

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

C.R., Appellant)	
)	
and)	Docket No. 18-1102
)	Issued: February 22, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Costa Mesa, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 7, 2018 appellant filed a timely appeal from a March 2, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated May 15, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 2, 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.*

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 October 18, 2013 appellant, then a 53-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 2, 2013 she sustained a left foot injury while pushing a dolly while in the performance of duty. She noted that she felt something stretch and pain in her left foot/ankle while walking on the edge of cement and grass. Appellant did not stop work following the injury, but worked a limited-duty position before later returning to full-duty work. OWCP accepted the claim for left foot sprain.

In a December 20, 2013 report, Dr. Hosea Brown, III, a treating Board-certified internist, diagnosed left knee and ankle sprains, left knee internal derangement, left knee medial and lateral meniscal tears, and left ankle ligament tear, which he attributed to the October 2, 2013 work injury. He noted that appellant had related that the injury occurred when she attempted to stop a 20-pound tub of mail from falling off a dolly and she developed pain and discomfort in her left ankle and knee while trying to stabilize herself on the dolly. Dr. Brown opined that this awkward biomechanical maneuver of stabilizing herself and trying to stop mail from falling off the dolly caused increased stress to her left ankle and knee, resulting in injury.

On January 10, 2014 appellant filed a claim for intermittent wage-loss compensation (Form CA-7) for the period December 31, 2013 to January 10, 2014.

Dr. Brown, in a January 22, 2014 report reiterated appellant's diagnoses and his opinion that these conditions were due to the awkward biomechanical maneuver she used in trying to stabilize herself while at the same time trying to prevent mail from falling off a dolly.

OWCP referred appellant for a second opinion evaluation with Dr. Steven M. Ma, a Board-certified orthopedic surgeon, on January 29, 2014. In a report dated February 20, 2014, Dr. Ma, based upon a review of the statement of accepted facts, medical records, and physical examination, diagnosed left knee sprain and left ankle sprain due to the October 2, 2013 work injury. He opined that, if diagnostic testing established ligament tears, they were unrelated to either her work duties or her October 2, 2013 work injury. Dr. Ma observed that appellant's work injury was relatively minor and she had fully recovered as of November 19, 2013, based on medical records he reviewed. He further found that she sustained no aggravation of any condition and that she was capable of working full duty from December 31, 2013 to January 10, 2014.

By decision dated April 1, 2014, OWCP denied appellant's claim for wage loss from December 30, 2013 to March 21, 2014 and continuing due to the accepted left ankle sprain.

By letter dated April 1, 2014, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, finding that she no longer had any disability or residuals due to her accepted right ankle sprain.

By decision dated May 23, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits, effective May 23, 2014, finding that the weight of the medical opinion evidence rested with the report of the second opinion examiner, Dr. Ma, who concluded that there was no employment-related disability or residuals causally related to the October 2, 2013 work injury. It discounted Dr. Brown's opinion as it found that his opinion was based on an inaccurate history of the injury and lacked sufficient medical rationale.

By a form dated June 6, 2014 and postmarked June 9, 2014, appellant requested an oral hearing before an OWCP hearing representative, which was held on January 15, 2015. By decision dated April 21, 2015, the hearing representative found that OWCP had met its burden of proof to terminate her wage-loss compensation and medical benefits, effective May 23, 2014.

On August 5, 2015 appellant requested reconsideration and submitted a July 21, 2015 report from Dr. Brown in support of her request.

In his July 21, 2015 report, Dr. Brown requested reversal of OWCP's termination decision and requested that the acceptance of the claim be expanded to include left knee anterior cruciate ligament tear, medial anterior meniscal tear, and aggravation of left knee chondromalacia as causally related to the October 2, 2013 work injury. He referenced medical reports, diagnostic testing, and her description of the injury in support of the request.

