

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

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L.W., Appellant)	
)	
and)	Docket No. 18-0319
)	Issued: March 21, 2019
U.S. POSTAL SERVICE, NETWORK)	
DISTRIBUTION CENTER, Philadelphia, PA,)	
Employer)	
_____)	

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 1, 2017 appellant, through counsel, filed a timely appeal from July 10 and November 1, 2017 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 23, 2017, 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.

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.*

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 7, 2016 C.C., on behalf of appellant who was then a 32-year-old custodial laborer, filed a traumatic injury claim (Form CA-1) alleging that, on June 18, 2016, she was injured on the work floor area when driving north from the south expansion area. The cause of injury was "unknown," noting that it could not be attributed to a specific event. The Form CA-1 further noted "[p]ain resulting from bending and twisting." Under the heading "Nature of injury," the claim form noted "Strain Not Applicable Middle Back." On the reverse side of the claim form, the employing establishment noted that appellant stopped work on June 18, 2016, that she previously vocalized that she has back problems, and that there was no evidence of a traumatic event. It controverted continuation of pay because "no traumatic injury occurred."

In a July 14, 2016 development letter, OWCP advised appellant to submit additional factual information, as well as a comprehensive medical report from her treating physician that included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to her claimed injury. It provided a questionnaire for her completion and afforded her 30 days to respond.

OWCP subsequently received a copy of a magnetic resonance imaging (MRI) scan of the lumbar spine dated June 28, 2016, which revealed mild hypertrophic degenerative changes with diffuse facet arthropathy, disc herniation at L4-L5, and disc bulge with annular tear at L5-S1. A June 30, 2016 cervical spine computerized tomography (CT) scan revealed no acute fracture and reversal of the lordosis centered at C5.

Appellant was treated by Dr. Geoffrey W. Temple, a Board-certified family practitioner, on July 11, 2016 for neck and low back pain. Dr. Temple reported that she operated a forklift at work with frequent twisting and experienced neck and low back pain. He noted findings of cervical, thoracic, and lumbar paraspinal spasm. Dr. Temple diagnosed lumbar disc herniation, lumbar radiculopathy, cervical disc protrusion, cervical radiculopathy, and cervical and lumbar myositis. He recommended physical therapy. In a July 18, 2016 attending physician's report (Form CA-20), Dr. Temple diagnosed lumbar disc disease with radiculopathy. He noted that appellant was disabled from June 27, 2016 and referred her for physical therapy.

In a report dated July 19, 2016, Dr. Claude Lessard, a chiropractor, noted that appellant was disabled from work and noted that the date at which she would be able to resume her normal work duties was undetermined.

Appellant attended physical therapy on July 29 and August 1, 2016 for the cervical and lumbar spine.

By decision dated August 22, 2016, OWCP denied appellant's claim, finding that the evidence submitted was insufficient to establish that an injury occurred in June 18, 2016, as alleged. It noted that appellant had not responded to its July 14, 2016 factual development questionnaire.

Appellant subsequently submitted an August 5, 2016 report from Dr. Elizabeth Paterek, Board-certified in emergency medicine, who examined appellant at an emergency room for shooting right foot pain which began during water therapy. Dr. Paterek diagnosed lumbosacral radiculopathy. OWCP also received reports dated June 21 to August 19, 2016 wherein Dr. Lessard diagnosed joint subluxations at C3, C4, T6, L4, and L5. A cervical spine MRI scan dated July 1, 2016 revealed mild disc bulges at C3-4, C4-5, C5-6, C6-7, and C7-T1 was also received.

On September 19, 2016 appellant requested a review of the written record. She continued to submit medical evidence including physical therapy notes dated July 29, 2016 to March 6, 2017, documenting treatment for herniated lumbar disc.

In an attending physician's report (Form CA-20) dated August 30, 2016, Dr. Temple noted that appellant was injured while driving a forklift. He diagnosed cervical and lumbar disc disease and check a box marked "yes" to the question of whether appellant's condition was caused or aggravated by an employment activity.

An electromyogram (EMG) dated September 12, 2016 revealed mild bilateral carpal tunnel syndrome and mild radiculopathy at L4-L5 affecting the right leg.

In a September 19, 2016 narrative statement, appellant noted that, while driving a forklift backwards at work on June 18, 2016, she twisted her torso to her limit and rested on the back of her seat. She indicated that before she drove completely out of that area and back over to retrieve two smaller boxes she felt pain in her back, but it went away. Appellant continued to drive the forklift. She subsequently got off the forklift and experienced a stabbing pain in her foot that did not last long. Appellant reported that her back was not painful, but it was tight and felt heavy, but she continued to work. She went on break and returned to perform a small amount of work. Appellant entered the maintenance break area and sat down in a chair. At this time she tried to stand up and fell back into her chair. Appellant stood up again and walked to a rack and she "buckled down" and almost fell to the ground, but caught herself. She called a coworker who helped her to the office where she sat in a chair. Appellant reported her injury to her supervisor, W.T., and left work.

In reports dated October 24, 2016 and February 15, 2017, Dr. Steven J. Valentino, an osteopath and Board-certified orthopedic surgeon, examined appellant and noted low back pain at region of L3 through S1 radiating into the bilateral legs, paresthesias, weakness, and radiating neck pain. Appellant reported the symptoms began after a work injury on June 18, 2016. She reported performing her maintenance worker duties and driving a forklift backwards, noting that her body was twisted to the right for approximately five minutes after which she experienced back pain. Dr. Valentino noted limited range of motion of the spine, significant spasm on palpation of the spine, facet synovitis, positive straight leg raises, and intact motor and sensory examination. He diagnosed low back pain, chronic old strain of the lumbosacral spine, cervical strain, annular tear of lumbar disc, and facet syndrome. In a report dated February 15, 2017, Dr. Valentino opined

that the above-mentioned injuries were apportioned to the work injury of June 18, 2016 by direct cause and aggravation. He noted that the mechanism of injury was torsional/twisting. Dr. Valentino concluded that appellant was unable to return to work in an unrestricted fashion and disability continued as a result of the work injury.

