

United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Warren, MI, Employer

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Docket No. 17-0708
Issued: August 3, 2017

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On February 8, 2017 appellant filed a timely appeal from an October 20, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated February 22, 2016, 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 claim.

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 1, 2005 appellant, then a 28-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on June 18, 2005, she sustained severe back pain while

¹ 5 U.S.C. § 8101 *et seq.*

casing her route that morning. She indicated that when she reached to case mail on a top shelf, she felt a pull and burning. Appellant stopped work immediately following the incident.² On November 21, 2005 OWCP accepted appellant's claim for exacerbation of lumbosacral strain. Appellant's claim was later updated to include a temporary aggravation of preexisting spondylolysis at L4-5. OWCP paid wage-loss compensation and medical benefits on the supplemental and periodic rolls commencing August 3, 2005.

On May 14, 2014 OWCP referred appellant to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion regarding appellant's disability status. In a June 6, 2014 report, Dr. Obianwu diagnosed bilateral spondylosis, mild degenerative disc disease, and overt symptom magnification. He opined that there were no residuals remaining of lumbosacral sprain or strain or from the exacerbation of lumbosacral strain/sprain. Dr. Obianwu noted no swelling in the lumbar spine and no tightness of the muscles of the lumbar spine. He noted nothing on clinical examination would support ongoing problems from spondylolysis at L4-5. Dr. Obianwu noted that the type of spondylosis that appellant had was developmental and bilateral at L5. He noted that it was invariably associated with a bulging disc at the adjoining level. Dr. Obianwu noted that appellant had no residuals from the work injuries. He did note nonwork-related bilateral spondylolisthesis at L5 and opined that, due to this, she would be unable to return to her employment without restrictions with regard to bending and lifting.

In a September 9, 2014 report, Dr. Ashraf Mohamed, appellant's treating Board-certified neurologist, diagnosed lumbar spondylosis, lumbar radiculopathy at L4-5 and L5-S1, lumbar facet disease, and depression. He indicated that appellant never magnified her symptoms during examination. Dr. Mohamed believed that her issues commenced when she fell on ice during a prior work injury. He opined that appellant could not perform her current job duties without restrictions, but appellant would remain stable as long as she had access to medical treatment.

By letter dated November 17, 2014, OWCP referred appellant to Dr. Clifford Buchman, a Board-certified orthopedic surgeon, for an impartial medical evaluation, to resolve the conflict between Dr. Obianwu and Dr. Mohamed with regard to whether appellant had residuals from her accepted employment injury. In a January 28, 2015 report, Dr. Buchman diagnosed resolved lumbosacral strain, no evidence of radiculopathy, signs of symptom magnification, and spondylosis without spondylolysis with mild bulge at L4-5. He opined that the sprain/strain had healed. Dr. Buchman noted that the preexisting spondylosis was not caused by any work incident. He noted that there may have been a temporary aggravation that occurred in 2005, but that this resolved. Dr. Buchman noted that appellant's underlying spondylolysis was not work related. He noted that, although no residuals remained, because of her spondylolysis at L4-5, appellant did have work restrictions.

On April 1, 2015 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits as the weight of medical evidence established that appellant no longer had residuals or continuing disability from work stemming from the employment injuries. On May 6, 2015 OWCP finalized the termination of compensation.

² Appellant had previously filed an occupational disease claim for an April 20, 2005 employment injury that was accepted by OWCP for a lumbosacral strain. OWCP File No. xxxxxx496. OWCP had also previously accepted a claim, OWCP File No. xxxxxx597 for a 2005 right ankle sprain, after appellant slipped on ice.

On May 18, 2015 appellant requested a telephonic hearing before an OWCP hearing representative. At the hearing held on January 4, 2016 she testified that she slipped on ice while working in January 2005 and that she returned to work, but that on April 20, 2005 she started having severe back pain which caused her to stop working. Appellant testified that she returned to work on June 18, 2005, but that she could not perform her regular job, and on June 18, 2005 she had burning, shooting pain in her lower back radiating down to her right leg. She noted that, prior to that time, the pain never radiated down her legs. Appellant described her medical treatment and continuing symptoms since June 18, 2005.

At the hearing and in an accompanying memorandum, counsel argued that the opinions of the second opinion and referee physicians were contradictory in that both physicians claimed that the lumbar sprain and aggravation of the preexisting spondylolisthesis had resolved, yet both physicians indicated that appellant had restrictions related to nonwork-related spondylolisthesis. He contended that neither physician explained how the aggravations resolved nor did they explain how appellant could have performed her duties as a letter carrier prior to the injuries, but not perform them at the time of the examinations. Counsel also contended that the physicians were misinformed as to appellant's accepted conditions. He concluded that neither of the reports of the referral physicians was sufficient to meet the burden of proof required to terminate benefits.