By decision dated August 26, 2015, OWCP denied modification of its prior decision, finding that the weight of the medical evidence rested with the report of the second opinion examiner, Dr. Ma, who concluded that there was no employment-related disability or residuals causally related to the October 2, 2013 work injury. It explained that the medical evidence submitted by appellant was insufficient to establish that she had any continuing disability or residuals due to her accepted left ankle sprain. OWCP further found the medical evidence insufficient to warrant expansion of the acceptance of her claim to include left knee anterior cruciate ligament tear, medial anterior meniscal tear, and aggravation of left knee chondromalacia as causally related to the October 2, 2013 work injury.

OWCP received reports dated September 23, 2015 from Dr. Brown repeating his opinion and diagnoses from prior reports. In a letter dated February 15, 2016, appellant requested reconsideration.

On February 14, 2017 appellant requested reconsideration and subsequently submitted a January 27, 2016 report from Dr. Brown, reiterating his opinion and diagnoses.³

By decision dated May 10, 2016, OWCP denied modification of its prior decision, finding Dr. Ma's opinion continued to constitute the weight of the medical opinion evidence as it was well rationalized. It found that Dr. Brown's reports contained no rationale explaining why appellant continued to require medical treatment for her accepted injury.

³ On February 18, 2016 appellant filed an appeal to the Board. On June 21, 2016 she requested that her appeal to the Board be dismissed. The Board granted appellant's request on June 21, 2016. *Order Dismissing Appeal*, Docket No. 16-0646 (issued June 21, 2016).

In progress reports dated May 11 and July 20, 2016, Dr. Brown provided examination findings and diagnosed left knee anterior cruciate ligament tear, medial anterior meniscal tear, left ankle tibiocalcaneal, calcaneofibular, and talofibular ligament tears, and left foot sprain.

In an August 18, 2016 report, Dr. Stephen C. Wan, a treating podiatrist, provided examination findings and noted a history of left ankle and foot sprains.

In reports dated August 30 and November 11, 2016, Dr. Charles Herring, a treating Board-certified orthopedic surgeon, noted an injury date of October 2, 2013 and diagnosed left knee anterior cruciate ligament tear, chondromalacia, and medial anterior horn meniscal tear. In a September 27, 2016 letter, he opined that appellant sustained left knee and ankle conditions as the result of the traumatic October 2, 2013 employment injury. Dr. Herring opined that her preexisting degenerative condition had been permanently aggravated by the October 2, 2013 work injury. He disagreed with Dr. Ma on whether the injury caused a torn ligament. In support of his opinion, Dr. Herring noted the lack of any history of a prior left knee injury and the fact that appellant continued to have positive joint effusion three years after the work injury.

Dr. Wan, in September 22, 2016 report, provided examination findings and diagnosed chronic left ankle sprain involving the anterior distal syndesmotiic ligament/distal anterior tibiofibular ligament. He reviewed Dr. Ma's report and opined that Dr. Ma missed the mechanism of injury.

Dr. Brown, in an October 26, 2016 report, provided examination findings and diagnosed chronic left ankle sprain, left ankle multiple ligament dysfunctions, left knee anterior cruciate ligament tear, left knee medial anterior horn meniscal tear, and left knee chondromalacia. He referenced treatment by Dr. Wan and Dr. Herring, including diagnoses from their reports.

On January 25, 2017 Dr. Brown requested OWCP expand the acceptance of appellant's claim to include the conditions of chronic left ankle sprain, left ankle multiple ligament dysfunctions, left knee anterior cruciate ligament tear, left knee medial anterior horn meniscal tear, and temporary aggravation of left knee chondromalacia as due to the October 2, 2013 work injury. He further disagreed with the termination of her medical benefits as she continued to require medical treatment for injuries sustained as the result of the October 2, 2013 work injury. Moreover, Dr. Brown claimed that there was an unresolved conflict in medical opinion between Dr. Ma, serving as the second opinion physician, and himself regarding the necessity of future medical care. He reported that, in accordance with "FECA Guidelines," OWCP should refer her for a referee examination to resolve this conflict.

