

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

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L.M., Appellant)	
)	
and)	Docket No. 20-0315
)	Issued: October 8, 2021
U.S. POSTAL SERVICE, PLAINVILLE POST)	
OFFICE, Plainville, CT, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 23, 2019 appellant filed a timely appeal from an October 17, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from OWCP's last merit decision, dated August 16, 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 to review the merits of this claim.

¹ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, she asserted that oral argument should be granted because she wished to clarify any issues that may not have been thoroughly reviewed or considered. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

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 November 15, 2017 appellant, then a 40-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 13, 2017 she sustained a back contusion when she lost her balance while bending over to grab a parcel and fell off the dock while in the performance of duty. She was pregnant at the time of her injury. Appellant stopped work on the date of injury.

In a note dated November 15, 2017, Dr. Stephanie Garozzo, an obstetrics and gynecology specialist, related that appellant would be out of work as of November 14, 2017 and would be reevaluated on November 22, 2017. On November 22, 2017 she extended appellant's out-of-work status until further notice due to secondary pregnancy complications.

In a development letter dated December 6, 2017, OWCP informed appellant of the deficiencies of her claim. It provided her with a questionnaire, advised her of the type of factual and medical evidence necessary to establish her claim, and afforded her 30 days to submit the necessary evidence.

In a letter dated December 7, 2017, Dr. Garozzo explained that appellant was currently under her care and that she was pregnant with an expected delivery date of January 23, 2018. She noted that appellant was recently injured by falling from a dock and complained of back pain with numbness and tingling in her fingers and hands. Dr. Garozzo noted that she had ordered a magnetic resonance imaging (MRI) scan to determine any damage and to assess the cause of these symptoms. In an attached duty status report (Form CA-17), she diagnosed back pain complicating pregnancy and advised that appellant was not to resume work.

In a letter dated December 7, 2017, Dr. Garozzo explained that appellant was referred to her primary care provider for treatment of her work-related back injury, but that the provider refused treatment due to her pregnancy. She noted that appellant was taken out of work due to injury and not being able to walk with a secondary diagnosis of pregnancy. Dr. Garozzo noted that appellant was also not able to return to work due to the additional diagnosis of high blood pressure complicating pregnancy.

On December 19, 2017 appellant responded to OWCP's development letter. She explained that on the date of injury she stood on a dock loading her truck with parcels. One of the parcels fell to the right of the hamper and appellant stepped to the right due to another carrier's hamper standing to the left of hers, obstructing her ability to reach the parcel without stepping over. Once she stepped over, she bent down to retrieve the package and to hand it to a coworker who was assigned to help with her deliveries for that day. As appellant proceeded to lift the package, which weighed approximately three pounds, she fell backwards from the dock, which was approximately two and one half feet in height. She landed on her back. Appellant immediately went to the hospital.

In a letter dated December 11, 2017, a nurse from the employing establishment's occupational health services asked Dr. Garozzo if appellant were not pregnant would her back injury be disabling. She also inquired whether appellant's inability to walk was due to her back injury or pregnancy. In a response, the reply was "Yes" that appellant would be disabled due to her back injury if she was not pregnant and that appellant's inability to walk was due to her "Back Injury."

In an attending physician's report (Form CA-20) dated January 5, 2018, Dr. Garozzo diagnosed lumbar spondylosis and back pain complicating pregnancy. She checked a box marked "Yes," indicating her belief that the conditions were caused or aggravated by an injury involving appellant's fall on her back from a dock on November 13, 2017. Dr. Garozzo recommended that appellant was able to resume regular work on February 15, 2018.

By decision dated January 16, 2018, OWCP accepted that the November 13, 2017 incident occurred as alleged. However, it denied appellant's traumatic injury claim, finding that she had not submitted evidence containing a medical diagnosis in connection with the accepted employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

The nurse from the employing establishment's occupational health services noted in a January 9, 2018 letter that appellant was now treating with her primary care provider for the back injury and that she was to remain out of work until February 14, 2018 due to the birth of her child.

On February 26, 2018 appellant requested reconsideration. She submitted a report from Dr. Farhan Karim, an orthopedic surgery specialist, dated February 8, 2018. Dr. Karim evaluated appellant for cervical spine pain radiating to the right shoulder, elbow, and thoracic region, as well as paraspinal and hip discomfort and low back pain without radiation to the bilateral lower extremities in a radicular fashion. He noted that she fell off a dock in November 2017 while working as a mail carrier and that at that time she was 28 weeks' pregnant. Appellant's pain began after this fall and she postponed intervention until after the birth. Dr. Karim diagnosed cervicalgia, cervical pain, and thoracic back pain. On physical examination he observed bilateral paraspinal tenderness and right trapezius tenderness with restricted flexion and extension. Review of an x-ray report demonstrated no acute fracture or dislocation, and review of an MRI scan of the lumbar spine demonstrated no disc herniation with mild levels of neuroforaminal narrowing present throughout the lumbar spine. Dr. Karim opined that appellant's fall in 2017 may have exacerbated preexisting spondylitic conditions in her lumbar and cervical spine and that her low back pain symptoms may have been exacerbated by the fall.

By decision dated April 20, 2018, OWCP denied modification of its decision of January 16, 2018.

