

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

_____)	
T.A., Appellant)	
)	
and)	Docket No. 19-1524
)	Issued: March 3, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Riverview, FL, Employer)	
_____)	

Appearances:
Capp P. Taylor, Esq., for the appellant¹
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 July 9, 2019 appellant, through counsel, filed a timely appeal from a January 22, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days elapsed from OWCP's last merit decision, dated February 7, 2018, to the filing of this

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 The record also includes a February 15, 2019 non-merit decision, which appellant's counsel did not specifically request Board review. As such, the Board will not exercise jurisdiction over OWCP's February 15, 2019 nonmerit decision. *See* 20 C.F.R. § 501.3.

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.⁴

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 June 27, 2017 appellant, then a 34-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she strained the right side of her lower back that same day. She indicated that the cause of her injury was "Unknown." On the reverse side of the claim form, the employing establishment indicated that appellant was injured while in the performance of duty and that she stopped work on June 27, 2017. The employing establishment further noted that appellant received medical care the date of the alleged injury.

Also on June 27, 2017, the employing establishment provided appellant authorization for examination and/or treatment (Form CA-16). In the accompanying attending physician's report, Tabitha Charleston, a physician assistant, noted a history of pain to the left lower back after getting into a vehicle. She diagnosed low back sprain, and checked the box marked "Yes" box indicating her belief that the diagnosis was caused or aggravated by the described employment activity. Ms. Charleston indicated that appellant could work light duty as of June 28, 2017. Her restrictions included no lifting, pulling or pushing in excess of 10 pounds, and no bending. Ms. Charleston also provided a June 27, 2017 duty status report (Form CA-17) with the same above-noted work restrictions.

OWCP also received June 27, 2017 urgent care progress notes signed by Ms. Charleston. Ms. Charleston noted that appellant complained of lower back pain while getting into a vehicle at work that day. She provided findings on physical examination and diagnosed low back sprain. Ms. Charleston also provided a June 27, 2017 state workers' compensation form report with a diagnosis of work-related lower back sprain. She reiterated the above-noted work restrictions.

In a July 10, 2017 development letter, OWCP advised appellant that when her claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work, and since the employing establishment had not controverted continuation of pay or challenged the case, a limited amount of medical expenses were administratively approved and paid. It noted that it had reopened the claim for formal consideration because appellant did not return to work in a full-time capacity. OWCP informed appellant that additional factual and medical evidence were required in support of her claim. It advised her of the factual and medical evidence necessary to

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the January 22, 2019 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 evidence for the first time on appeal. *Id.*

establish her claim and attached a questionnaire for her completion. OWCP afforded appellant 30 days to submit the requested factual and medical evidence.

July 4, 2017 urgent care notes signed by Honey Chacko, a nurse practitioner, indicated that appellant presented with back pain from a work-related injury. Appellant's condition was improving, but she was still unable to bend down. On physical examination there was minimal range of motion in her spine, but otherwise her findings were normal results. Ms. Chacko diagnosed low back sprain and continued the previous work restrictions.

A July 4, 2017 state workers' compensation uniform medical treatment/status reporting form signed by Ms. Chacko indicated that appellant sought treatment for a work-related injury and was diagnosed with a back sprain. She noted that there were no preexisting conditions contributing to the diagnosis, and that the injury in question was the major contributing cause for appellant's diagnosis. Ms. Chacko also repeated appellant's work restrictions.

A July 11, 2017 urgent care progress note signed by Jessy Abraham, a nurse practitioner, indicated that appellant related that she no longer had back pain and would go back to work the next day. A physical examination revealed normal results, including that the range of motion of appellant's spine was normal. A July 11, 2017 work note from urgent care signed by Mr. Abraham stated that appellant could return to full-duty work without restrictions on July 12, 2017. A July 11, 2017 state workers' compensation uniform medical treatment/status reporting form signed by Mr. Abraham noted that appellant had no restrictions and could return to work the following day.