By decision dated May 15, 2017, OWCP denied modification of its prior decision, as it found that the weight of the medical opinion evidence continued to rest with Dr. Ma's well-rationalized opinion. It further found that the medical evidence appellant submitted was insufficiently rationalized to support her claim of continuing residuals or disability or to warrant expansion of her claim or to create a conflict with Dr. Ma's opinion.

On August 7, 2017 appellant requested reconsideration and submitted additional reports from Dr. Brown.

Dr. Brown in a letter dated July 17, 2017, noted his disagreement with OWCP's decision denying modification. He again opined that the medical evidence was sufficient to establish that the October 2, 2013 work injury caused additional conditions from which appellant had not recovered and which required further medical treatment. Dr. Brown also claimed that there was a conflict in medical opinion between Dr. Ma, serving as the second opinion physician, and her treating physicians regarding the necessity of future medical care. He reiterated his request to refer appellant for a referee examination to resolve this conflict.

In a July 17, 2017 progress report, Dr. Brown provided examination findings and diagnoses of chronic left ankle sprain, multiple left ankle ligament dysfunctions, temporary aggravation of left knee chondromalacia, left knee medial anterior meniscal tear, and left knee anterior cruciate ligament tear.

By decision dated November 3, 2017, OWCP denied reconsideration of the merits of appellant's claim as it found that the medical evidence submitted was cumulative and repetitious.

In a letter dated February 5, 2018 appellant, through a representative, requested reconsideration contending that the weight of the medical opinion evidence rested with Dr. Brown, appellant's treating physician or in the alternative that there was an unresolved conflict in the medical opinion evidence between Dr. Brown and Dr. Ma. Appellant also contended that her claim should be upgraded or expanded to include left ankle and knee conditions. No new evidence accompanied the reconsideration request.

By decision dated March 2, 2018, OWCP denied reconsideration. It found that appellant failed to submit new and relevant evidence or argument in support of her claim. OWCP noted that argument regarding an unresolved conflict in the medical opinion evidence had been previously raised and considered.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the

⁴ 5 U.S.C. § 8128(a). Under section 8128 of FECA, 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 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

above standards, OWCP will deny the application for review without reopening the case for a review on the merits.⁷

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set for at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁰

The Board has held that the submission of evidence which repeats or duplicates evidence already of record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹¹

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).

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. The representative argued that the weight of the medical opinion evidence rested with Dr. Brown, appellant's treating physician or that in the alternative there was an unresolved conflict in the medical opinion evidence between Dr. Brown and Dr. Ma. He further contended that OWCP erred in failing to expand acceptance of appellant's claim to include additional conditions. These arguments were previously raised and considered by OWCP in its prior decisions. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹² As such, appellant is not entitled to a 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).

Appellant failed to submit any relevant and pertinent new evidence with the February 5, 2018 request for reconsideration. Since issuing its November 3, 2017 nonmerit decision, OWCP did not receive any additional evidence relevant to whether she continued to have residuals and disability due to her accepted employment injury, or that her claim should be expanded to include

⁷ *Id.* at § 10.608(b).

⁸ *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

⁹ *Id.*; see also *Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *Supra* note 8; *Annette Louise*, 54 ECAB 783 (2003).

¹¹ *K.T.*, Docket No. 18-0193 (issued May 21, 2018); *M.E.*, 58 ECAB 694 (2007).

¹² See *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007).

additional medical conditions. Because appellant did not provide any relevant and pertinent new evidence, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹³

As appellant's reconsideration request did not meet any of the three requirements enumerated under section 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.¹⁴

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).

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 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

¹³ 20 C.F.R. § 10.606(b)(3)(iii). *See K.C.*, Docket No. 16-1526 (issued June 4, 2018).

¹⁴ *C.F.*, Docket No. 18-0360 (issued July 19, 2018); *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).