgenstern, a Board-certified orthopedist, examined appellant on March 7 and April 18, 2017 for her lower back condition. She indicated to him that her lumbar condition was progressively worsening over the past 20 years which she attributed to her repetitive work duties which required repetitive heavy lifting, bending, carrying, and standing. Dr. Morgenstern diagnosed lumbar radiculopathy, spondylolisthesis of the lumbar spine, and degenerative disc disease of the lumbar spine. He indicated that appellant continued to have lower back symptoms with worsening radiculopathy affecting the bilateral lower extremities. Dr. Morgenstern opined that her work-related duties caused her lower back symptoms. He also treated appellant on March 9, 2017. In disability certificates dated April 27 and May 30, 2017, Dr. Morgenstern noted that appellant was disabled from work from April 27 to June 24, 2017 due to weakness in the bilateral lower extremities.

By decision dated June 28, 2017, OWCP reviewed the additional evidence submitted, but denied modification of the decision dated November 16, 2016.

On March 23, 2018 appellant requested reconsideration.

Appellant submitted standard operating procedures for a group leader, loader operator, preparation operator, and sweeper operator; a job description for a mail handler and a mail rewraper; and reports from Dr. Morgenstern dated March 7 and April 18, 2017, all previously of record.

Appellant also submitted descriptions of job functions and tasks including the registry room, flat sequencing system (FSS) machinery, tractor driver, output subsystem (OSS) machinery, input subsystem (ISS) machinery, small parcel and bundle sorter (SPBS) detail, delivery bar code sorter (DBCS), priority rack, express rack, and dock expediter.

Also submitted was a report dated August 8, 2017 in which Dr. Morgenstern noted that appellant was a mail handler for over 20 years and held 19 details that were highly repetitive in nature and involved strenuous work duties. He opined that appellant experienced a recurrence of thoracic strain and referenced the American Association of Neurological Surgeons which suggested that thoracic and back sprains are the most common back injury. Dr. Morgenstern further explained that the back was prone to strain because of its weight bearing function in moving, twisting, and bending. He noted that these conditions can become chronic and progress into lumbosacral spondylolisthesis as occurred in appellant's case. Dr. Morgenstern opined that based on appellant's history, past MRI scan, imaging, diagnostic findings, and literature, the evidence supports that there was a "strong possibility" that patients who experience sprain or strain are at higher risk in developing a worsening condition. Similarly, he noted on December 7, 2017 that appellant was employed for over 20 years in duties which were repetitive and physically taxing on her low back. Dr. Morgenstern opined that the diagnosed lumbar radiculopathy, spondylolisthesis of the lumbar spine, and degenerative disc disease were attributed to her work-related duties performed over 20 years. He noted that she was asymptomatic prior to working in this job and her condition has progressively worsened. Dr. Morgenstern opined that the degenerative changes in her low back far exceed that which would occur naturally without the work factors and reiterated that within reasonable medical certainty her lower back condition was attributed to her work. In duty status reports (Form CA-17) dated August 8 and November 16, 2017, he noted clinical findings of lumbar pain and radiculopathy and returned appellant to work with restrictions.

By decision dated June 14, 2018, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁴ 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 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

⁴ 5 U.S.C. § 8128(a).

⁵ *Id.* at § 8128(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

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, 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

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).

In appellant's March 23, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She also did not advance a relevant legal argument not previously considered by OWCP. Accordingly, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board also finds that appellant failed to submit relevant and pertinent new evidence not previously considered by OWCP. The underlying issue on reconsideration was causal relationship, which generally requires submission of relevant medical evidence.¹⁰ Since the prior decision dated June 28, 2017, OWCP received documentation regarding various job duties and position descriptions. As this evidence did not address the relevant issue on reconsideration, it is insufficient to warrant further merit review.¹¹ Appellant also resubmitted Dr. Morgenstern's March 7 and April 18, 2017 reports, which were already of the record. Submitting evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹² Therefore, Dr. Morgenstern's March 7 and April 18, 2017 reports are insufficient to require OWCP to reopen the case for merit review.

Appellant also submitted reports from Dr. Morgenstern dated August 8 and December 7, 2017. While these reports are new, they are substantially similar to his March 7, 2017 report because they provide the same medical rationale and citation to medical literature,

⁶ 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).

⁷ 20 C.F.R. § 10.607(a).

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

¹¹ *D.K.*, 59 ECAB 141, 147 (2007).

¹² *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

which OWCP considered in its June 28, 2017 decision and found to be deficient. As noted, evidence that repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹³ Therefore, Dr. Morgenstern's August 8 and December 7, 2017 reports are insufficient to require OWCP to reopen the claim for a merit review. Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).

On appeal counsel asserts that the newly submitted medical evidence, although insufficient to establish causal relationship, was sufficient to warrant further merit review of the case. As noted above, Dr. Morgenstern's latest reports are substantially similar and duplicative of evidence previously considered by OWCP and found insufficient to warrant further merit review.¹⁴

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁵

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).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2019
Washington, DC

Christopher J. Godfrey, 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