Records relating to a separate alleged work-related lower back injury sustained by appellant on July 13, 2017 while lifting packages were received by OWCP.⁵

By decision dated August 16, 2017, OWCP denied appellant's traumatic injury claim, finding that the evidence of record failed to establish that she sustained an injury in the performance of duty, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

June 27, 2017 medical records signed by Ms. Charleston indicated that appellant complained of a work-related injury, was diagnosed with a lower back sprain, and was prescribed medication.

A July 4, 2017 work note from urgent care noted that appellant could return to work on July 5, 2017 with the restrictions of no bending, lifting, pulling, or pushing more than 10 pounds.

Appellant resubmitted urgent care records from July 4 and 11, 2017, both of which now contained two unidentifiable signatures.

An August 8, 2017 medical report by Dr. Fabio Fiore, an orthopedic surgeon, indicated that on June 27, 2017 appellant sustained a lower back injury when she got into her car after

⁵ The current record confirms that appellant previously filed an occupational disease claim, which OWCP assigned File No. xxxxxx567. By decision dated March 25, 2019, OWCP denied modification of its September 24, 2018 denial of the claim. This prior claim is the subject of a separate appeal assigned Docket No. 19-1525.

delivering two packages and felt back pain. She went to urgent care on that day and reported back pain, returned with back pain on July 4, 2017, and again went to urgent care on July 11, 2017 where she noted her back pain was improving. Dr. Fiore stated that, after two weeks of not going to work, appellant returned to work and experienced a recurrence of her back pain.

An August 10, 2017 lumbar magnetic resonance imaging (MRI) scan indicated that appellant's intervertebral discs at L3-4 and L4-5 showed some desiccation changes, and her intervertebral disc at T12-L1 showed desiccation changes and reduction in height. At L2-3 there was a grade 1 retrolisthesis of L2 over L3 by 1 mm, and a broad-based posterior disc bulge indented the thecal sac and caused some narrowing of the right neural foramen, inferiorly. Additionally, hypertrophic changes were noted in bilateral facet joints. At L3-4 and L4-5 a disc bulge indented the thecal sac, and at L5-S1 mild hypertrophic changes were noted in the bilateral facet joints.

On August 28, 2017 appellant requested review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a September 18, 2017 follow-up report, Dr. Fiore indicated that appellant reported that her symptoms had improved to the point that she was ready to go back to work full duty. Accordingly, he advised that appellant was to return to work full duty, and that she should return to his office on an as need basis.

In an undated response to OWCP's questionnaire, appellant recounted the circumstances surrounding her injury. She stated that she had exited her vehicle to deliver parcels, and as she pulled herself up to get back into her truck she felt extreme pain in her lower right back. Appellant was unable to twist or move without pain, and she called her supervisor and returned to her office. She completed the relevant paperwork and then went to a walk-in clinic. Appellant was in pain the entire time, and she related that she was prescribed pain medication and muscle relaxers. She indicated that she did not sustain any other injury between the date of her injury and the date it was first reported to her supervisor and her physician. Appellant also noted that she did not have any similar disability or symptoms prior to this injury.

By decision dated February 7, 2018, an OWCP hearing representative modified the August 16, 2017 decision, finding that appellant established that she sustained an injury in the performance of duty, as alleged, but continued to deny her claim as the evidence of record failed to establish causal relationship.

In May 2018, OWCP received another copy of Dr. Fiore's September 18, 2017 follow-up report indicating that appellant was able to return to work full duty.

A July 23, 2018 personal narrative statement from appellant indicated that on June 27, 2017 she injured her lower back while getting into her postal vehicle and was diagnosed with a low back strain. She noted that on July 11, 2017 her pain dissipated and she was advised she could return to work full time, which she did on July 12, 2017. Appellant also noted that on July 13, 2017, her second day back to work, she reinjured her low back while bending over and putting down a parcel, and that this pain was more intense, especially on the right side, and radiated down her right leg. She additionally described the trajectory of her treatment for her July 13, 2017 injury.

