

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

R.V., Appellant)
)
and) **Docket No. 18-1125**
) **Issued: January 17, 2019**
DEPARTMENT OF VETERANS AFFAIRS,)
AMERICAN LAKE VETERANS)
ADMINISTRATION MEDICAL CENTER,)
Takoma, WA, Employer)

Appearances:
*Herschel Veal, for the appellant*¹
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 14, 2018 appellant, through her representative, filed a timely appeal from a March 28, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated February 8, 2017, to the

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.

filing of this appeal, 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 April 29, 2016 appellant, then a 52-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that, on April 21, 2016, she sustained an injury due to a fall while in the performance of duty. OWCP accepted her claim for left knee contusion, left knee medial meniscus tear, and left hip contusion. Appellant did not stop work at the time of her injury.

Appellant stopped work on June 12, 2016 and on July 8, 2016 she underwent OWCP-approved left knee surgery, including partial medial/lateral meniscectomy and chondroplasty.⁴

In an August 24, 2016 duty status report (Form CA-17), Dr. Mario G. Alinea, an attending Board-certified family practitioner, indicated that appellant could return to work on August 29, 2016 with restrictions, including lifting no more than 10 pounds on a continuous basis and lifting no more than 20 pounds on an intermittent basis. Appellant returned to limited-duty work on a full-time basis on August 29, 2016.

Appellant stopped work on September 5, 6, and 9, 2016 and for a portion of September 16, 2016. On September 22, 2016 she commenced working for four hours per day, rather than for eight hours. Appellant filed a series of Form CA-7 claims for compensation for wage loss due to her work stoppages. These forms covered intermittent periods of disability commencing September 5, 2016.

In a September 6, 2016 report, Dr. Alinea advised that appellant reported that on September 3, 2016 she fell on her left hip while at home. He detailed appellant's left hip pain symptoms and prescribed pain medication.

In a September 22, 2016 report, Dr. David A. Coons, an attending Board-certified orthopedic surgeon, diagnosed left hip trochanteric bursitis and recommended that appellant perform light-duty work for four to six hours per day commencing September 22, 2016.

In an October 17, 2016 duty status report, Dr. Alinea diagnosed left hip contusion and recommended that appellant work for four hours per day commencing September 22, 2016.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted a timely request for oral argument with her appeal. By letter dated October 2, 2018, appellant withdrew her request for oral argument.

⁴ Appellant received disability compensation on the daily rolls from June 12 to August 20, 2016.

By decision dated November 29, 2016, OWCP denied appellant's disability claim for September 5, 6, and 9, 2016 and for a portion of September 16, 2016. By separate decision dated November 29, 2016, it denied her disability claim for September 22, 2016 and continuing. In both decisions, OWCP determined that appellant had failed to submit rationalized medical evidence relating her disability beginning in September 2016 to her April 21, 2016 employment injury.⁵

On January 4, 2017 appellant requested reconsideration of both November 29, 2016 decisions. She submitted additional medical evidence including a December 23, 2016 report in which Dr. Alinea indicated that appellant sustained a left hip injury during a fall on April 21, 2016. Dr. Alinea noted that x-rays taken after the fall showed no left hip fracture and indicated that appellant continued to have left hip pain thereafter. He reported that appellant fell at home on September 3, 2016 as she "felt her hip was weak." Appellant presented to Dr. Alinea on September 6, 2016 with left hip complaints. Dr. Alinea expressed his opinion that it was irrelevant that appellant fell at home on September 3, 2016, as there was clear documentation that she already had left hip problems even prior to September 3, 2016 and had not received treatment for the left hip component of her April 21, 2016 work injury. He noted that some of the magnetic resonance imaging (MRI) scan findings could clearly be explained by the April 21, 2016 fall and noted, "It is my opinion based on the facts above that her hip complaints are claim related on a more probable than not basis."

By decision dated February 8, 2017, OWCP denied modification of its November 29, 2016 decisions. It noted that the medical evidence submitted did not contain a rationalized medical opinion relating appellant's disability beginning in September 2016 to the accepted April 21, 2016 employment injury.

On January 30, 2018 appellant requested reconsideration of the February 8, 2017 decision. In a January 24, 2018 letter, she argued that she submitted medical evidence establishing that she had intermittent disability commencing in early-September 2016 due to her April 21, 2016 employment injury.

