

FACTUAL HISTORY

On October 19, 2012 appellant then a 58-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained right knee and neck conditions due to repetitive twisting, bending and standing for prolonged periods of time. OWCP accepted the claim for neck sprain, right knee medial meniscus tear, and right knee lateral meniscus tear.

In a letter dated January 29, 2013, Dr. Edward Mittleman, Board-certified in family medicine, explained that he was confused by OWCP's diagnosis of a neck sprain. He explained that appellant had osteophytic disease (spondylosis). Dr. Mittleman noted that she had to perform casing and pulling down of mail for two to three hours a day at various times. He noted that the activity required the patient to be constantly turning her head from side to side as well as upward and downward, with a frequent twisting motion. Dr. Mittleman noted that appellant related that she performed the activities from 1987 to 2007 for approximately six hours per day. Additionally, from 1985 to 1988, appellant drove a vehicle that required frequent movement of the axial skeletal system during the four to six hours of mail delivery. Dr. Mittleman also noted that she was required to push and pull equipment weighing up to 400 pounds as well as loading and unloading all-purpose containers (APC), pallets and oyster cages, some weighing up to 800 pounds. He explained that the performance of these activities placed significant forces upon the trapezii because the trapezius muscle worked to move the neck in several directions and placed significant exertional forces upon the cervical axial skeletal system. Dr. Mittleman opined that as a result of all of these repetitive activities, impulse and biomechanical forces upon the cervical vertebra and soft tissue overtime, initiates the sequence of metabolic biochemical and biomechanical events that led to cervical osteoarthritis. He explained that he was formally requesting that the diagnosis of cervical spondylosis be accepted.

On August 19, 2013 OWCP referred appellant for a second opinion examination with Dr. Steven Ma, a Board-certified orthopedic surgeon, to determine whether acceptance of appellant's claim should be expanded.

In a September 4, 2013 report, Dr. Ma noted appellant's history of injury and treatment. He explained that, with regard to her neck, appellant's current diagnosis was cervical spondylosis and arthritis. Dr. Ma indicated that it was difficult to envision how she injured her neck from repetitive twisting, bending, and standing for prolonged periods of time. He opined that the cause of appellant's neck pain was her arthritis, which was not related to the accepted work injury of June 6, 2012. Dr. Ma explained that arthritis was nonindustrial in nature. Furthermore, there was no aggravation to the underlying degenerative arthritis. Dr. Ma explained that it was present for a long period of time and would have been present in the current state regardless of appellant's employment as it was part of the normal aging process and was not related to her employment. He explained that her neck sprain had resolved.

By decision dated October 23, 2013, OWCP denied appellant's request to expand the acceptance of her claim to include the additional condition of cervical spondylosis. It found that the medical evidence submitted was insufficient to establish that the cervical spondylosis was causally related to her accepted work injury. OWCP accorded the weight of medical evidence to the second opinion report of Dr. Ma dated September 4, 2013.

Appellant subsequently submitted multiple requests for reconsideration and OWCP denied modification.

On July 19, 2016 appellant again requested reconsideration. In support of her request, she submitted a new report from Dr. James T. Tran, a Board-certified neurosurgeon.

In a May 13, 2016 report, Dr. Tran indicated that he was providing rationale to support how appellant's current neck condition was causally related to the work injury of June 6, 2012. He explained that the work injury was differentiated from the arthritis found on magnetic resonance imaging (MRI) scan and x-ray of the cervical spine, because appellant's frequent neck turning, flexion, extension while casing mail, delivering mail, and retrieving mail satchels caused the disc bulges at C4-5, C5-6, C6-7. Dr. Tran noted that osteophytes followed disc bulges at C5-6 over time and the disc osteophytes arose to cover the disc bulges at C5-6. He explained that as a result, the arthritis as manifested on MRI scan as disc osteophyte at C5-6, resulted from work activities causing tears in annulus fibrosis, disc bulges and subsequent osteophytes to cover up the disc bulges at C5-6. Dr. Tran indicated that the arthritis referred to by Dr. Ma, should not be considered as a preexisting condition, but a result of the work injury. He also explained that the extension of neck with frequent movement of neck while turning the neck to retrieve mail satchels and sorting mail caused cervical superior and inferior facet joints at each cervical spinal level to disengage and separate. Dr. Tran also advised that the disengagement of facet joints shifted the force exerted on the cervical spine from the facet joints to the cervical discs. He related that disengagement of facet joints stretched the ligamentum flavum leading to thickening of the ligamentum flavum in the cervical spinal canal. Dr. Tran further noted that thickened ligamentum flavum caused spinal stenosis and compression of the cervical nerve roots and spinal cord resulting in neck and arm pain. He opined that the cervical disc osteophyte at C5-6 with stenosis of spinal canal or arthritis at C4-5, C5-6, C6-7 were work related and resulted from appellant's work activities as a letter carrier since 1985. Dr. Tran noted that there was a conflict of medical opinion regarding the cause of appellant's cervical stenosis.