In narrative medical report dated November 19, 2018, Dr. Fiore indicated that he reviewed appellant's urgent care records regarding the June 27, 2017 accepted employment incident, which

caused her back strain. He also noted having reviewed appellant's July 23, 2018 statement. Dr. Fiore indicated that on July 11, 2017 appellant was instructed by a physician to return to work, as there were no continuing symptoms in her low back. A day after appellant returned to work she experienced renewed and more intense pain in her low back while bending over and putting down a parcel.

Dr. Fiore reported that the degenerative findings from the August 10, 2017 lumbar MRI scan exceed what would be expected for a 35-year-old woman. He noted that appellant's job duties of extensive moving in and out of cars, lifting packages of various weights from the ground, and carrying those packages for delivery would place stress on the low back degenerative conditions identified in appellant's MRI scan, which he noted was consistent with her right lower extremity radicular symptoms. Dr. Fiore opined that the physical requirements of appellant's position such as frequent lifting, twisting, and climbing in and out of a car would aggravate her lumbar degenerative condition, and stated that the July 13, 2017 incident was consistent with further aggravation of her degenerative condition. He concluded that her occupational activities were the major cause for the aggravation of her degenerative back condition as revealed by her August 10, 2017 lumbar MRI scan.

On January 17, 2019 appellant, through counsel, requested reconsideration. In an accompanying letter, counsel stated that the newly submitted evidence included a physician's opinion as to causal relationship between appellant's diagnosed condition and her specified employment factors. Counsel further noted that the physician's opinion was supported by objective medical findings and medical rationale, which explained the nature of the relationship between appellant's factors of employment and her diagnosed condition, and that the doctor's opinion was expressed with a reasonable degree of medical certainty. He also noted that appellant filed an occupational disease claim (Form CA-2) regarding the same condition. Counsel concluded that appellant's claim should now be accepted, as he had cured its deficiencies.

By decision dated January 22, 2019, OWCP denied appellant's reconsideration request.

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.⁶

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.⁷

⁶ 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).

⁷ 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).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ 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.¹⁰

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 did not show that OWCP erroneously applied or interpreted a specific point of law, and did not advance a relevant legal argument not previously considered by OWCP. Consequently, 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).

The Board further finds that appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. In support of her reconsideration request, appellant submitted a July 23, 2018 personal statement describing her injuries and the trajectory of her symptoms, treatment, and return to work. The Board notes that OWCP denied appellant's traumatic injury claim because there was insufficient medical evidence to establish causal relationship between appellant's diagnosed condition and her accepted June 27, 2017 employment incident. As the underlying issue in this case was a medical issue, it must be addressed by relevant and pertinent new medical evidence.¹¹ Accordingly, appellant's July 23, 2018 narrative statement is insufficient to warrant further merit review.

OWCP also received another copy of Dr. Fiore's September 18, 2017 follow-up report indicating appellant was able to return to full-duty work. The Board has held that the submission of evidence which duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.¹²

Appellant also submitted a November 19, 2018 narrative medical report by Dr. Fiore stating that there is a causal relationship between the factors of appellant's federal employment and her diagnosed condition, and specifically noting that appellant's factors of federal employment aggravated a preexisting condition. As stated earlier, OWCP denied appellant's claim because the evidence of record was insufficient to establish causal relationship between her diagnosed

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *K.W.*, Docket No. 18-0970 (issued February 15, 2019).

¹² *S.W.*, Docket No. 18-1261 (issued February 22, 2019); *E.M.*, Docket No. 09-0039 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

condition and the accepted June 27, 2017 employment incident. Dr. Fiore's report does not address the relationship between appellant's accepted June 27, 2017 employment incident and her diagnosed condition. 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.¹³ Thus, appellant was not entitled to a review of the merits of her claim based on the third above-noted requirements 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). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁴

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 January 22, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 3, 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

¹³ *R.M.*, 19-0060 (issued April 15, 2019).

¹⁴ *S.H.*, Docket No. 19-1115 (issued November 12, 2019).