Appellant submitted a February 17, 2017 report in which Dr. Alinea indicated that appellant's OWCP claim was in dispute in spite of there being clear documentation that she had persistent left hip problems even prior to her September 3, 2016 fall at home. Dr. Alinea noted that appellant might have fallen on September 3, 2016 as a result of her "bad hip" given that her left hip might have given way. He explained that there was no known cause for the September 3, 2016 fall as appellant did not recall any trip, fall, or syncope. Dr. Alinea noted that a left knee MRI scan clearly showed a labral tear of the left knee related to the September 3, 2016 fall. He indicated that he did not know what more he could do to convince OWCP that "this should be covered under the claim." Appellant also submitted an August 24, 2017 report of Dr. Alinea which contained the same text as the February 17, 2017 report.

⁵ OWCP noted that appellant's attending physicians failed to adequately explain why she could only work four hours per day commencing September 22, 2016.

In several duty status reports dated in January 2017, Dr. Alinea recommended that appellant perform limited-duty work for four hours per day.⁶ In periodic narrative reports dated, beginning in January 2017, he discussed appellant's left hip and left knee conditions. Appellant submitted progress notes, dated beginning in November 2016, of Dr. John C. Hung, a Board-certified orthopedic surgeon. In reports dated in March 2017, Dr. James D. Bruckner, another attending Board-certified orthopedic surgeon, discussed appellant's left hip condition. Appellant also submitted numerous diagnostic testing reports from 2016 and 2017, including several MRI scans and x-ray tests of her left hip.

By decision dated March 28, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence submitted by appellant in connection with her reconsideration request was duplicate or irrelevant.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.⁷

A claimant seeking reconsideration of a final decision must present arguments or provide evidence 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.⁸ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁹ 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.¹⁰

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.¹¹ For OWCP decisions issued on or after August 29, 2011, timeliness is determined by the "received date" as recorded in the integrated Federal Employees' Compensation System (iFECS).¹² If the last day of the one-year time period

⁶ In these reports, Dr. Alinea provided a history of "fall" on an unspecified date.

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(3); *see also* *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ *Id.* at § 10.608(a); *see also* *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

¹⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *Id.* at § 10.607(a).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

is a Saturday, Sunday, or a legal holiday, OWCP will still consider a request to be timely filed if it is received on the next business day.¹³

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁴ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁵

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).

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP.¹⁶ In a January 24, 2018 letter, appellant argued that she submitted medical evidence establishing that she had intermittent disability commencing in early-September 2016 due to her April 21, 2016 employment injury.

Appellant submitted numerous medical reports in support of her reconsideration request. The underlying issue in this case is whether appellant submitted medical evidence sufficient to establish disability for intermittent periods commencing September 5, 2016 due to her April 21, 2016 employment injury, and this is a medical issue which must be addressed by relevant medical evidence.¹⁷ A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence. The Board finds, however, that appellant did not submit any such evidence in this case.

Appellant submitted February 17 and August 24, 2017 reports in which Dr. Alinea, an attending physician, posited that appellant's September 3, 2016 fall at home was due to a left hip condition related to her April 21, 2016 employment injury. In these reports, Dr. Alinea emphasized that appellant already had left hip problems prior to her September 3, 2016 fall. The Board notes that Dr. Alinea's February 17 and August 24, 2017 reports are similar to his December 23, 2016 report which was previously considered by OWCP and found to be insufficient to establish appellant's disability claim. The submission of these reports do not require reopening of appellant's claim for review of the merits because the Board has found that the submission of evidence which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹⁸

¹³ *Id.* at Chapter 2.1602.4. *See also M.A.*, Docket No. 13-1783 (issued January 2, 2014).

¹⁴ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁵ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁶ *See supra* note 7.

¹⁷ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁸ *See supra* note 13.

Appellant submitted other medical reports, including additional reports of Dr. Alinea produced in 2017¹⁹ and reports of Dr. Hung and Dr. Bruckner from 2016 and 2017. She also submitted numerous diagnostic testing reports from 2016 and 2017, including several MRI scans and x-ray tests of her left hip. However, these reports are not relevant to appellant's disability claim because none of them contain an opinion that she sustained disability for intermittent periods commencing September 5, 2016 due to her April 21, 2016 employment injury. The submission of these reports does not require reopening appellant's claim for review on the merits because the Board has held that the submission of evidence or argument, which does not address the particular issue involved, does not constitute a basis for reopening a case.²⁰

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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 In several duty status reports dated in January 2017, Dr. Alinea recommended that appellant perform limited-duty work for four hours per day.

²⁰ See *supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 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