

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

R.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Alhambra CA, Employer**

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**Docket No. 17-0595
Issued: September 7, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 23, 2017 appellant filed a timely appeal from September 14, 2016 and January 3, 2017 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision, dated November 4, 2015, 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 to review the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference, the relevant facts are as follows.

On December 15, 2009 appellant, then a 54-year-old custodian-laborer, filed an occupational disease claim (Form CA-2) alleging that he developed grade 2 spondylolisthesis of the lumbar spine at L5 as well as arthritis and degeneration of his hips due to lifting, carrying, and pushing heavy containers. He noted that his job required him to bend, lift, twist, pull, and push as well as use a heavy machine to clean floors. Appellant first became aware of his condition in December 1989 and first attributed it to his federal employment in April 1991. He also submitted a statement describing his work duties as a part-time flexible carrier beginning in 1988. Appellant noted that his back condition was first diagnosed in April 1991. He returned to work at the employing establishment on June 25, 1994 as a custodian laborer. Appellant noted that his condition worsened and that he needed a hip replacement.

In a note dated December 15, 2009, Dr. Scott Goldman, a Board-certified orthopedic surgeon, diagnosed osteoarthritis and spondylolisthesis of the lumbar spine and osteoarthritis of both hips due to repetitive bending, stooping, and lifting in his job.

OWCP requested additional factual and medical information in support of appellant's claim on January 25, 2010. Dr. Goldman completed a February 8, 2010 report and noted appellant's work duties. He diagnosed osteoarthritis and spondylolisthesis of the lumbar spine as well as osteoarthritis of both hips. Dr. Goldman opined that appellant would have had some arthritis and spondylolisthesis without working at the employing establishment. He noted, "However, the severity of arthritis in the lower back and hips is not consistent with [appellant's] age had he not worked for the [employing establishment]. It is my opinion that his severe conditions, including arthritis of the lower back and both hips, are the result of the repetitive bending, stooping, and lifting activities he has performed with working at the [employing establishment] since 1988."

By decision dated April 28, 2010, OWCP denied appellant's claim finding that Dr. Goldman's reports were not based on a complete factual background.

Dr. Goldman completed an additional report on May 24, 2010 and opined that appellant's conditions were due to repetitive trauma that occurred while working at the employing establishment.

Appellant requested a review by an OWCP hearing representative of the written record. In a February 17, 2011 decision, the hearing representative found that Dr. Goldman had not provided the necessary factual background to support his opinion on causal relationship. She noted, "Dr. Goldman provided a conclusion without sufficient explanation of the nature of the repetitive motions required by [appellant's] duties in 2010, when the claim was filed, or why, over a period of time, the identified work activities caused the diagnosed conditions."

² Docket No. 13-0450 (issued April 26, 2013).

In a July 14, 2011 letter, appellant noted that he disagreed with the denial of his claim. He noted that he was submitting more information and asserted that additional medical reports he was submitting showed that his job duties contributed to his diagnosed conditions. Appellant submitted notes from a chiropractor, Dr. Gary Spunt, dated April 11, 2011, diagnosing degenerative joint disease in the lower back and hip region.

On December 6, 1993 appellant underwent a fitness-for-duty examination due to intermittent lower back pain resulting in a diagnosis of spondylosis. Dr. Thomas W. Jackson, a Board-certified orthopedic surgeon, noted that appellant had preexisting spondylolisthesis at L5-S1 which was aggravated by his work activities. He found that appellant's spondylolisthesis was stable and would likely result in a spontaneous fusion. Dr. Jackson noted that appellant could work.

Dr. Randy Jones, Board-certified in emergency medicine, examined appellant on April 18, 1993 and diagnosed severe spondylosis at L5-S1. He opined that appellant was totally disabled and that his condition was not due to his employment.

Dr. Steven M. Ma, a Board-certified orthopedic surgeon, examined appellant on April 23, 1993 and diagnosed grade 2 spondylolisthesis of L5 on S1 with significant sclerosis and loss of L5-S1 disc space. He recommended work restrictions including lifting no more than 25 pounds.

