

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

L.S., Appellant

and

**DEPARTMENT OF THE ARMY, MILITARY
ENTRANCE PROCESSING STATION,
Doral, FL, Employer**

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**Docket No. 19-0117
Issued: July 11, 2019**

Appearances:

*Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 19, 2018 appellant, through counsel, filed a timely appeal from an April 23, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated July 15, 2016, to the 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

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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the April 23, 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 February 21, 2014 appellant, then a 50-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that she sustained injury to her lower back, hip, and right knee while in the performance of duty on February 14, 2014. She asserted that her chair rolled out from under her while she was standing up, resulting in her falling to the floor. Appellant stopped work on February 18, 2014.

In a February 15, 2014 emergency room report, Dr. Warren Dirk, a Board-certified emergency medicine physician, noted that appellant reported that she fell to the floor onto her buttocks when a chair rolled away from underneath her on February 14, 2014. He diagnosed low back pain. On March 17, 2014 Dr. Christopher Brown, an attending Board-certified orthopedic surgeon, provided a history of appellant's February 14, 2014 fall at work and diagnosed lumbar sprain, prolapsed cervical disc, and prolapsed thoracic disc (with radiculopathy). He noted that "the injury she sustained on [February 14, 2014] in my opinion is work related."

By decision dated April 7, 2014, OWCP accepted appellant's claim for lumbar sprain due to her February 14, 2014 employment injury.⁴ In the same decision, it determined that she did not establish that the additional conditions of prolapsed cervical disc and prolapsed thoracic disc (with radiculopathy) were causally related to her accepted February 14, 2014 employment injury.

On April 7, 2015 appellant, through counsel, requested reconsideration of OWCP's April 7, 2014 decision with respect to the finding that she had not established the additional employment-related conditions of prolapsed cervical disc and prolapsed thoracic disc (with radiculopathy) as causally related to the February 14, 2014 employment injury.

Appellant submitted an April 21, 2014 report from Dr. Brown, who diagnosed lumbar sprain, thoracic disc prolapse with radiculopathy, and neck pain. On January 9, 2015 Dr. Brown diagnosed thoracic disc prolapse with radiculopathy, displacement of lumbar intervertebral disc without myelopathy, lumbar sprain, displacement of cervical intervertebral disc without myelopathy, and prolapsed cervical intervertebral disc.

By decision dated April 28, 2015, OWCP denied appellant's request for expansion of the acceptance of her claim to include the additional conditions of prolapsed cervical disc and prolapsed thoracic disc (with radiculopathy). It determined that she had not submitted medical evidence sufficient to establish that these conditions were causally related to her February 14, 2014 employment injury.

On April 22, 2016 appellant, through counsel, requested reconsideration of OWCP's April 28, 2015 decision.

⁴ OWCP paid appellant wage-loss compensation on the daily rolls commencing April 4, 2014.

Appellant submitted an April 27, 2014 attending physician report (Form CA-20) from Dr. Alan Gruskin, an attending Board-certified physical medicine and rehabilitation physician, who listed a date of injury of February 14, 2014, diagnosed lumbar facet pain, and found that appellant was partially disabled from work. In a May 5, 2015 report, Dr. Gruskin diagnosed lumbar sprain, displacement of thoracic disc, displacement of cervical intervertebral disc without myelopathy, and facet syndrome.

By decision dated July 15, 2016, OWCP denied modification of its April 28, 2015 decision, finding that appellant had not established that the additional conditions of prolapsed cervical disc and prolapsed thoracic disc (with radiculopathy) were causally related to her February 14, 2014 employment injury.

On July 12, 2017 appellant, through counsel, requested reconsideration of OWCP's July 15, 2016 decision. In a July 12, 2017 letter received on the same date, counsel asserted that Dr. Robert R. Reppy, an attending Board-certified family practitioner, had greatly increased appellant's work restrictions based on objective findings regarding "the ongoing issues with her cervical, thoracic, and lumbar medical condition."

Appellant submitted a March 17, 2017 report from Dr. Reppy, who advised that appellant reported a February 14, 2014 accident at work when she fell backwards to the floor onto her coccyx/lumbar spine due to a chair rolling out from underneath her. Dr. Reppy reported the findings of his March 17, 2017 physical examination, and diagnosed cervical disc disease, lumbar disc disease, and coccydynia. He prescribed Flexeril pain medication and requested that appellant return for follow-up evaluation in a month. On May 5, 2017 Dr. Reppy noted that appellant complained of pain in her thoracic spine, neck, lumbar spine, and coccyx. He again diagnosed cervical disc disease, lumbar disc disease, and coccydynia.