An x-ray of the lumbar spine dated November 7, 2016 revealed mild levoscoliosis and slight degenerative disc disease at L5-S1 without significant subluxation.

In a statement dated March 3, 2017, appellant's supervisor, W.T., noted that on June 18, 2016 he observed appellant in discomfort while in the maintenance department. Appellant reported that the pain would pass and continued to work. W.T. advised that later in the afternoon appellant reported experiencing a lot of back pain and she could hardly stand. Appellant refused to go to the hospital, but requested to go home. W.T. noted that appellant had not sustained an accident or traumatic injury, rather her back pain became progressively worse throughout the tour while performing her normal duties.

By decision dated March 23, 2017, an OWCP hearing representative affirmed the August 22, 2016 decision, as modified. The hearing representative found that appellant had established both components of fact of injury, but denied the claim finding that she had failed to establish causal relationship.

On April 19, 2017 appellant, through counsel, requested reconsideration and submitted additional medical evidence. He asserted that a new March 23, 2017 report from Dr. Valentino should be read in conjunction with his prior reports, particularly his February 15, 2017 report. Counsel further noted that Dr. Valentino's latest report explained how appellant's low back condition had been aggravated by the work incident on June 18, 2016.

In the March 23, 2017 report, Dr. Valentino provided a follow-up narrative to his February 15, 2017 report. He again noted the mechanism of injury after which appellant developed low back pain radiating into the legs, numbness, weakness, and neck pain radiating into both arms. Dr. Valentino noted that diagnostic studies showed hypertrophic degenerative changes in the lumbar spine and diffuse facet arthropathy. He noted that the MRI scan of the cervical spine revealed bulges at C4-5, C6-7, and C7-T1. Dr. Valentino advised that these changes could not be apportioned to the traumatic injury, rather they were chronic changes exacerbated by trauma. He indicated that the mechanism of torsional rotation resulted in increased inflammation, which led to ongoing radiating neck and low back pain.

By decision dated July 10, 2017, OWCP denied appellant's request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

On August 3, 2017 appellant, through counsel, again requested reconsideration. Counsel referenced appellant's statement of July 22, 2017, which noted that Dr. Valentino's reports were based on an accurate history. He indicated that her supervisor's portrayal of the June 18, 2016 employment incident was inaccurate and the supervisor who had filled out the employee's portion of the Form CA-1 had incorrectly noted appellant's account of what had occurred on that day. Counsel indicated that her supervisor's statement that she had prior symptomology in her back was erroneous. He asserted that appellant's written statement unequivocally showed that

Dr. Valentino's opinions were based upon an accurate history. Counsel indicated that OWCP was misguided by fabrications made by the supervisor. He advised that causal connection had been established and the claim should therefore be accepted.

In statements dated July 22 and 28, 2017, appellant indicated that she had not prepared the Form CA-1 nor had she signed it. She noted that her interview was conducted over the telephone because she was unable to walk for a period of time after the incident. Appellant advised that, when relaying the circumstances surrounding the incident, M.M. failed to include in the report that when driving a loaded forklift you must drive in reverse and twist your body because they are not equipped with rear view mirrors or cameras. She indicated that M.M. ignored her statement and erroneously noted that she was stooping and bending. Appellant reported that prior to this incident she never sustained or sought treatment for a back injury.

By decision dated November 1, 2017, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant further merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁵ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ 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.⁷

³ This section provides in pertinent part: "[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." 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.607.

⁵ *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.

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

ANALYSIS

The Board finds that OWCP properly denied appellant's requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

The underlying issue on reconsideration before OWCP was whether appellant had met her burden of proof to establish causal relationship, which is an issue that must be resolved by competent medical evidence.

On reconsideration counsel asserted that Dr. Valentino's reports were based on an accurate history of injury and his opinions were sufficient, when read in conjunction with his prior reports to establish causal relationship. Neither of counsel's requests for reconsideration established that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. Thus, appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).⁸

Appellant also failed to submit relevant and pertinent new evidence in support of her request for reconsideration. The April 19, 2017 request for reconsideration was accompanied by Dr. Valentino's March 23, 2017 report. In this report, Dr. Valentino noted that the chronic changes in appellant's cervical and lumbar spine were not caused by a traumatic injury, but were exacerbated by the trauma. He explained that the mechanism of "torsional rotation" resulted in increased inflammation, which led to ongoing radiating neck and low back pain. In its July 10, 2017 nonmerit decision, OWCP found that Dr. Valentino's March 23, 2017 report was similar to his February 15, 2017 report, yet contradictory. It concluded that the March 23, 2017 report was cumulative and substantially similar to evidence already in the record and, therefore, did not warrant reopening the case for further merit review. The Board has long held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁹ The Board finds that OWCP properly declined to reopen the record in response to appellant's submission of Dr. Valentino's March 23, 2017 report, as it did not constitute relevant and pertinent new evidence on the issue of causal relationship. Accordingly, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).

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.

CONCLUSION

The Board finds that OWCP properly denied appellant's April 19 and August 3, 2017 requests for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁸ *Id.* at § 10.606(b)(3)(i) and (ii).

⁹ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

ORDER

IT IS HEREBY ORDERED THAT the November 1 and July 10, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 21, 2019
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board