

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

_____)	
D.B., Appellant)	
)	
and)	Docket No. 19-1963
)	Issued: July 1, 2020
DEPARTMENT OF THE INTERIOR, BUREAU)	
OF INDIAN AFFAIRS, CROW CREEK)	
AGENCY, Fort Thompson, SD, Employer)	
_____)	

Appearances:
*Madison Goodman, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 25, 2019 appellant, through counsel, filed a timely appeal from a May 23, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated May 4, 2018 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 January 26, 2016 appellant, then a 53-year-old legal administrative specialist (probate), filed an occupational disease claim (Form CA-2) alleging that she sustained a back condition causally related to factors of her federal employment, including carrying copier paper and boxes with probate information weighing up to 20 pounds, working without an ergonomic chair, and repeated stair climbing. She indicated that she first became aware of her condition on August 6, 2014 and realized its relation to factors of her federal employment on June 11, 2015. Appellant stopped work on June 11, 2015.

In a development letter dated February 4, 2016, OWCP advised appellant that additional factual and medical evidence was necessary to establish her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion regarding the factual elements of her claim. OWCP also requested that appellant provide a narrative medical report from her physician, which contained a detailed description of findings and diagnoses, explaining how her work activities caused, contributed to, or aggravated her medical conditions. It afforded her 30 days to submit the necessary evidence.

In a February 9, 2016 statement, appellant again described the duties she performed on a daily basis, which she alleged aggravated her preexisting back condition.³

By decision dated March 8, 2016, OWCP denied her claim finding that she had not established a medical diagnosis causally related to the accepted employment factors and she had not submitted medical evidence with her claim. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On August 30, 2016 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a May 19, 2016 report, Dr. Mitchell C. Johnson, an osteopath specializing in orthopedic surgery, diagnosed back pain with lumbar facet arthropathy and lumbar disc degeneration, based upon x-ray and magnetic resonance imaging (MRI) scan evidence. He noted that appellant related back problems since a November 9, 1999 employment injury.⁴ Dr. Johnson summarized appellant's medical history, work duties, and noted appellant's pain complaints. Physical examination findings included low back tenderness on palpation, no identified tender focal points, no somatic dysfunction findings, no paraspinal muscle spasms, and full bilateral hip range of

³ See note 4 *infra*.

⁴ The Board notes that under File No. xxxxxx472, OWCP accepted that appellant sustained an employment-related back sprain on November 9, 1999.

motion. Dr. Johnson opined that her job duties in 2012 aggravated her chronic facet arthrosis. He further opined that her pain complaints could be due to a 1999 employment injury.

By decision dated February 8, 2017, OWCP modified its prior decision, finding that appellant had established a medical diagnosis, but denied the claim as modified finding that the medical evidence of record was insufficient to establish causal relationship.

On February 5, 2018 appellant, through counsel, requested reconsideration and submitted additional evidence.

In progress notes dated August 17 and 23, 2017, Dr. Daniel R. Rasmussen, an osteopath and Board-certified physiatrist, noted that appellant was seen for right low back pain complaints and provided examination findings. He diagnosed lumbar facet joint syndrome, lumbar spondylosis, and chronic low back/lumbar pain.

In a February 5, 2018 report, Dr. Rasmussen noted that appellant was first seen on October 31, 2012 for complaints of low back pain. Appellant related that approximately 13 years prior she sustained an employment injury from lifting heavy boxes. A history of treatment and examination findings were detailed. Dr. Rasmussen noted that, after discussing the results of a November 6, 2012 MRI scan and recommending treatment, appellant did not contact him again until January 20, 2016. He diagnosed lumbar facet syndrome based on examination findings, the MRI scan, and her symptoms. Dr. Rasmussen indicated that he was unable to say “with confidence that this [lumbar facet syndrome] is related specifically to a work-related injury and not simply a degenerative change.” He explained that he had not seen appellant when the 1999 employment injury occurred, nor did he have any of the medical records pertaining to the injury for review.

By decision dated May 4, 2018, OWCP denied modification.

On May 3, 2019 appellant, through counsel requested reconsideration. In support of her request, appellant submitted additional medical evidence.

In progress notes dated April 23, 2019, Dr. John L. McFee, Jr., a physician specializing in family and general medicine, diagnosed chronic low back pain and type 2 diabetes mellitus. Under history of injury, he noted that appellant’s diabetes is poorly controlled at times, and that she has had back pain since a November 9, 1999 employment injury. Appellant related having pain after lifting something heavy at work. Dr. McFee opined that her complaints of leg pain and numbness could be attributable to her diabetic neuropathy and that some of her pain complaints “may be related” to an employment injury sustained approximately 20 years ago.

Dr. McFee, in an April 26, 2019 report, reviewed an MRI scan performed that day and diagnosed lumbar intervertebral disc degeneration, lumbar spondylolisthesis, lumbar intervertebral disc displacement, other chronic pain, and low back pain.

An April 26, 2019 MRI scan revealed lumbar scoliosis convex to the right, multilevel lumbar spine degenerative disc disease, and L4-5 degenerative spondylolisthesis. The study noted a mild progression in the multilevel lumbar degenerative disc disease since the last study.

By decision dated May 23, 2019, OWCP denied reconsideration of the merits of the claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, 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

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).

Counsel requested reconsideration, summarized the medical evidence of record, and concluded that causal relationship had been established. 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. Consequently, the Board finds that she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁰

⁵ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁶ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit 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 2.1602.4(b).

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

The Board further finds that appellant has not provided relevant and pertinent new evidence in support of her request for reconsideration. The underlying issue in this case is the medical question of whether the accepted employment factors caused or aggravated the diagnosed conditions. That is a medical issue which must be addressed by relevant medical evidence.¹¹

On reconsideration, appellant submitted April 23, 2019 progress notes from Dr. McFee diagnosing chronic low back pain and type 2 diabetes mellitus. He opined that the chronic low back pain could be attributable to her diabetic neuropathy or may be related to a 20-year-old employment injury, which is not the subject of the current appeal. While this evidence is new, it is not relevant as it attributed her pain to a traumatic injury sustained about 20 years ago and possibly to underlying diabetic neuropathy. 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 As such, this evidence is insufficient to warrant merit review.

OWCP also received an April 26, 2019 MRI scan of the lumbar spine and an April 26, 2019 report by Dr. McFee, who reviewed the scan. These reports noted diagnoses duplicative of previous evidence of record.¹³ However, neither the MRI scan nor Dr. McFee's April 26, 2019 report offered an opinion on whether appellant's diagnosed lumbar conditions had been caused or aggravated by the accepted employment factors. As noted, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ Therefore, appellant also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

As appellant's May 3, 2019 request for reconsideration does not meet any of the requirements of 20 C.F.R. § 10.606(b)(3), the Board finds that OWCP properly denied merit review, pursuant to 20 C.F.R. § 10.608.

On appeal counsel asserts that OWCP erred in denying a merit review as new medical evidence and legal argument were provided. 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 *J.B.*, Docket No. 18-1531 (issued April 11, 2019); *E.D.*, Docket No. 18-0138 (issued May 14, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² See *S.P.*, Docket No. 18-1711 (issued May 28, 2019); *N.B.*, Docket No. 17-0927 (issued April 18, 2018); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ *V.L.*, Docket No. 19-0069 (issued February 10, 2020); evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.

¹⁴ *Supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board