

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

F.D., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Albuquerque, NM, Employer**

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**Docket No. 18-0199
Issued: March 20, 2019**

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 November 6, 2017 appellant filed a timely appeal from May 26, July 19, and August 7, 2017 merit decisions and a May 10, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 recurrence of total disability for the period April 3 through 14, 2017 and intermittent periods from May 1

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the August 7, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP at the time of the August 7, 2017 decision 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.*

through June 9, 2017 causally related to her February 6, 2014 accepted employment injury; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 4, 2014 appellant, then a 38-year-old training instructor, filed a traumatic injury claim (Form CA-1) alleging that, on February 6, 2014, she was hit on the head by several dodgeballs while in the performance of duty. OWCP accepted the claim for displacement of cervical interval disc without myelopathy. It subsequently expanded acceptance of the claim to include cervical disc disorder with myelopathy at C5-6 and spondylosis without myelopathy or cervical radiculopathy.

Appellant initially lost no time from work, but then stopped work on May 4, 2014. On May 8, 2014 she underwent an OWCP authorized cervical arthroplasty at C5-6 with an artificial cervical disc device. On June 23, 2014 appellant returned to work in a full-time modified-duty capacity. She resumed full-duty work on August 28, 2014.

Approximately one year later, on August 28, 2015, appellant reported to a hospital emergency department noting that she hit the back of her neck on a metal bar a week prior and experienced ongoing neck pain and headaches. She stopped work on September 14, 2015 and has not returned.

On September 22, 2015 appellant filed a claim for wage-loss compensation (Form CA-7) alleging a change or worsening of her February 6, 2014 accepted employment injury.

By decision dated November 6, 2015, OWCP denied appellant's recurrence claim for wage-loss compensation commencing September 22, 2015 due to her accepted injury. It found that she had sustained an intervening injury in August 2015 rather than a recurrence of her accepted February 6, 2014 employment injury.

In a report dated October 28, 2015, Dr. Richard E. Manos, a Board-certified orthopedic surgeon, related that appellant was seen in follow up on September 15, 2015 for headaches, which may be the result of a postconcussive syndrome since she had been hit on the head with a dodge ball. He related that on August 28, 2015 she was seen in an emergency room after she hit her neck on a metal bar, but he concluded that this incident was not an intervening injury. Dr. Manos noted that he took appellant off work on September 15, 2015.

In a report dated December 1, 2015, Dr. Manos related that on May 8, 2014 appellant had undergone cervical arthroplasty at C5-6 for a disc herniation. He noted that when he last saw her on September 15, 2015 she related that she found it difficult to work because her headaches and neck pain were constant. Dr. Manos opined that appellant's symptoms existed before she hit her neck on a metal bar, and she had no significant change from her preexisting symptoms. He concluded that her symptoms were residual to her cervical arthroplasty and that at this point she could return to light duty, with periodic 10-minute breaks every hour.

On January 26, 2016 appellant filed a request for reconsideration of the November 6, 2015 decision. By decision dated May 5, 2016, OWCP denied modification of the November 6, 2016

decision, finding that the medical evidence submitted was insufficient to establish a change or worsening of her accepted work-related condition(s) without intervening cause.

On May 5, 2017 appellant requested reconsideration of OWCP's May 5, 2016 decision. She contended that Dr. Manos had opined in an October 28, 2015 report that her increasing headaches may be the result of a postconcussive syndrome and that this was "new evidence" and supported her claim for recurrence.

By decision dated May 10, 2017, OWCP denied appellant's request for reconsideration without performing a merit review. It found that she had not established that it had erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP.

On April 13, 2017 appellant submitted a claim for wage-loss compensation (Form CA-7) for total disability for the period April 3 to 14, 2017.

In an April 3, 2017 work status slip, Robert McDonald, a certified physician assistant, diagnosed cervical radiculopathy/pain and took appellant off work from April 3 to 13, 2017.

By development letter dated April 20, 2017, OWCP advised appellant regarding the medical evidence necessary to establish her recurrence claim and afforded her 30 days to provide the requested information.

On April 24, 2017 Dr. Beth S. Rogers, Board-certified in physical medicine and rehabilitation, performed a cervical facet arthroplasty.

On May 18 and 24, 2017 appellant filed claims for compensation (Form CA-7) claiming total disability for the periods May 1 to 12 and May 15 to 25, 2017, respectively.