Appellant submitted additional medical a July 14, 2010 note indicating that he had undergone a posterior left hip replacement.

In response to a telephone call, OWCP advised appellant to select the type of appeal he wished to pursue. Appellant requested reconsideration on March 26, 2012. He noted that the July 14, 2011 letter was also a request for reconsideration.

By decision dated June 22, 2012, OWCP declined to review the merits of appellant's claim as his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board.

In its April 26, 2013 decision,³ the Board found that appellant's July 14, 2011 letter constituted a timely reconsideration request and remanded the case for review of the new evidence under the proper standard of review for timely reconsideration requests.⁴

Appellant submitted an August 30, 2012 report from Dr. Edward Mittleman, a family practitioner. Dr. Mittleman described appellant's work duties and his medical history including a left hip replacement on July 14, 2010 and a right hip replacement on May 24, 2012. He reviewed appellant's test studies and diagnosed chronic lumbar sprain/strain, lumbar spondylosis, and lumbar spondylolisthesis. Dr. Mittleman opined that appellant's work activities aggravated his condition and caused greater slippage of the anterolisthesis. He noted that

³ *Id.*

⁴ After the Board's April 26, 2013 decision, appellant filed a new occupational disease claim (Form CA-2) and attributed his low back pain to repetitive bending, stooping, twisting, pushing, and pulling heavy equipment as a custodian. OWCP deleted this claim on November 1, 2012 as repetitious of appellant's December 15, 2009 claim.

appellant did not initially experience numbness in the legs, and that the increased numbness was an indication that the anterolisthesis had increased. Dr. Mittleman opined that appellant's repetitive work duties "produced significant forces on the lumbar axial skeletal system." He explained that, with the repetitive biomechanical impact loading produced during appellant's work activities, the fibers of the annulus fibrosus surrounding appellant's intervertebral disc had separated resulting in a loss of fluid from the disc or desiccation. Dr. Mittleman noted that after desiccation the disc was allowed to herniate beyond its physiologic position and impinge upon surrounding structures through which spinal nerves traverse resulting in radiculopathy. He related that, "Medical studies have shown that repetitive flexion, rotation, and compression of the lumbar axial skeletal system over an adequate length of time leads to annular separation and subsequent prolapse." Dr. Mittleman found that appellant had developed degenerative spondylosis involving the facet joints as well as a bony spur at L4-5. He explained, "The bones' response to repetitive biomechanical impact loading is to produce more bone (osteoarthritis) this repose to the abnormal stresses on the joint produce degenerative changes as noted in this patient's lumbar [magnetic resonance imaging] (MRI) [scan]." Dr. Mittleman concluded, "I believe one can now conclude that it is the repetitive impulse loading over [appellant's] 24 years as an employee of the [employing establishment] that has initiated the sequence of metabolic, biochemical, and biomechanical events that had led to the additional pathology in his low back."

By decision dated August 29, 2013, OWCP denied modification of its prior decision. It found that Dr. Mittleman's report failed to provide a reasoned medical opinion explaining how appellant's employment duties, beginning in April 1991, caused his current medical conditions.

Appellant again requested reconsideration on February 14, 2014. He submitted a December 23, 2013 note from Dr. Mittleman. Dr. Mittleman reviewed appellant's medical treatment and opined that appellant had developed permanent aggravation of his lumbar pathology due to his job duties of lifting a 30-pound lawnmower three times a week, lifting bags of grass weighing 25 pounds, and lifting trash cans weighing 75 pounds. He explained that these activities had produced repetitive compression forces on appellant's lumbar axial skeletal system. Dr. Mittleman also described appellant's job duty of mopping floors with repetitive lumbar axial skeletal system twisting for four hours. He diagnosed permanent aggravation of lumbar spondylosis and permanent aggravation of lumbar spondylolisthesis.

In a March 4, 2014 decision, OWCP reviewed the merits of appellant's claim, but denied modification finding that Dr. Mittleman's reports were cumulative as he cited previously reviewed medical reports and did not provide a rationalized opinion based on objective evidence to show how appellant's work activities aggravated his underlying activities. It further determined that Dr. Mittleman had not addressed the impact of appellant's bilateral hip replacement surgeries or 1995 spine surgery. OWCP noted that the record did not contain these operative reports and concluded that there was no objective basis for a comparison of how appellant's condition had been permanently and materially changed by his work duties.