In a duty status report (Form CA-17) dated July 14, 2017, Dr. Reppy listed a date of injury of February 14, 2014 and a diagnosis due to injury of "lumbar." He listed various work restrictions for full-time work, including lifting no more than five pounds, walking for no more than one hour per day, standing for no more than one half hour per day, and no bending, stooping, or twisting. In September 15 and November 10, 2017 reports, Dr. Reppy advised that appellant continued to report pain in her coccyx and cervical, thoracic, and lumbar spines. In a September 15, 2017 duty status report, he listed a date of injury of February 14, 2014 and a diagnosis due to injury of "pain disc herniated." Dr. Reppy provided the same work restrictions as he had on July 14, 2017.⁵

In a January 26, 2018 report, Dr. Reppy noted that appellant reported that neck pain had become her chief complaint. He diagnosed cervical disc disease, lumbar disc disease, and coccydynia, and prescribed Flexeril and ibuprofen pain medication. In a January 26, 2018 duty status report, Dr. Reppy listed a date of injury of February 14, 2014 and a diagnosis due to injury of "disc [disease]," and he provided the same work restrictions as he had on July 14 and September 15, 2017.

⁵ Appellant also submitted the results of physical capacity evaluations which were obtained on July 17 and November 14, 2017 by an attending physical therapist with an illegible signature.

In support of her reconsideration request, appellant also submitted a November 20, 2014 hospital treatment report and a January 19, 2015 medical authorization request form which had previously been submitted and considered by OWCP.

By decision dated April 23, 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 submitted evidence/argument was repetitious or immaterial.

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.⁶

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.⁷ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁸ 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.⁹

For OWCP 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.¹⁰

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹¹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹² While a 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.¹³

⁶ 5 U.S.C. § 8128(a).

⁷ 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).

⁸ *Id.* at § 10.608(a); *see also* *C.K.*, Docket No. 18-1019 (issued October 24, 2018).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010). To be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought. 20 C.F.R. § 10.607(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹¹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹² *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ *John F. Critz*, 44 ECAB 788, 794 (1993).

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 filed a timely request for reconsideration on July 12, 2017,¹⁴ but she did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP.¹⁵ Consequently, she is not entitled to 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).

In support of her request for reconsideration, appellant submitted March 17, May 5, September 15, November 10, 2017, and January 26, 2018 narrative reports in which Dr. Reppy diagnosed cervical disc disease, lumbar disc disease, and coccydynia. In duty status reports dated July 14, September 15, 2017, and January 26, 2018, Dr. Reppy recommended work restrictions and provided diagnoses such as "lumbar," "pain disc herniated," and "disc [disease]."

As the underlying issue in this case is medical in nature, it must be addressed by relevant and pertinent new medical evidence.¹⁶ The underlying medical issue in this case is whether appellant has submitted sufficient medical evidence to establish that the acceptance of her claim should be expanded to include the additional conditions of prolapsed cervical disc and prolapsed thoracic disc (with radiculopathy) as causally related to her accepted February 14, 2014 employment injury. OWCP had only accepted appellant's claim for lumbar sprain.

While the above-noted medical evidence submitted by appellant was new, it was not relevant because it did not directly address the underlying issue of the present case. The evidence was not relevant because it did not contain an opinion that appellant sustained the conditions of prolapsed cervical disc and prolapsed thoracic disc (with radiculopathy) or any additional conditions other than the accepted lumbar sprain due to the accepted February 14, 2014 employment injury. 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.¹⁷

In support of her reconsideration request, appellant submitted a November 20, 2014 hospital treatment report and a January 19, 2015 medical authorization request form which had previously been submitted and considered by OWCP. However, the Board has held that the

¹⁴ See *supra* note 8.

¹⁵ Appellant presented the argument that Dr. Reppy had greatly increased her work restrictions based on objective findings regarding "the ongoing issues with her cervical, thoracic, and lumbar medical condition." However, she did not provide a clear argument that she sustained an employment-related condition on February 14, 2014 other than the low back condition which had been accepted.

¹⁶ See *K.B.*, Docket No. 18-1392 (issued January 15, 2019); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹⁷ See *supra* note 13. Appellant also submitted the results of physical capacity evaluations which were performed on July 17 and November 14, 2017 by an attending physical therapist. These reports are not relevant to the underlying issue of the present case because the report of a physical therapist does not constitute probative medical evidence as a physical therapist is not a physician under FECA. *S.T.*, Docket No. 17-0913 (issued June 23, 2017) (a physical therapist is not a physician under FECA).

submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁸

For these reasons, appellant is not entitled to review of the merits of her claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

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).

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 11, 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

¹⁸ See *supra* note 12.