

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

T.R., Appellant)	
)	
and)	Docket No. 23-0287
)	Issued: June 23, 2023
DEPARTMENT OF STATE, BUREAU OF)	
CONSULAR AFFAIRS, Washington, DC,)	
Employer)	
)	

Appearances:
Appellant, pro se
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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 23, 2022 appellant filed a timely appeal from a June 27, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated December 18, 2019 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the June 27, 2022 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 additional evidence for the first time on appeal. *Id.*

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 March 4, 2016 appellant, then a 34-year-old passport specialist, filed a traumatic injury claim (Form CA-1) alleging that on March 2, 2016 she sustained a bruise and headache when she was hit in the right side of her head by a metal ring that fell from the sprinkler above her desk, while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for post-concussion syndrome. OWCP paid appellant wage-loss compensation on the supplemental rolls from April 18 to May 24, 2016. Appellant returned to part-time light-duty work on June 16, 2016. On June 12, 2017 she relocated to a part-time limited-duty job in Buffalo, New York working six hours per day with restrictions before stopping work again on August 7, 2017.

In an April 26, 2017 report, Dr. Jon D. Peters, a Board-certified neurologist, noted that appellant reported ongoing symptoms including headaches, photosensitivity, and difficulty tolerating ambient activity associated with dizziness and spatial disorientation. He related that appellant was transferring from Washington, District of Columbia to the passport division in Buffalo, New York. Dr. Peters requested appellant be provided with reasonable accommodations, including the ability to wear sunglasses, limited computer time, frequent breaks, ability to have snacks or hydrate when needed, and time off/reduced hours as needed.

Dr. Peters, in a May 15, 2017 addendum, requested appellant immediately be given reasonable accommodations, which would remain in place until at least December 31, 2017. The accommodations included wearing sunglasses, work from home Monday through Fridays, up to six hours of work, no working on Fridays, ability to have snacks or hydrate when coming into the office and as needed, and 15-minute breaks every two hours.

In progress notes dated July 20 and August 16, 2017, Dr. Michelle A. McFarlane, a Board-certified psychiatrist, diagnosed post-concussion syndrome, dizziness, cognitive complaints, convergence insufficiency, and bilateral occipital neuralgia. She found appellant capable of working with restrictions provided by her prior physicians. In an attending physician's report (Form CA-20) dated August 25, 2017, Dr. McFarlane advised that appellant could resume light-duty work on August 16, 2017. Under remarks, she noted computer accommodations including screen covers, and wearing sunglasses.

In an August 25, 2017 letter, the employing establishment noted that since appellant's injury on March 2, 2016 she has been absent intermittently. Appellant applied for and was granted a hardship transfer from the Washington, DC Passport Agency to the Buffalo, NY Passport Agency. She began work with the Buffalo, NY Passport Agency on June 19, 2017. The employing establishment granted appellant's request for accommodation in the form of leave without pay so that she had every Friday off, worked no more than six hours per day, a 15-minute break every two hours, reduced lighting, and headphones through December 2018. It noted that she was occupying a full-time 40-hour-per-week position, but due to her accommodation was working a part-time schedule. The employing establishment indicated that appellant struggled to

abide with her schedule and requested retraction of her accommodation in order to file for FECA benefits. It noted that her request for full-time work from home was not feasible as the passport systems could not be accessed from home.

In progress notes dated October 18, 2017, Dr. Kristina Mae Cummings, an osteopathic physician, diagnosed post-concussion syndrome, anxiety and depression, convergence insufficiency, and intractable migraine without aura and without status migrainous.

In progress notes dated October 30, November 29, and December 27, 2017, Dr. Sarra G. Solomon, a family medicine physician specializing in pediatrics, noted appellant's March 2, 2016 work injury. Appellant's diagnoses were listed as post-concussion syndrome, anxiety and depression, convergence insufficiency, and intractable chronic post-traumatic headache. Dr. Solomon found that appellant was temporarily totally disabled. She reported that appellant was unable to work in office light and on a schedule with certain number of tasks expected to be performed. In an October 30, 2017 form, Dr. Solomon placed appellant off work from October 30 to November 30, 2017.

In a November 8, 2017 report, Dr. Patrick Hughes, a Board-certified neurologist and OWCP second opinion physician, related appellant's symptoms which included headaches, mild memory problems, occasional dizziness, vertigo associated with migraine headaches, difficulty concentrating, confusion, vision issues when driving, and word finding difficulties. He noted that appellant was out of work for 45 days following the work injury, returned to light-duty work with reduced hours for a week, stopped work for a month, and then returned to light-duty work with reduced hours and occasional flare-ups before stopping work on October 30, 2017. On examination Dr. Hughes reported visual fields were full to confrontation, full extraocular movements, normal facial symmetry and strength, and normal motor strength. He found no objective findings, but observed it was not uncommon for people who sustained a mild head injury with cerebral concussion not to have objective findings. Dr. Hughes related that appellant's diagnostic tests performed in 2016 had normal findings. He diagnosed mild head injury with cerebral concussion followed by post-concussive syndrome. Dr. Hughes recommended a neuropsychological evaluation be conducted to determine whether the accepted condition had resolved, any need for further treatment, and appellant's work capacity.

