

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

S.P., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Ann Arbor, MI, Employer**

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**Docket No. 18-1711
Issued: May 28, 2019**

Appearances:

Alan J. Shapiro, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 11, 2018 appellant, through counsel, filed a timely appeal from an August 23, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated November 29, 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 request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 22, 2009 appellant, then a 53-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2009 she sprained her back when moving a patient from a wheel chair to the bed while in the performance of duty. She stopped work on October 14, 2009 and returned on October 20, 2009, with restrictions of no lifting patients, no lifting more than 20 pounds, and no pushing. Appellant again stopped work on October 26, 2009. On November 3, 2009 the employing establishment terminated her employment. By decision dated November 17, 2009, OWCP accepted the claim for sacroiliitis on the right. It paid appellant wage-loss compensation on the supplemental rolls as of November 4, 2009 and on the periodic rolls as of January 17, 2010. On February 16, 2010 OWCP expanded acceptance of the claim to include right L5 lumbosacral radiculitis, and on April 28, 2010 it further expanded the acceptance of the claim to include facet syndrome.

In a report dated March 26, 2015, Dr. Angel J. Rigueras, Board-certified in physical medicine and rehabilitation, examined appellant and diagnosed arthropathy of the lumbar facet joint, facet joint pain, low back pain, sacroiliac joint pain, back pain with radiculopathy, left lateral femoral cutaneous neuropathy, and chronic pain syndrome. He opined that she would be disabled from work for the next four months due to her chronic pain and physical restrictions.

By letter dated July 22, 2015, OWCP referred appellant to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion examination to determine the status of her accepted employment conditions, work tolerance limitations, and current treatment recommendations.

In a report dated September 16, 2015, Dr. Obianwu noted appellant's history of injury, treatment, and his examination findings. He diagnosed degenerative lumbar disc disease, diffuse disc bulge at L4-5 and obesity. Dr. Obianwu noted that while sacroiliitis was an accepted condition, his examination did not support it. He also noted that at the time of the incident appellant weighed close to 300 pounds and he doubted that the October 9, 2009 incident at work precipitated any significant pathology in the lower back. Dr. Obianwu explained that she had nonwork-related conditions that contributed to her persistent back pain, however, her facet syndrome lingered and contributed to some disability in her lower back. He opined that appellant was not capable of performing her regular duties and that her disability was attributable to persistence of facet syndrome. Dr. Obianwu recommended weight loss to alleviate her symptoms. He completed a work capacity evaluation (Form OWCP 5c) in which he related that appellant could work eight hours a day with a 40-pound pushing, pulling restriction, and a 25-pound lifting restriction.

OWCP forwarded a copy of Dr. Obianwu's report to appellant's treating physician, Dr. Ed Atty, Board-certified in pain medicine, physical medicine, and rehabilitation, on October 9, 2015 for review and comment.

In a November 4, 2015, response, Dr. Atty opined that appellant's symptoms were not solely related to obesity or age and that her condition was related to her employment injury. He indicated that she had facet syndrome and multifactorial lower back pain due to sacroiliac joint pain syndrome, lumbar facet joint pain syndrome, right L5 radiculopathy, and chronic pain syndrome due to the work injury. Dr. Atty completed a Form OWCP-5c indicating that appellant was totally disabled and would not be able to return to work in her lifetime.

On February 1, 2016 OWCP referred appellant along with a statement of accepted facts (SOAF) and the medical record to Dr. Stanley Lee, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Atty, the treating physician, and Dr. Obianwu, the second opinion physician, regarding the degree of disability and the physical limitations imposed by any residuals from the accepted injury.

In a report dated March 3, 2016, Dr. Lee noted appellant's history of injury and treatment and provided examination findings. He opined that she had fully recovered from the injuries sustained in the work-related incident and that there was no need for any further diagnostic testing, treatment, or medical restrictions related to employment injury.

In a letter dated July 12, 2016, OWCP requested clarification from Dr. Lee regarding appellant's accepted conditions.

In an August 16, 2016 supplemental report, Dr. Lee repeated his review of diagnostic tests and opined that appellant's diagnoses of sacroiliitis and facet syndrome were based upon subjective complaints, not objective findings, and that she did not have any loss of function that would require a restriction of her activities. He opined that she could return to unrestricted work.

On November 30, 2016 OWCP determined that a conflict of medical opinion existed between Dr. Atty, the treating physician, and Dr. Lee, the impartial medical examiner, regarding whether appellant continued to suffer from residuals of the accepted condition of facet syndrome. It referred her to Dr. Clifford Buchman, a Board-certified orthopedic surgeon, to resolve the conflict.