Appellant again requested reconsideration on July 28, 2014. In support of his request, he submitted medical documents regarding his July 14, 2010 left hip replacement, May 24, 2012 right hip replacement, and a January 19, 1995 thoracic laminectomy and excision of intradural extramedullary schwannoma. In a report dated July 16, 2014, Dr. Mittleman reviewed appellant's back surgery and noted that this was not for a malignant tumor, but a benign nerve

sheath tumor. He opined that removal of the schwannoma did not result in any persisting pathology and did not instigate any future pathology. Dr. Mittleman further determined that there was no relationship between appellant's hip pathology and his spondylolisthesis. He reviewed appellant's July 13, 2012 MRI scan which demonstrated bilateral pars defect at L5-S1. Dr. Mittleman explained:

“When there is a degeneration of the vertebra's articulating part called the pars, this defect is referred to as spondylosis. Spondylosis pain can lead to reduced mobility and inactivity of the individual experiencing this pain. Because the vertebra is no longer as stable as a fixed vertebra, the vertebra can slip out of place. When this occurs it is referred to medically as spondylolisthesis.

“The condition of spondylolisthesis (which has increased and has been aggravated while [appellant] has been working for the [employing establishment]) is caused by repetitive trauma incurred during the activities that [appellant] performs....

“With shifting motion of the vertebra, this can produce irritation to the bony vertebra result in the formation of addition bone (spondylosis).”

By decision dated August 14, 2014, OWCP denied modification of its prior decision. It determined that the latest evidence submitted deficient was, as appellant had not provided information about his work history prior to working at the employing establishment. Additionally, OWCP found unbelievable that a brief stint as a letter carrier caused or permanently aggravated his spine to the point that he developed spondylolisthesis. It determined that there was simply too much missing information.

On August 6, 2015 appellant again requested reconsideration and submitted a July 30, 2015 report from Dr. Basimah Khulusi, a Board-certified physiatrist. Dr. Khulusi noted reviewing appellant's medical records and OWCP's August 14, 2014 decision. He reported that appellant's back pain began in 1989 and that appellant informed an employing establishment physician of this in a 1993 fitness-for-duty examination. Appellant began working as a custodian in 1994. He listed appellant's laminectomy and schwannoma removal in 1995, hip replacement surgeries in 2010 and 2012 as well as shoulder surgeries on March 10, 2015 and July 10, 2015. Dr. Khulusi described appellant's previous work history as a busboy and retail sales in a department store for 15 years. Appellant was not a military veteran. Dr. Khulusi reviewed appellant's progressive spondylolisthesis. He described appellant's custodian duties that included repeated bending, stooping, and twisting of his back. Dr. Khulusi opined that appellant had bilateral pars defect that caused spondylosis resulting in spondylolisthesis even before he began working at the employing establishment. Once appellant began working at the employing establishment, the demands on his back were more than his muscles could compensate for and he developed back symptoms. Dr. Khulusi noted, “The job at the [employing establishment] did not cause his pars defect or his spondylolisthesis, but it did definitely aggravate his back condition.” He noted that appellant's hip girdle had to act excessively to minimize the stresses on the L5-S1 area. Dr. Khulusi found, “All those excessive stresses onto his hip girdles have resulted over time in accelerating the degeneration of his hip joints.”

In a November 4, 2015 decision, OWCP reviewed the merits of the claim, but denied modification, finding that the medical evidence of record was insufficient to establish causal relationship. It found that Dr. Khulusi did not provide sufficient rationale to support his conclusions. OWCP noted that he did not discuss appellant's prior injuries or explain why appellant's preexisting conditions were not due to the natural progression of the aging process. It also questioned whether Dr. Khulusi's report was based on a complete and accurate medical history.

Appellant again requested reconsideration on December 14, 2015. He submitted a September 10, 2014 report from Dr. Khulusi providing findings on examination. In a report dated November 19, 2015, