

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

C.B., Appellant)	
)	
and)	Docket No. 18-1108
)	Issued: January 22, 2019
DEPARTMENT OF STATE, CHICAGO)	
PASSPORT AGENCY, Chicago, IL , 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 8, 2018 appellant filed a timely appeal from an April 4, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from OWCP's last merit decision, dated October 6, 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 April 4, 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 September 13, 2004 appellant, then a 43-year-old contact representative/typist, filed an occupational disease claim (Form CA-2) alleging that she developed severe bilateral carpal tunnel syndrome in both wrists and hands as well as trigger finger and a left shoulder condition due to typing on a keyboard in the performance of duty. On December 20, 2004 OWCP accepted her occupational disease claim for bilateral carpal tunnel syndrome. On February 9, 2005 it expanded acceptance of the claim to include left thumb localized swelling, fibromatosis, lesion of the ulnar nerve, and aggravation of displacement of lumbar intervertebral disc without myelopathy. Appellant underwent left carpal tunnel release and left thumb surgery on April 4, 2005, right carpal tunnel release on June 15, 2005, right cubital tunnel surgical release on April 21, 2008, and left cubital tunnel surgical release on July 21, 2008.

On October 6, 2008 appellant returned to full-duty work. By decision dated April 3, 2009, OWCP found that her actual earnings as a modified contact representative, effective November 3, 2008 fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation to zero.

On December 14, 2010 appellant filed a notice of recurrence (Form CA-2a) alleging that she stopped work on October 13, 2010 due to total disability causally related to her December 27, 1996 employment injury.³ OWCP accepted that she sustained a recurrence of disability beginning October 21, 2010. Appellant returned to light-duty work on November 29, 2010.

Beginning on January 10, 2012 appellant's work schedule was reduced to four hours a day. She continued to work four hours a day through August 28, 2012.

On August 15, 2012 Dr. Robert Bowser, a family practitioner, listed appellant's diagnosed conditions of degenerative joint disease, carpal tunnel syndrome, gait abnormality, lumbar disc disease with radiculopathy, hand pain, right leg numbness, tear of the bilateral shoulder supraspinatus tendons, spinal stenosis, and pain in the ankles and feet. He opined that due to these chronic medical problems she was unable to perform the essential functions of her position with or without a reasonable accommodation.

In a report dated August 30, 2012, Dr. Merrie Viscarra, an osteopath and Board-certified physiatrist, noted that appellant had problems tolerating even a four-hour workday due to severe pain in multiple joints, including her knees and back, as well as her wrists and hands. She further found that appellant had difficulty standing and sitting. Dr. Viscarra reported that appellant wanted to be taken out of work and to go on disability. She opined that appellant required knee and

³ On October 28, 2010 appellant filed a claim for compensation (Form CA-7) requesting wage-loss compensation for total disability beginning October 18, 2010.

back surgeries. Dr. Viscarra completed a work capacity evaluation form (OWCP-5c) on August 30, 2012 and indicated that appellant could not work.

On August 31, 2012 appellant filed claims for compensation (Form CA-7) requesting wage-loss compensation for total disability from September 3 through October 19, 2012.⁴ She stopped work on August 31, 2012 and began using eight hours a day of leave without pay at that time.

In a development letter dated October 30, 2012, OWCP informed appellant that it was authorizing wage-loss compensation for four hours a day for the period September 3 through October 19, 2012 and onward. It noted that the additional four hours a day of wage-loss compensation claimed was not supported by the medical evidence from Drs. Viscarra and Bowser as these physicians found that appellant was totally disabled based on her increasing subjective pain complaints. OWCP afforded appellant 30 days to submit additional medical evidence to support her increased disability causally related to her accepted employment injury.

Appellant submitted additional medical evidence including a July 30, 2012 note from Dr. Joshua J. Jacobs, a Board-certified orthopedic surgeon, diagnosing end-stage bilateral knee osteoarthritis. Dr. Jacobs recommended a 30-day pain clinic and total knee replacements. Appellant also provided a report dated August 22, 2012 from Dr. Browser, listing her diagnosed conditions and finding that she was totally disabled.

On November 5, 2012 the employing establishment removed her from her position.