By decision dated October 17, 2016, OWCP denied modification of the January 28, 2016 decision.

On May 25, 2017 appellant again requested reconsideration and submitted additional medical evidence.

In a January 11, 2017 report, Dr. Hosea Brown, III, a Board-certified internist, noted that he disagreed with OWCP's decision. He explained that Dr. Tran had provided the requisite rationale to justify reversing the prior decision. Dr. Brown also noted that Dr. Tran was a Board-certified neurosurgeon, whereas Dr. Ma was not and argued that Dr. Tran should be accorded greater weight. He also requested a referee examination as he believed a conflict existed. Dr. Brown examined appellant and diagnosed: spinal stenosis of cervical region, cervical myelopathy, cervical disc degeneration, sprain of the neck (accepted), right knee medial meniscal tear, right knee lateral meniscal tear, and cervical radiculopathy.

In a February 17, 2017 report, Dr. Tran repeated his previous findings and opinion that cervical spondylosis was not of the normal aging process. He again described appellant's work activities and noted that appellant's claim was for an occupational disease, therefore appellant's

daily work activities, which she had performed as a letter carrier from 1985 to 1987 and as a distribution clerk from 1987 until the filing of this claim, were not new work activities. Dr. Tran explained that diagnostic studies also revealed disc bulges at C3-4, C4-5, C5-6, and C6-7 with C4-5 and C6-7 stenosis and C5-6 spinal cord compression on August 5, 2014. He reiterated his opinion that a conflict in the medical evidence existed.

OWCP also received a March 10, 2017 report, wherein Dr. Tran examined appellant and provided an update on appellant's condition. Dr. Tran diagnosed neck sprain and also provided expanded diagnoses to include: spinal stenosis of the cervical region; cervical myelopathy; and cervical disc degeneration. He requested that OWCP accept the additional conditions.

A March 21, 2017 MRI scan of the cervical spine read by Dr. Vikram Hatti, a Board-certified family practitioner, revealed findings which included: diffuse circumferential disc bulge at C4-5; disc bulge at C5-6; disc bulge and mild canal stenosis; mild left neural foraminal narrowing; and straightening and slight reversal of cervical spine lordosis.

In April 11 and July 25, 2017 reports, Dr. Brown repeated his diagnoses and requested that appellant be referred for a referee examination to resolve the conflict of medical opinion.

By decision dated August 23, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim.

LEGAL PRECEDENT

Section 8128 (a) of FECA 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 compensation, at any time, on his or her own motion or on application.³

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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens

³ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

and reviews the case on its merits.⁶ 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.⁷

ANALYSIS

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

Appellant disagreed with the October 17, 2016 decision and timely requested reconsideration on May 25, 2017. However, she did not allege that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Appellant was therefore not entitled to a review of the merits of her claim based on the first and second requirements under 20 C.F.R. § 10.606(b)(3).

With her request for reconsideration, appellant submitted several new medical reports from Dr. Tran and Dr. Brown. While OWCP found that Dr. Tran's new reports were duplicative or cumulative, the Board finds that Dr. Tran offered a new and relevant medical explanation regarding the underlying issue in this case. OWCP had denied appellant's request for expansion of the acceptance of her claim to include the additional condition of cervical spondylosis based upon Dr. Ma's opinion that cervical spondylosis was an age-related condition and that this additional condition was not causally related to appellant's accepted condition of neck strain. However, Dr. Tran provided further medical explanation regarding appellant's claim for occupational disease and indicated that factors of her federal employment since 1985 had contributed to appellant's cervical spondylosis condition. The Board further notes that Dr. Brown's opinion regarding the cause of appellant's diagnosed cervical conditions had not been previously considered by OWCP. As these reports directly address the basis upon which OWCP denied appellant's request for expansion of the acceptance of her claim, appellant's request for reconsideration did provide relevant and pertinent new evidence not previously considered.⁸ Appellant therefore met the third standard for obtaining merit review of her case.⁹ Accordingly, OWCP improperly denied her request for reconsideration of the merits of her claim.

The Board will therefore set aside OWCP's August 23, 2017 decision and remand the case for such further development of the evidence as deemed necessary, to be followed by an appropriate merit decision.

⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ The Board has held that, 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. He or she need only submit relevant and pertinent evidence not previously considered by OWCP. *See M.C.*, Docket No. 17-1983 (issued August 17, 2018); *S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *D.P.*, Docket No. 19-0001 (issued June 13, 2019).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2017 decision of the Office of Workers' Compensation Program is set aside and this case is remanded for further action consistent with this decision of the Board.\

Issued: December 23, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board