Dr. Solomon, in disability notes dated November 29 and December 27, 2017, held appellant off work from November 29, 2017 through January 27, 2018. In a Form CA-20 dated December 11, 2017, she noted her agreement with the work restrictions by Dr. Peters on May 15, 2017, which would be applicable until at least December 31, 2017. Dr. Solomon, in an OWCP Form CA-20 dated January 22, 2018, found appellant unable to work in any capacity. She explained that appellant's chronic post-concussion headache and visual problems prevented her from working in an office and performing computer work.

On March 15, 2018 appellant filed a claim for compensation (Form CA-7) for disability from work for the period October 29 through November 11, 2017.

On March 26, 2018 OWCP referred appellant to Thomas Griffiths, Ph.D., a clinical psychologist, for neuropsychological testing and evaluation. In a neuropsychological evaluation dated April 10, 2018, Dr. Griffiths found no evidence of neurocognitive impairment. His

neuropsychological testing consistently revealed appellant had skills within at least the average range. Dr. Griffiths reported her current findings were consistent with her self-report of findings from an October 2017 neuropsychological evaluation, which also found no evidence of significant neurocognitive impairment. He diagnosed a preexisting somatic symptom disorder, which had been permanently aggravated by the March 2, 2016 work injury, and preexisting persistent depressive disorder. Dr. Griffiths reported there was no evidence of acquired neurocognitive impairment due to her accepted employment injury. He further opined that appellant had no residual symptoms from the accepted post-concussion syndrome. However, Dr. Griffiths opined that her preexisting psychological condition had been aggravated by the accepted March 2, 2016 work injury. He opined that appellant was capable of performing her date-of-injury job as a passport specialist from neurocognitive and psychological/emotional perspectives and with no restrictions.

OWCP received reports dated May 8 and 16, 2018 from Dr. Solomon, finding appellant totally disabled from work. In the May 16, 2018 report, Dr. Solomon noted appellant's condition has been ongoing and was not a recurrence. She also opined that appellant should work at home, and not work on a computer.

Appellant filed additional Form CA-7 claims for disability from work from October 30, 2017 through April 27, 2018 and April 30 through June 6, 2018.

In a development letter dated July 18, 2018, OWCP informed appellant that it appeared that she was claiming a recurrence of disability due to a material worsening of her accepted post-concussion syndrome beginning May 20, 2017. It advised her regarding the definition of a recurrence and the medical evidence required to establish her claim. OWCP provided appellant 30 days to submit the requested evidence.

OWCP subsequently received reports dated June 11 and 25, and July 9, 2018 from Dr. Solomon diagnosing post-concussion syndrome and finding appellant temporarily totally disabled. Dr. Solomon advised that she was capable of working a job from home with no computer work.

In a report dated August 3, 2018, Dr. Laura Giganti, a Board-certified physiatrist, noted March 2, 2016 that appellant related she could not tolerate her work environment including computer screens, overhead lights, and ambient noise. Appellant reported frequent migraine headaches requiring her to go into a dark room and causing her to miss work. Diagnoses included post-concussion syndrome and migraine without aura and with status migraines, not intractable. Dr. Giganti recommended Botox treatments for headaches.

In a report dated August 13, 2018, Dr. Solomon diagnosed post-concussion syndrome with headache, insomnia, anxiety, and vision abnormality. She indicated that appellant had a worsening of her post-concussion symptoms following a trial return to work. Dr. Solomon opined that appellant was in the small percentage of patients with post-concussion syndrome that did not improve over time and have chronic issues due to the injury. She further opined that appellant was totally disabled from working in the passport department, but that she might be capable of working a desk job which does not require fluorescent lighting or work on a computer screen.

By decision dated August 31, 2018, OWCP denied appellant's claim for a recurrence of disability, commencing May 20, 2017.

OWCP subsequently received reports dated January 22, February 26, August 8, September 4, and October 3, 10, 16, and 30, 2018, wherein Dr. Solomon repeated his findings.

On September 25, 2018 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 12, 2019.

OWCP received a November 14, 2018 supplemental report, Dr. Hughes reviewed Dr. Griffith's April 10, 2018 neuropsychological evaluation. Based on his review of the report, Dr. Hughes found no evidence of neurocognitive impairment. He related that appellant displayed skills within the average to above average range. Dr. Hughes opined that appellant had sustained a mild head injury and that he expected her to have made a full and complete recovery based on the neuropsychological evaluation. He opined that appellant's post-concussion syndrome had resolved, that she could return to work without restrictions, and that further medical treatment was not required.

In a report dated January 8, 2019, Dr. Solomon reiterated findings from prior reports.

On December 14, 2018 appellant filed Form CA-7 claims for disability from work from October 30, 2017 through December 1, 2018.

In a statement dated January 11, 2019, the employing establishment related that appellant had received leave for psychiatric conditions which preceded the date of injury. It further indicated that agency had attempted to accommodate appellant's work restrictions as they related to the accepted injury; however, appellant was resistant and eventually ceased coming to the workplace.