In a note dated November 16, 2012, Dr. Viscarra reported that appellant could no longer tolerate a four-hour workday as she had increased difficulty standing and sitting even with accommodations. She diagnosed polyarticular arthritis. Dr. Viscarra opined that appellant was wholly and permanently disabled from work.

On September 12 and December 4, 2012 Dr. Steven Stanos, Jr., an osteopath, discussed pain program recommendations with appellant. He examined appellant and listed her diagnosed conditions of chronic upper limb pain, chronic bilateral knee pain, gait abnormality, chronic bilateral carpal tunnel syndrome, severe bilateral knee osteoarthritis with limited mobility, lumbar spinal stenosis, lumbosacral radiculopathy with distal foot pain, and obesity.

In a report dated January 18, 2013, Dr. Stanos diagnosed severe osteoarthritis in multiple joints including bilateral knees, hips, and upper limbs. He noted that appellant was presently working at a sedentary level and using a scooter for mobility within her office.

On January 2, 2013 Dr. Bowser listed appellant's conditions of lumbar degenerative disc disease, degenerative joint disease, and spinal stenosis, as well as end stage bilateral degenerative joint disease of both knees, carpal tunnel syndrome of both hands, and bilateral nonoperable shoulder supraspinatus tears. He opined that she became partially disabled on January 9, 2012 due

⁴ Appellant submitted additional claims for compensation for the period October 22 through November 19, 2012 and "indefinite."

to these conditions and totally and permanently disabled due to these conditions on August 30, 2012.

In a January 18, 2013 report, Dr. Bowser opined that appellant had experienced a worsening of her degenerative joint disease and degenerative disc disease of her back, which resulted in her inability to stand erect or to sit at a computer due to her forward flexion. He further found progression in her bilateral knee degenerative joint disease resulting in imbalance and gait disorder. Dr. Bowser found that appellant was unable to stand or walk independently and therefore could not perform her work duties of filing.

In a note dated April 4, 2013, Dr. Stanos diagnosed severe polyarticular osteoarthritis and noted that appellant was undergoing a chronic pain program for management of her bilateral knee and back pain.

On April 19, 2013 appellant underwent a functional capacity evaluation (FCE) which noted that she did not exhibit full effort. The FCE determined that she could work full time at the sedentary level, but that she rated her abilities as less than sedentary capacity.

On November 26, 2013 appellant elected to receive Office of Personnel Management (OPM) disability retirement benefits rather than FECA wage-loss compensation benefits, effective November 4, 2013.

OWCP continued to receive reports from Dr. Viscarra in 2014 and 2015, opining that appellant continued to be totally disabled from work due to chronic pain and mobility dysfunction.⁵ In a report dated August 28, 2015, Dr. Viscarra opined that appellant continued to be totally and permanently disabled due to chronic pain repeating her earlier findings and diagnoses. She further opined that appellant had reached maximum medical improvement (MMI) on August 30, 2012.

By decision dated April 21, 2017, OWCP denied appellant's claim for total disability for the period September 3, 2012 through November 2, 2013. It noted that Dr. Viscarra continued to find that appellant was capable of working four hours a day from February 13 through August 30, 2012.⁶

On January 2, 2018 appellant requested reconsideration of the April 21, 2017 decision. She provided a narrative statement and asked that OWCP recognize that she had a previous claim for aggravation of preexisting L4-5 disc herniation. Appellant identified the medical evidence which she believed established her total disability beginning August 31, 2012.

⁵ By decision dated May 23, 2016, OWCP accepted appellant's June 16, 2011 occupational disease claim for bilateral carpal tunnel syndrome. On June 8, 2016 it authorized left shoulder arthroscopy. On June 15, 2016 OWCP expanded acceptance of appellant's claim to include incomplete rotator cuff tears of the right and left shoulders, bilateral ulnar neuropathies, and bilateral bicipital tendinitis. It noted that bilateral knee osteoarthritis and lumbar spinal stenosis were not accepted work-related conditions.

⁶ By decision dated October 6, 2017, OWCP denied appellant's claim for a consequential bilateral degenerative joint disease of the knees.