Evidence received in support of the wage-loss compensation claim included resubmission of Dr. Manos' October 28, 2015 letter. OWCP also received a May 4, 2017 work slip from Mr. McDonald wherein he took appellant off work from May 4 to 15, 2017. In a May 10, 2017 work slip, Mr. McDonald held her off work due to increased headaches, but did not specify a time frame.

By decision dated May 26, 2017, OWCP denied appellant's claim for wage-loss compensation for the period April 3 to 14, 2017, for a total of 64 hours.

In a development letter dated May 26, 2017, OWCP advised appellant of the deficiencies in her claims for disability compensation for the period May 1 to 26, 2017. It afforded her 30 days to submit additional medical information.

On June 15, 2017 appellant filed an additional claim for wage-loss compensation (Form CA-7) for the period May 29 to June 9, 2017.

In a June 9, 2017 report, Stephanie Mooney, a nurse practitioner, released appellant back to work 4 hours per day with 10- to 15-minute breaks every hour.

In a June 19, 2017 letter, Dr. Manos indicated that appellant was off work while undergoing continued treatment for severe headaches and ongoing symptoms related to her February 6, 2014 employment injury. He noted that on June 12, 2017 she was released to modified duty with restrictions. Dr. Manos also provided work slips dated March 30, April 3, May 10, and June 9, 2017 which indicated that appellant was unable to work due to cervical pain and increased headaches. In the June 9, 2017 work slip, he indicated that she could return to modified work part time with restrictions.

By development letter dated June 20, 2017, OWCP advised appellant that the evidence received in support of her claim for wage-loss compensation for the period May 29 through June 9, 2017 was insufficient. It afforded her 30 days to submit the evidence necessary to establish her claim.

OWCP received physical therapy reports and copies of February 14, 2017 examination notes of Stephen Wren, a certified physician assistant. It also continued to receive progress reports from Dr. Manos evaluating appellant's condition after June 9, 2017.

By decision dated July 19, 2017, OWCP denied the claim for disability compensation for the period May 1 to 12 and 15 to 26, 2017. It found the medical evidence submitted was insufficient to establish the alleged periods of disability.

By decision dated August 7, 2017, OWCP denied appellant's claim for disability compensation for the period May 29 to June 9, 2017. It found that the medical evidence submitted was insufficient to establish a worsening of her February 6, 2014 accepted employment injury.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without an intervening cause or a new exposure to the work environment that caused the illness.³

Appellant has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence causal relationship between his or her recurrence of disability and the employment injury.⁴ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁵

For each period of disability claimed, an employee must establish that he or she was disabled from work as a result of the accepted employment injury. The Board will not require OWCP to pay compensation for disability, in the absence of medical evidence directly addressing

³ 20 C.F.R. § 10.5(x); *see F.C.*, Docket No. 18-0334 (issued December 4, 2018).

⁴ *C.K.*, Docket No. 17-1853 (issued August 17, 2018).

⁵ *Mary A. Ceglia*, 55 ECAB 626 (2004).

the specific dates of disability for which compensation is claimed. To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability for the period April 3 through 14, 2017 and intermittent periods from May 1 through June 9, 2017 causally related to her February 6, 2014 accepted employment injury.

In March 30 and April 3, 2017 work status reports, Dr. Manos held appellant off work until April 13, 2017 due to cervical radiculopathy/pain. However, the Board has held that pain alone is a symptom, not a medical diagnosis.⁷ Therefore, the Board finds that these reports are of limited probative value in establishing a recurrence of disability due to the accepted medical condition causally related to the February 6, 2014 employment injury.⁸

In support of the April 3 to 14, 2017 period of disability, OWCP also received an April 3, 2017 work slip from Mr. McDonald, a physician assistant, which related that appellant could not return to work from April 3 to 13, 2017. However, this work slip has no probative value as a physician assistant is not considered a physician as defined under FECA.⁹

In her April 24, 2017 report, Dr. Rogers noted that she had performed a cervical facet arthropathy, but she did not discuss or address the issue of recurrence of disability. Since she did not offer an opinion regarding whether appellant had a recurrence of disability from April 3 to 14, 2017 causally related to her accepted employment injury, her report therefore is of limited probative medical value in respect to appellant's claimed period of disability.¹⁰

The Board therefore finds that appellant has not established total disability for the period from April 3 to 14, 2017 causally related to her accepted February 6, 2014 employment injury.

