

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, 2017 appellant, then a 57-year-old aircraft overhaul systems mechanic, filed a traumatic injury claim (Form CA-1) alleging that on August 11, 2016 she strained her low back when climbing aircraft ladders and excessively bending and kneeling while in the performance of duty. She did not immediately stop work.

By decision dated March 17, 2017, OWCP accepted that the August 11, 2016 employment incident occurred as alleged. However, it denied appellant's traumatic injury claim, finding that she had not submitted medical evidence demonstrating that a medical condition was diagnosed in connection with the accepted August 11, 2016 employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

On March 17, 2018 appellant, through counsel, requested reconsideration.

In reports dated June 17, 2016 through February 23, 2017, Dr. George Martinez, a Board-certified internist, diagnosed various medical conditions, including left lower neuropathy, status post lumbar spine surgery, herniated lumbar disc, diabetes mellitus, hypertension, hyperlipidemia, and subclinical hypothyroidism.

An August 17, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine revealed large left paracentral herniated disc at L5-S1 with mild stenosis and neuroforaminal narrowing.

Appellant was treated by Delta Mayhue, a nurse practitioner, on August 22 and November 29, 2016, who diagnosed herniated lumbar disc at L5-S1. In her November 29, 2016 report, she advised that on September 2, 2016 appellant underwent a hemilaminectomy and foraminotomy with microdiscectomy at L5-S1.

Dr. George Stefanis, a Board-certified neurosurgeon, treated appellant from August 26, 2016 through January 10, 2017, for left leg pain and weakness beginning in August 2016 while at work. He noted that an August 26, 2016 lumbar myelogram and post-myelogram computerized tomography (CT) scan revealed a small protrusion at L1-2 and large disc herniation at L5-S1. Dr. Stefanis described his September 2, 2016 performance of a hemilaminectomy and foraminotomy with microdiscectomy at L5-S1, and diagnosed herniated disc at L5-S1 on the left with S1 radiculopathy.

On October 13, 2016 Nancy Anderson, a physician assistant, diagnosed status post back surgery and released appellant to work full time with restrictions.

By decision dated June 20, 2018, OWCP denied modification of the March 17, 2017 decision.

On June 20, 2019 appellant, through counsel, requested reconsideration.

OWCP received additional evidence. An MRI scan of the left ankle dated April 28, 2017 revealed no evidence of internal derangement. An MRI scan of the lumbar spine dated October 3, 2017 revealed postsurgical changes at L5-S1 and degenerative changes.

In reports dated July 20, 2017 through March 22, 2019, Dr. Martinez described his treatment of appellant for dry cough, possible exposure to lead, diabetes mellitus uncontrolled, hypertension, tick bite, hyperlipidemia, hypothyroidism, and Vitamin D deficiency.

On August 21, 2017 Dr. Frederick Jennart, an osteopath and Board-certified neurologist, performed an electromyogram and nerve conduction velocity (EMG/NCV) study that revealed chronic L5 radiculopathy and denervation/reinnervation of the L5 nerve root.

In a September 19, 2017 report, Ms. Mayhue advised that she treated appellant for occasional numbness in her left calf and swelling of the left ankle. She diagnosed radiculopathy and swelling of the left lower extremity.

By decision dated September 10, 2019, OWCP denied modification of the June 20, 2018 decision.

On September 10, 2020 appellant, through counsel, requested reconsideration.

Appellant submitted reports that indicated Dr. Martinez continued to treat her from November 19, 2019 through August 7, 2020 and diagnosed left knee pain and swelling, diabetes mellitus uncontrolled, hypertension, hyperlipidemia, elevated liver function test, hypothyroidism, Vitamin D deficiency, and bilateral shoulder pain.

On October 12, 2020 Dr. Ralph D'Auria, a Board-certified orthopedist, treated appellant for low back and left lower extremity symptoms. Appellant reported an onset of pain on August 11, 2016 while excessively bending to pick up aircraft parts from the floor. Dr. D'Auria provided a history of medical treatment and diagnosed trauma to the lumbar spine during an employment-related injury on August 11, 2016, which required surgical treatment.

By decision dated December 2, 2020, OWCP denied modification of the September 10, 2019 decision.

On December 2, 2021 appellant, through counsel, requested reconsideration.

OWCP received additional evidence. In an August 6, 2021 report, Dr. D'Auria diagnosed intervertebral disc disorder at L1-2 and intervertebral disc disorder at L5-S1 with radiculopathy. He noted that appellant reported experiencing severe back pain with her job duties on the date of injury when she had to stand and constantly bend to pick up aircraft parts from the floor. An MRI scan of the lumbar spine confirmed a large paracentral disc herniation at L5-S1 and appellant subsequently underwent surgery. Dr. D'Auria opined that, with regard to causal relationship, all factors fit together including mechanism of injury, physical examination findings, subjective

complaints, and diagnostic testing. He further noted that, prior to August 11, 2016, appellant had only dull back pain without radiation into the extremities. After the August 11, 2016 injury, appellant experienced severe radiating pain into her left lower extremity. Dr. D'Auria explained that repetitive bending and lifting could lead to disc herniation, and advised that the surgery was reasonable, medically necessary, and causally related to the work injury.

By decision dated March 1, 2022, OWCP modified the December 2, 2020 decision, finding that the medical reports established a diagnosis of intervertebral disc disorder at L1-2 and intervertebral disc disorder at L5-S1 in connection with the accepted August 11, 2016 employment incident. However, the claim remained denied as the medical evidence of record was insufficient to establish causal relationship between the diagnosed medical conditions and the accepted August 11, 2016 employment incident.

On March 1, 2023 appellant, through counsel, requested reconsideration. Counsel asserted that Dr. D'Auria's October 10, 2020 report provided a history of injury, physical findings, and diagnoses, which established causal relationship. He requested, on behalf of appellant, that the claim be accepted.

In support of her request, appellant submitted a report from Dr. D'Auria dated August 6, 2021, and an MRI scan of the lumbar spine dated August 17, 2016, both previously of record.

By decision dated April 13, 2023, 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 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

³ 5 U.S.C. § 8128(a); *see 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 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).

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).

With her request for reconsideration, appellant provided a statement wherein counsel argued that Dr. D'Auria's October 10, 2020 report, which had previously been submitted and considered by OWCP, provided a history of injury, physical findings, and diagnoses which established causal relationship. Counsel, on behalf of appellant, requested that the claim be accepted. Appellant's reconsideration request does not advance a new legal argument not previously considered, nor show that OWCP erroneously applied or interpreted a specific point of law. The Board finds that the argument submitted by appellant on reconsideration was cumulative, duplicative, or repetitive in nature and was insufficient to warrant reopening the claim for merit review.⁸ Thus, 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 a report from Dr. D'Auria dated August 6, 2021, and an MRI scan of the lumbar spine dated August 17, 2016. The Board finds that submission of this evidence does not require reopening appellant's case for merit review, as it had already been considered by OWCP and therefore does not constitute relevant new and pertinent evidence. As these reports repeat evidence already in the case record, it is cumulative and does not constitute relevant and pertinent new evidence. The Board has held that the submission of evidence or argument, which repeats or duplicates evidence or argument already in the record does not constitute a basis for reopening a claim.¹⁰ Therefore, it is insufficient to require OWCP to reopen the claim for consideration of the merits.

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); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *J.V.*, Docket No. 19-1554 (issued October 9, 2020); *see T.B.*, Docket No. 16-1130 (issued September 11, 2017); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁹ *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *Supra* note 8; *see also S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

The Board, accordingly, finds that appellant has not met any of the requirements under 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).

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 23, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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