In a January 6, 2017 report, Dr. Buchman noted that he reviewed the SOAF, the medical evidence, and examined appellant. He determined that there were no objective findings to support residuals of sacroiliitis, right L5 radiculopathy, or facet syndrome. Dr. Buchman opined that the sprain/strain of the lumbar spine had resolved, there was no evidence of sacroiliitis or facet syndrome at this time, and appellant had exogenous obesity. He explained that, at some point, appellant had a sprain of the lumbar spine, however, there was no evidence of radiculopathy and the diagnostic findings did not correlate with the clinical examinations. Dr. Buchman opined that her obesity was not work-related and that she was otherwise capable of working as a staff nurse without restriction.

On March 16, 2017 OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she no longer had residuals of her October 14, 2009 employment injury. It relied upon the report of the referee physician, Dr. Buchman, who concluded that the residuals related to her accepted work-related medical conditions had ceased and that she was no longer disabled from work as a result of the accepted injury or illness. OWCP

afforded appellant 30 days to submit additional evidence and argument if she disagreed with the proposed termination.

In a letter dated April 6, 2017, Dr. Atty explained that he was providing a “rebuttal letter” expressing his disagreement with the opinions of Dr. Obianwu, the second opinion physician, and the impartial medical examiners, Dr. Lee and Dr. Buchman. He opined that appellant would never recover to the point that she would be productive or suitable for employment. Dr. Atty discussed the medical record, her diagnostic testing and that her lower back pain was a chronic condition which was managed by a comprehensive program.

On May 1, 2017 OWCP terminated appellant’s wage-loss compensation and medical benefits, effective that same date, finding that she no longer had residuals or disability causally related to the employment injury of October 14, 2009.

Appellant subsequently requested a telephonic hearing, held on October 2, 2017.

By decision dated November 29, 2017, OWCP’s hearing representative affirmed the May 1, 2017 decision. She found that the report of Dr. Buchanan was sufficient to carry the weight of the medical evidence and affirmed the termination.

On March 19, 2018 appellant, through counsel, requested reconsideration. Counsel submitted additional evidence to include a new report from Dr. Atty.

In a January 2, 2018 report, Dr. Atty noted that he saw appellant for follow up of her chronic lower back pain related to her work injury. He related that she indicated that OWCP found that her lower back pain was only due to muscle strain from her work injury which should have healed. Dr. Atty referred to his May 1, 2017 letter and distinguished his diagnoses related to appellant’s employment injury.³ He advised that he documented her objective findings and history on examination, as well as her diagnostic studies, such as the magnetic resonance imaging (MRI) scan of the lumbar spine and electromyography scan findings, response to fluoroscopic-guided interventional spine injections, and that she required further continuous treatment for lower back pain that was chronic in nature.

OWCP also received a December 8, 2009 MRI scan of the lumbar spine without contrast, read by Dr. Gaurang Shah, a Board-certified internist.

By decision dated August 23, 2018, OWCP denied appellant’s request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a), finding that she did not submit new and relevant evidence or legal argument sufficient to warrant reopening the merits of her claim. It found that the evidence was cumulative and substantially similar to evidence or documentation previously considered. OWCP explained that the new report from Dr. Atty dated January 2, 2018, was insufficient because he offered no new opinion and only referred to his previously considered report.

³ While Dr. Atty referred to a letter dated May 1, 2017, this appears to be a typographical error as his prior report was dated April 6, 2017.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶

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.⁷ 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.⁸

ANALYSIS

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

The Board notes that the underlying issue in this case is whether appellant had continuing residuals or disability after May 1, 2017 due to the accepted October 14, 2009 employment injury. That is a medical issue which must be addressed by pertinent and relevant medical evidence not previously considered.⁹ Counsel's March 19, 2018 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. Thus, appellant is not entitled to a review of the merits of her case based on the first and second above-noted requirements under section 10.606(b)(3).

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case.¹⁰ In

⁴ 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).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). 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. Chapter 2.1602.4b.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608.

⁹ *E.D.*, Docket No. 18-0138 (issued May 14, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁰ *Supra* note 7; *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

support of her reconsideration request, counsel submitted a new report from Dr. Atty dated January 2, 2018. While this report was not previously considered by OWCP, the Board finds that it is substantially similar and duplicative of evidence previously considered and reviewed by OWCP. Dr. Atty merely referred to his prior report dated April 6, 2017, which was addressed in the May 1, 2017 decision. The Board has held that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹¹

OWCP also received a December 8, 2009 MRI scan of the lumbar spine, read by Dr. Shah. However, this report does not offer any opinion regarding whether appellant had continuing residuals or disability after May 1, 2017, due to the accepted October 14, 2009 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.¹²

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel argues that the August 23, 2018 nonmerit decision was contrary to fact and law. For the reasons stated above, 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).

¹¹ See *L.R.*, Docket No. 18-0400 (issued August 24, 2018); *Candace A. Karkoff*, 56 ECAB 622 (2005).

¹² See *N.B.*, Docket No. 17-0927 (issued April 18, 2018); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ORDER

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

Issued: May 28, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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