United States Department of Labor
Employees' Compensation Appeals Board

E.M., Appellant	)	
and	)	**Docket No. 18-1546**
	)	**Issued: December 12, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Monmouth, ME, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On August 10, 2018 appellant filed a timely appeal from a March 14, 2018 merit decision and a June 14, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish a back condition causally related to the accepted October 27, 2017 employment incident; and (2) whether

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that appellant submitted additional evidence on appeal. 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.*

OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 27, 2017 appellant, then a 61-year-old postmaster, filed a traumatic injury claim (Form CA-1) alleging that on October 27, 2017 she suffered a herniated disc on the right side of her lower back while in the performance of duty. She stopped work on October 29, 2017.

In a letter dated November 27, 2017, the employing establishment controverted the claim. It noted that she swam competitively and had filed her traumatic injury claim two weeks prior to her scheduled retirement. In a separate letter of even date, the employing establishment asserted that appellant had initially alleged that she had sustained a recurrence of a November 2, 2015 employment injury.[3]

On October 31, 2017 a physician assistant requested that appellant be excused from work from October 31 to November 6, 2017. She advised that appellant could resume work on November 7, 2017 with restrictions. In an accompanying report of even date, the physician assistant noted that she had experienced increased back pain the previous Friday after performing work activities, and had sought treatment at the emergency room the next day. She noted that appellant had subsequently fallen at home landing on her left hip.

On November 6, 2017 a physician assistant advised that appellant was unable to work due to radiculopathy from S1.

Appellant received treatment at a hospital emergency room on November 12, 2017. A physician assistant provided a diagnosis of right hip pain and found that she should not perform heavy lifting.

A November 15, 2017 magnetic resonance imaging (MRI) scan revealed a central L4-5 disc herniation indenting the thecal sac with "moderately advanced posterior element degenerative findings, moderate acquired central spinal stenosis, some narrowing of [the] subarticular recesses [that] could result in L5 origin neural encroachment," and moderate disc bulging at L3-4 with possible mild encroachment of the right L3 nerve root.

On November 17, 2017 a physician assistant determined that appellant was unable to work until January 1, 2018 due to back pain.

In a development letter dated December 13, 2017, OWCP advised appellant that, when her claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work. The claim was therefore administratively approved to allow payment for limited medical expenses, but the merits of the claim had not been formally adjudicated. OWCP informed appellant that it would not formally adjudicate her claim. It requested that she submit factual and medical information, including a comprehensive report from her physician regarding how a

[3] The record indicates that OWCP previously had accepted that on November 2, 2015 appellant sustained an aggravation of right hip arthritis requiring a total right hip arthroplasty. It assigned OWCP File No. xxxxxx420.

specific work incident contributed to her claimed injury. OWCP afforded appellant 30 days to submit the necessary evidence.

Thereafter, OWCP received a November 28, 2017 report from Dr. Genevieve A. Hall, a Board-certified physiatrist. Dr. Hall obtained a history of appellant experiencing back pain on October 27, 2017 at work after she had performed "a significant amount of repetitive heavy lifting and reaching" during a period when they were understaffed. She noted that appellant had a history of a right hip arthroplasty. Dr. Hall reviewed the results of the MRI scan and diagnosed low back pain with right lower extremity radicular symptoms.

On December 8, 2017 Dr. Julie Phelps, Board-certified in family medicine, noted that appellant had sought treatment at a hospital emergency room on October 28, 2017 for pain in her back, right hip, and upper leg. She indicated that her pain had begun after she had worked extended days for a week lifting and sorting mail. Dr. Phelps found that x-rays showed a stable right hip arthroplasty and diagnosed a disc herniation with radiculopathy. She opined that appellant was disabled from employment. Dr. Phelps advised that it was difficult to determine the time that a disc herniation occurred, but that her work duties of twisting and lifting could have aggravated a disc herniation, noting that her pain presented after a busy day at work.

In a statement dated December 10, 2017, appellant noted that she had seen a physician for pain in the area of her pancreas on October 5, 2017. She sought medical treatment on October 29, 2017 for a fall at home following her October 27, 2017 employment incident.