In a report dated January 23, 2019, Dr. David Halpert, a Board-certified neurologist, noted appellant was seen for migraine headaches. Appellant related her headaches are triggered by two hours or more of computer use. Under assessment, Dr. Halpert listed post-concussion syndrome and migraine without aura, not refractory. He reported appellant was currently not working and was temporarily totally disabled.

OWCP received a progress report from Dr. Solomon dated March 26, 2019.

By decision dated April 11, 2019, OWCP's hearing representative set aside the August 31, 2018 decision and remanded the case for further development regarding the issue of recurrent disability commencing October 29, 2017. The hearing representative instructed OWCP to obtain a written description of appellant's restricted-duty position from June to October 29, 2017, and whether it remained available after October 29, 2017. The hearing representative also instructed OWCP to obtain a further explanation of appellant regarding her absences from work from March 2, 2016 to October 29, 2017 and whether they were related to the alleged injury.

By decision dated July 26, 2019, OWCP denied appellant's claim for a recurrence of disability commencing October 29, 2017, finding that she had not established a change or withdrawal of her limited-duty assignment or an increase in disability.

On August 24, 2019 appellant requested a review of the written record by the Branch of Hearings and Review.

On August 25, 2019 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning October 31, 2017. She asserted that the Buffalo, NY Passport agency chose not to continue her accommodations from the Washington, DC Passport agency. Appellant described the accommodations made by the Washington, DC Passport agency, asserting that she did not perform her regular job duties as listed in her performance plan. She explained that she was unable to work for extended periods of time on a computer, required multiple breaks, and was restricted to part-time, light-duty work for 20 hours per week.

OWCP received a progress report from Dr. Solomon dated August 27, 2019 which was repetitive of prior reports.

By decision dated December 18, 2019, OWCP's hearing representative affirmed the denial of her claim for a recurrence of disability.

OWCP subsequently received an August 10, 2018 progress note from Dr. Giganti. The report related appellant's history of injury and that she alleged that she was currently experiencing 16 headaches a month, 12 of them migraine headaches. Dr. Giganti assessed post-concussion syndrome and migraine without aura. She noted that she had discussed botox treatment with appellant.

OWCP also received February 26, 2018 and March 26 and August 27, 2019 reports from Dr. Solomon, which were previously of record. It also received an October 8, 2019 report, wherein Dr. Solomon, reiterated findings made in his prior reports.

On December 17, 2020 appellant requested reconsideration, asserting that her case should be reconsidered due to the lack of any response from the employing establishment regarding her recurrence claim. She alleged that she was not claiming a worsening of her medical condition as her treating physician never released her from treatment for post-concussion syndrome. Appellant also asserted a recurrence of disability due to the withdrawal of her light-duty assignment and accommodations. In support of her claim, she submitted additional evidence.

Dr. Halpert, in reports dated May 27, December 18, 2020, March 12 and September 13, 2021, diagnosed post-concussion syndrome and migraines secondary to appellant's concussion. He related that reading on a computer triggered appellant's incapacitating headaches and resulting inability to work. Dr. Halpert checked "yes" to the questions of whether appellant's complaints are consistent with her injury history, the history of injury is consistent with objective findings, and that the incident described by appellant was competent to be the cause of her illness. He explained that her headaches occurred following a 2016 concussion and constituted a post-concussion syndrome.

By decision dated June 27, 2022, OWCP denied appellant's request for reconsideration.

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 or her 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 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.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).

In support of her timely reconsideration request, appellant reiterated that she was not claiming a recurrence of disability or worsening of her condition, but rather that she remained disabled from work and that the employing establishment had withdrawn her light-duty job. She also again asserted that the employing establishment failed to respond to OWCP's inquiry regarding her light-duty status. Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, she has not advanced a relevant legal argument not previously considered. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not

³ 5 U.S.C. § 8128(a); *see R.C.*, Docket No. 22-0612 (issued October 24, 2022); *M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁴ 20 C.F.R. § 10.606(b)(3); *see R.C., id.; L.D., id.; see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). 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); *see also M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *R.C., supra* note 3; *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

constitute a basis for reopening a case.⁸ Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).⁹

In support of her request for reconsideration, appellant resubmitted progress reports from Dr. Solomon dated February 26, 2018 and March 26 and August 27, 2019, which were previously of record. As noted, submission of evidence or argument which repeats or duplicates evidence or argument previously of record does not constitute a basis for reopening a case.¹⁰ Appellant also submitted progress notes dated August 10, 2018 from Dr. Giganti; October 8, 2019 from Dr. Solomon; and May 27 and December 18, 2020, and March 12 and September 13, 2021 from Dr. Halpert. While this medical evidence is new, it was repetitive and cumulative of prior medical evidence of record. The Board has previously held that repetitive and cumulative evidence does not constitute a basis for reopening a case.¹¹ Consequently, appellant is not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board, therefore, 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 request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

⁸ *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁹ *R.C.*, *supra* note 3; *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁰ *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹¹ *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Eugene F. Butler*, 36 ECAB 393 (1984).

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board