In a January 19, 2016 report, Dr. Mohamed indicated that prior to 2005 appellant had a congenital defect of spondylosis which was not symptomatic. However, in April 2005, her employment-related duties resulted in an aggravation of the condition and a sprain, which predisposed her to an additional injury in June 2005, at which time the lumbosacral muscle sprain or lumbar facet disease caused the lumbar radiculopathy at L4-5 and L5-S1 as subjectively found in the electromyogram tests of June 8, 2013. Dr. Mohamed opined that appellant continued to suffer from an aggravation of the lumbar spondylosis resulting in the lumbar facet disease and lumbar radiculopathy at L4-5 and L5-S1. He also noted that as a result of this chronic condition she also suffered from depression. Dr. Mohamed noted his disagreement with Dr. Buchman's report. He noted that Dr. Buchman failed to explain why the previously asymptomatic conditions were now requiring restrictions if all the residuals of the accepted conditions had resolved. He also noted no objective studies contradicted the electromyogram test and that a prior magnetic resonance imaging scan demonstrated that the aggravations at L4-5 and L5-S1 had not resolved.

On February 22, 2016 the hearing representative affirmed OWCP's May 6, 2015 decision.

On September 20, 2016 appellant requested reconsideration. She argued that the February 22, 2016 decision was defective, in that the hearing representative indicated that the May 6, 2015 schedule award decision should be affirmed, but the decision was actually a termination decision. Appellant further argued that her claim was accepted for spondylosis, but that the hearing representative and Drs. Obianwu and Buchman did not consider spondylolysis an accepted condition. She argued that numerous errors were made by the referral physicians including: that their allegations of symptom magnification were unsupported, that their opinions lacked rationale, that there was no valid conflict to be resolved by an impartial medical examiner, and that the opinions of the referral physicians were unequivocal. She also alleged

that the statement of accepted facts was inaccurate as to the description of her accepted conditions.

By decision dated October 20, 2016, OWCP denied appellant's request for reconsideration without conducting a merit review of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁵

ANALYSIS

On September 20, 2016 appellant filed a timely request for reconsideration from the hearing representative's February 22, 2016 decision which affirmed the termination of her compensation benefits. On October 30, 2016 OWCP reviewed appellant's request for reconsideration under the appropriate criteria for a timely filed reconsideration requests. OWCP properly determined that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor had she advanced a relevant legal argument not previously considered by OWCP.

On reconsideration, appellant raised numerous arguments with regard to OWCP's evaluation of the medical evidence. These arguments were raised by her representative prior to the hearing representative's decision, and the hearing representative found the arguments without merit. OWCP carefully evaluated these arguments and determined at that time that the weight of the evidence established that appellant was properly referred to Dr. Buchman for an impartial medical examination, and that he had resolved the conflict between appellant's treating physician, Dr. Mohamed, and the second opinion physician, Dr. Obianwu. Arguments which are duplicative, cumulative, or repetitive in nature are insufficient to warrant reopening a claim for merit review.⁶

The only new arguments raised by appellant were that the February 22, 2016 decision was defective because it indicated that the issue was a schedule award and not termination of compensation and that the statement of accepted facts was defective in the description of her accepted conditions. Although the hearing representative did make an error in setting forth the

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.608(b).

⁶ *See C.W.*, Docket No. 16-337 (issued May 2, 2016).

facts when she referred to a May 6, 2016 schedule award decision, the rest of the opinion contains a thorough discussion with regard to termination of compensation and she concludes that OWCP had met its burden of proof in terminating appellant's medical benefits and compensation. The Board, therefore, finds that the reference to the schedule award was harmless error.⁷

Regarding appellant's reference to the statement of accepted facts, the Board notes that OWCP had accepted a temporary aggravation of preexisting spondylosis, while the statement of accepted facts referred to a strain over preexisting spondylosis. The Board also notes that Dr. Buchman, the impartial medical examiner, whose opinion formed the basis of the termination of appellant's compensation benefits, nonetheless properly referred to appellant's diagnosis as temporary aggravation of preexisting spondylosis. Appellant's argument that the statement of accepted facts led to an improper termination of her compensation benefits therefore has no color of legal validity.⁸ The Board thus finds that appellant has failed to establish that OWCP erroneously applied or interpreted a point of law, nor has she advanced a relevant legal argument not previously considered by OWCP.⁹

Appellant also failed to submit any relevant and pertinent new evidence in support of her request for reconsideration.

Accordingly, as appellant has not met any of the criteria warranting reopening her claim for further merit review, 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).

⁷ See *M.C.*, Docket No. 15-1932 (issued March 7, 2016).

⁸ See *Lovetta V. Brown*, Docket No. 00-1097 (issued April 26, 2002).

⁹ See *J.F.*, Docket No. 16-1233 (issued November 23, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 20, 2016 is affirmed.

Issued: August 3, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board