In a December 27, 2017 response to OWCP's request for additional information, appellant related that her injury had occurred during the period October 23 to 27, 2017, when two clerks were off work and she had to perform additional duties, including lifting parcels, loading mail for transport, and working at the window. She described her fall at home on October 29, 2017. Appellant related that she had a history of a bulging disc in her back that was not disabling.

By decision dated January 19, 2018, OWCP denied appellant's traumatic injury claim. It found that the medical evidence she had submitted was insufficient to establish that she sustained a diagnosed condition causally related to the accepted October 27, 2017 work event.

Thereafter, appellant submitted a December 28, 2017 report from Dr. Phelps who indicated that she had a history of back pain that had begun when she was working 12-hour days and had to stand at the counter, lift mail sacks, and sort mail. She diagnosed a disc herniation with radiculopathy. Dr. Phelps related, "It is difficult to determine when exactly a disc herniation occurs as symptoms do not always occur right after the herniation, but symptoms can be aggravated by a lot of twisting, turning or lifting, which is what [appellant] was doing at work when her pain started."

On February 8, 2018 Dr. Phelps reviewed the results of a November 16, 2017 MRI scan. She again advised that she was unable to determine when the disc herniation happened, but that twisting, turning, and lifting consistent with appellant's employment activities could aggravate the symptoms. Dr. Phelps related:

> "[Appellant's] symptoms of back pain and radiculopathy started during a busy week at work where she worked 12-hour days standing [at] the counter as well as

lifting and twisting to sort mail repeatedly. Prior to her change in activity at work [she] had not been recently seen or evaluated for back pain. It was only after her extended work hours and limited assistance that she presented to the emergency room with severe pain."

On February 21, 2018 appellant requested reconsideration.

By decision dated March 14, 2018, OWCP denied modification of its January 19, 2018 decision.

On April 30, 2018 appellant again requested reconsideration. She submitted a letter from her husband describing her symptoms following her work activities.

By decision dated June 14, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6] In an occupational disease claim, appellant's burden of proof requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[7]

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical

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[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.,* 59 ECAB 178 (2007); *Joe D. Cameron,* 41 ECAB 153 (1989).

[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.,* 59 ECAB 427 (2008); *James E. Chadden, Sr.,* 40 ECAB 312 (1988).

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett,* 41 ECAB 992 (1990).

[7] *T.H.*, Docket No. 18-1585 (issued March 22, 2019); *Joe D. Cameron*, *supra* note 4.

certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[8]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a back condition causally related to the accepted factors of her federal employment.

Appellant filed a claim for a traumatic injury. However, in a December 27, 2017 statement, she attributed her condition to performing additional duties from October 23 to 27, 2017, when two clerks were off sick. OWCP defines an occupational disease as a condition produced by the work environment over a period longer than a single workday or shift.[9] As appellant attributed her back condition to her employment duties occurring over more than one day, OWCP should have adjudicated her claim as an occupational disease.[10] While she filed a traumatic injury claim, the Board finds, in fact, her claim was for an occupational disease.

In support of her claim, appellant submitted reports dated October 31 and November 6, 12, and 17, 2017 from a physician assistant. These reports, however, are of no probative value as physician assistants are not considered physicians as defined under FECA.[11] Consequently, the opinion of a physician assistant is insufficient to meet appellant's burden of proof.[12]

On November 28, 2017 Dr. Hall noted that on October 27, 2017 appellant had experienced back pain at work after performing repetitive heavy lifting and reaching. She diagnosed low back pain with right radiculopathy. Dr. Hall, however, did not address the cause of the diagnosed condition. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.[13]

In a report dated December 8, 2017, Dr. Phelps discussed appellant's history of pain in her back, right hip, and upper leg after lifting and sorting mail at work for a week. She diagnosed a disc herniation with radiculopathy. Dr. Phelps explained that it was difficult to determine the time of occurrence of a disc herniation, but found that appellant's employment duties could aggravate a herniated disc, noting that her back pain had begun after a full workday. Her opinion, however, that work duties could aggravate a herniated disc is speculative in nature and thus of little probative

[8] *H.B.*, Docket No. 18-0781 (issued September 5, 2018).