The Board also finds that appellant has not met her burden of proof to establish total disability for intermittent periods from May 1 through June 9, 2017 causally related to her accepted February 6, 2014 employment injury.

In support of appellant's claims for wage-loss compensation for the period in question, OWCP received a June 19, 2017 report from Dr. Manos. In his June 19, 2017 report, Dr. Manos

⁶ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁷ *Z.B.*, Docket No. 17-1336 (issued January 10, 2019).

⁸ *Id.*

⁹ See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law). *E.T.*, Docket No. 17-0265 (issued May 25, 2018) (physician assistants are not considered physicians under FECA).

¹⁰ See *E.C.*, Docket No. 16-0925 (issued March 3, 2018).

indicated that she was held off work due to a cervical C5-6 injury and had been undergoing continued treatment for severe headaches and pain related to that injury. However, he did not mention the specific dates of disability for which compensation is claimed. The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.¹¹

In a May 10, 2017 work status report, Dr. Manos held appellant off work for treatment due to cervical radiculopathy/pain and headaches. While he opined that she was totally disabled for work, his opinion is conclusory in nature and fails to explain in detail how the accepted medical conditions were responsible for her disability without intervening injury and why she could not perform her federal employment during the period claimed from May 1 to June 9, 2017.¹² To establish a period of disability the medical evidence must provide a discussion of how objective medical findings attributable to the accepted conditions support a finding that appellant could not perform her job duties.¹³

OWCP received additional reports from physician assistants and physical therapists, however, these reports are also of no probative value as physical therapists and physician assistants are not considered physicians as defined under FECA.¹⁴

The Board therefore finds that the evidence of record is insufficient to establish that appellant was totally disabled for the claimed periods

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 does not entitle a claimant to review of an OWCP decision as a matter of right.¹⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.¹⁶ One such limitation is that the request for reconsideration

¹¹ *E.B.*, Docket No. 17-0875 (issued December 13, 2018).

¹² *See J.J.*, Docket No. 15-1329 (issued December 18, 2015).

¹³ *See W.E.*, Docket No. 17-0451 (issued November 20, 2017).

¹⁴ *See supra* note 9; *S.P.*, Docket No. 18-1419 (issued February 27, 2019) (physical therapists are not considered physicians under FECA).

¹⁵ This section provides in pertinent part: 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 U.S.C. § 8128(a).

¹⁶ 20 C.F.R. § 10.607.

must be received by OWCP within one year of the date of the decision for which review is sought.¹⁷ A timely application for reconsideration, including all supporting documents, must 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.¹⁸ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁹

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.²⁰ Further, the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²¹

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).

In support of her request for reconsideration of the denial of her recurrence of disability, appellant did not demonstrate that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP.²² As such, she was 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).²³

The Board further finds that appellant has not submitted relevant and pertinent new evidence in support of her reconsideration request.

Appellant resubmitted Dr. Manos' October 28, 2015 report. OWCP had previously reviewed that report in its November 6, 2016 decision and found that Dr. Manos failed to explain

¹⁷ *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.

¹⁸ 20 C.F.R. § 10.606(b)(3).

¹⁹ *Id.* at § 10.608(a), (b).

²⁰ *See K.M.*, Docket No. 18-0479 (issued September 17, 2018); *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

²¹ *See N.A.*, Docket No. 18-0897 (issued December 3, 2018); *S.O.*, Docket No. 15-1412 (issued December 8, 2015); *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²² *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

²³ 20 C.F.R. § 10.606(b)(3).

how her current medical condition(s) were related to the original injury without intervening cause. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.²⁴ Appellant therefore was not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).²⁵

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.²⁶

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability for the period April 3 through 14 and intermittent periods from May 1 through June 9, 2017 causally related to her February 6, 2014 accepted employment injury. The Board also finds that OWCP properly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

²⁴ See *D.G.*, Docket No. 17-1251 (issued October 23, 2017); *Denis M. Dupor*, 51 ECAB 482 (2000).

²⁵ 20 C.F.R. § 10.606(b)(3).

²⁶ See *D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the August 7, July 19, and May 26 and 10, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 20, 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