On June 11, 2018 appellant requested reconsideration. She submitted a May 3, 2018 report from Dr. Kayvon Alizadeh, Board-certified in surgery, anesthesiology, and pain medicine, in which he diagnosed thoracic spine pain, low back pain with sciatica with an onset date of July 5, 2016, and lumbar spondylosis. Dr. Alizadeh noted that she presented with low and mid-back pain, primarily right-sided, since a fall over a dock in November 2017. He noted that she completed a course of physical therapy, but that the pain was still present. Dr. Alizadeh interpreted a lumbar

spine MRI scan, which demonstrated degenerative disc disease at L4-5 and L5-S1 with a small annular tear, as well as a cervical spine MRI scan demonstrated degenerative disc disease at C5-6 with left-sided disc bulging and neuroforaminal narrowing. On physical examination of the spine he noted tenderness to palpation over the mid-thoracic spine with right-sided positive facet loading and antalgic gait. Dr. Alizadeh opined that appellant's primarily right-sided low and mid-back pain after a fall in November 2017 was a likely component of discogenic presented pain. Appellant also submitted a June 5, 2018 report from Dr. Alizadeh in which he diagnosed intervertebral disc disorder and lumbar spondylosis. Dr. Alizadeh opined that appellant presented with low back pain symptoms and primarily right-sided mid-back pain after falling at work in November 2017, that the symptoms were likely consistent with a component of discogenic and facet neck pain with posterior annular tearing of the low back, and that this was likely related to the fall at work. He recommended a right-sided facet joint injection.

On August 15, 2018 appellant informed OWCP that she had returned to regular duty.

By decision dated August 16, 2018, OWCP denied modification of its decision of April 20, 2018.

On October 15, 2018 appellant requested reconsideration. She submitted a September 25, 2018 report from Dr. Alizadeh in which he diagnosed lumbar spondylosis, lumbago, and intervertebral disc disorder. Dr. Alizadeh noted that appellant continued to experience low and mid-back pain symptoms, primarily right-sided with some left-sided symptoms, since a work-related fall injury in 2017. On physical examination he observed tenderness to palpation over the mid-thoracic spine with right-sided positive facet loading and antalgic gait. Dr. Alizadeh opined that appellant's lumbar spondylosis, degenerative disease of the lumbar spine, facet-genic and discogenic pain were directly related to a work-related injury that occurred in November 2017. He recommended a left-sided lumbar facet point injection.

By decision dated November 6, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence submitted on reconsideration was cumulative and substantially similar to evidence that was already contained in the case file and had been previously considered.

In a letter dated March 19, 2019, Dr. Alizadeh stated that appellant had low back pain symptoms, primarily right-sided, after a fall at work in November 2017. He noted that an MRI scan demonstrated degenerative disc disease at L4-5 and L5-S1 with a small annular tear. Dr. Alizadeh stated that appellant's pain was discogenic and facet-genic in nature and that she had undergone a lumbar facet point injection with excellent response to the treatment. He opined that the pain in her low back was a result of the fall at work in November 2017.

Appellant requested reconsideration on July 30, 2019. She submitted a July 18, 2019 letter from Dr. Garozzo in which she noted that appellant was placed on bedrest during her pregnancy secondary to the trauma of the back injury sustained at work, that she did not have issues prior to the trauma, and that her pain had continued. Dr. Garozzo noted that she did not believe the pain was related to the pregnancy and that appellant subsequently developed elevated blood pressure during the pregnancy, which led to delivery.

By decision dated October 17, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.⁴

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

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's July 30, 2019 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that it did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of her claim based on either the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

³ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁴ 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).

⁵ *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 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 *Id.* at § 10.608(a); *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of her reconsideration request. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.⁸ In support of her reconsideration request, appellant submitted a letter dated March 19, 2019 in which Dr. Alizadeh stated that appellant had low back pain symptoms, primarily right sided, after a fall at work in November 2017. Dr. Alizadeh stated that an MRI scan demonstrated degenerative disc disease at L4-5 and L5-S1 with a small annular tear. He stated that her pain was discogenic and facet-genic in nature her pain was discogenic and facet-genic in nature and that she had undergone a lumbar facet point injection. Dr. Alizadeh opined that the pain in her low back was a result of the fall at work in November 2017. This letter was, however, duplicative and repetitive of his prior letter dated September 25, 2018, and was, therefore, insufficient to warrant merit review.

Appellant also submitted a July 18, 2019 letter from Dr. Garozzo in which she noted that she placed appellant on bedrest during her pregnancy secondary to the trauma of the back injury sustained at work, that appellant did not have issues prior to the trauma, and that appellant's pain had continued. Dr. Garozzo noted that she did not believe the pain was related to the pregnancy. This letter did not contain a valid diagnosis of a condition, as it related only appellant's symptoms of pain due to the incident in November 2017. Under FECA, the assessment of pain is not considered a diagnosis, as pain merely refers to a symptom of an underlying condition.⁹ 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.¹⁰ As appellant failed to provide relevant and pertinent new evidence, she is not entitled to a merit review based on the third requirement 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.

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).

⁸ See *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *Denis M. Dupor*, 51 ECAB 482 (2000); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁹ *M.V.*, Docket No. 18-0884 (issued December 28, 2018). The Board has consistently held that pain is a symptom, not a compensable medical diagnosis. See *P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁰ *A.J.*, Docket No. 20-0926 (issued January 26, 2021); *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 8, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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