In support of her January 2, 2018 request for reconsideration, appellant submitted a June 9, 2017 report from Dr. Chirag M. Shah, a Board-certified orthopedic surgeon, opining that she was totally disabled due to chronic pain and mobility dysfunction. Dr. Shah found that her conditions were related to back pain caused by lumbar degenerative disc disease, degenerative joint disease, and spinal stenosis affecting her low back and legs. He also reported that appellant had arthritis in both knees, chronic carpal tunnel syndrome, chronic shoulder pain, and supraspinatus tears, chronic fatigue due to sleep apnea, and morbid obesity. Dr. Shah found that she had reached MMI on August 30, 2012.

Appellant also resubmitted medical evidence from her treating physicians including Drs. Viscarra, Bowser, Stanos, and Jacobs. She resubmitted medical documentation predating her alleged period of total disability which began on August 31, 2012 as well as medical evidence that did not mention or address the alleged period of disability, including diagnostic studies. Appellant also resubmitted documents from OPM, OWCP, and the employing establishment.

By decision dated April 4, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review. It determined that she had not submitted relevant and pertinent new evidence addressing her claimed period of total disability from September 3, 2012 through November 2, 2013.

LEGAL PRECEDENT

Section 8128(a) of FECA⁷ vests OWCP with discretionary authority to determine whether to review an award for or against compensation either under its own authority or on application by a claimant. 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.⁸ For decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the integrated Federal Employees' Compensation System.⁹

Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determined that the claimant has present evidence and/or argument that meets at least one of the standards described in section 10.606(b)(3).¹⁰ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.¹¹

⁷ 5 U.S.C. § 8128(a). Under section 8128 of FECA, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁸ 20 C.F.R. § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). See also *R.R.*, Docket No. 18-1044 (issued October 24, 2018); *C.B.*, Docket No. 13-1732 (issued January 28, 2014).

¹⁰ 20 C.F.R. § 10.608(b).

¹¹ *Id.* at § 10.606(b)(3).

Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of the requirements, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹²

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹³ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴

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.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. As such, she 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).

In support of her January 2, 2018 request for reconsideration, appellant submitted a report dated June 9, 2017 from Dr. Shah. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but she did not submit any such evidence in this case.¹⁵ The underlying issue in the case is whether appellant has provided sufficient medical evidence to establish that she was totally disabled from September 3, 2012 through November 2, 2013 due to her accepted employment injuries. The Board notes that Dr. Shah's report only addresses the pertinent issue by noting that she reached MMI on August 30, 2012. However, Dr. Shah's report does not require a merit review as it duplicates Dr. Viscarra's August 28, 2015 report verbatim.¹⁶ The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁷

Appellant also resubmitted the medical evidence described in the factual history above. This evidence was previously considered by OWCP and it is therefore not pertinent new evidence.¹⁸ Appellant also provided copies of medical reports and diagnostic studies that predate

¹² *Id.* at § 10.608(b).

¹³ *P.H.*, Docket No. 18-1020 (issued November 1, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁴ *P.H.*, *id.*; *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁵ *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

¹⁶ It appears from the letterhead that Dr. Viscarra had left the practice and that Dr. Shah merely altered the date and signature from her August 28, 2015 report.

¹⁷ *S.S.*, *supra* note 15.

¹⁸ *Id.*

her alleged period of total disability beginning on August 31, 2012 or fail to address the claimed period of disability. These reports either cannot, or do not, address the period of disability claimed and are therefore irrelevant to the underlying basis for which OWCP denied her claim.¹⁹ Diagnostic studies are of limited probative value as they do not address whether the diagnosed condition results in any period of disability.²⁰ Appellant also provided copies of the documents that she received from OPM, the employing establishment, and OWCP regarding her claim for total disability. These documents are irrelevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.²¹ As appellant did not meet any of the necessary regulatory requirements, she was not entitled to further merit review based on her January 2, 2018 reconsideration request.

Appellant's reconsideration request did not show that OWCP erroneously applied or interpreted a point of law, advance a relevant legal argument not previously considered by OWCP, or include relevant and pertinent new evidence.

Accordingly, 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).

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).

¹⁹ *G.C.*, Docket No. 18-0506 (issued August 15, 2018).

²⁰ *Id.*

²¹ *Id.*; *C.N.*, Docket No. 17-1475 (issued May 23, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 22, 2019
Washington, DC

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

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

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