[9] 20 C.F.R. § 10.5(q).

[10] *Id.*; *see also E.K.,* Docket No. 18-0091 (issued April 6, 2018).

[11] 5 U.S.C. § 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *K.C.*, Docket No. 19-0834 (issued October 28, 2019); *E.T.,* Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

[12] *See A.A.*, Docket No. 19-0957 (issued October 22, 2019).

[13] *See J.H.*, Docket No. 19-0838 (issued October 1, 2019); *S.G.*, Docket No. 19-0041 (issued May 2, 2019).

value.[14] Additionally, the fact that a claimant was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.[15]

On December 28, 2017 Dr. Phelps noted that appellant had experienced back pain after working 12-hour days lifting and sorting mail, and standing at the counter. She diagnosed a disc herniation with radiculopathy. Dr. Phelps again explained that symptoms did not always occur immediately following a disc herniation and thus it was challenging to determine when the herniation had happened. She opined that symptoms of a herniated disc could be aggravated by lifting, turning, or twisting, the activities that appellant was performing at work at the time of the onset of her pain. Dr. Phelps provided a similar report on February 8, 2018, noting that she had not experienced recent back pain prior to her busy workweek. Again, however, her opinion that the symptoms of appellant's herniated disc could be aggravated by her employment activities is speculative in nature.[16] Dr. Phelps failed to explain with certainty how or why appellant's work duties aggravated her herniated disc, noting only that she had not experienced recent back pain prior to the incident. As discussed, an opinion that a condition results from employment because the employee was asymptomatic before the incident is insufficient to establish causal relationship absent supporting rationale.[17] Such rationale is particularly necessary given appellant's history of a prior back condition.[18] Consequently, Dr. Phelps' opinion is insufficient to meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

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 payment of compensation at any time on his own motion or on application.[19]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.[20]

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[14] *See D.R.*, Docket No. 19-0954 (issued October 25, 2019).

[15] *M.B.*, Docket No. 19-0840 (issued October 2, 2019).

[16] *See M.M.*, Docket No. 18-1522 (issued April 22, 2019).

[17] *Id*.

[18] *M.E.*, Docket No. 18-0940 (issued June 11, 2019).

[19] 5 U.S.C. § 8128(a).

[20] 20 C.F.R. § 10.606(b)(3); *see also B.W.*, Docket No. 18-1259 (issued January 25, 2019).

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[21] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[22] 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.[23]

ANALYSIS -- ISSUE 2

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).

The Board finds that appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, she has not advanced a relevant legal argument not previously considered. Consequently, 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).[24]

The Board further finds that appellant has not submitted relevant and pertinent new evidence not previously considered relevant to the issue of whether she has established a back condition causally related to factors of her federal employment. With her reconsideration request, she submitted a statement from her husband regarding her condition. The lay opinion of appellant's spouse, however, is not relevant to the underlying issue in this case, which is whether the medical evidence establishes that appellant sustained an employment-related back condition.[25] This is a medical issue that must be addressed by relevant medical evidence, including the opinion of a physician.[26] As appellant did not provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement under section 10.606(b)(3).[27]

On appeal appellant argues that she submitted a report from her physician that OWCP failed to consider. The record, however, does not contain a medical report submitted with her reconsideration request.

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[21] *Id.* at § 10.607(a). 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.

[22] *Id.* at § 10.608(a); *see also A.P.*, Docket No 19-0224 (issued July 11, 2019).

[23] *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019).

[24] *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

[25] *See R.S.*, Docket No. 18-0684 (issued October 18, 2018).

[26] *M.C.*, Docket No. 18-0841 (issued September 13, 2019).

[27] *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

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.[28]

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a back condition causally related to the accepted factors of her federal employment. The Board further finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

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

Issued: December 12, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

[28] *See L.A.,* Docket No. 18-1226 (issue December 28, 2018) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).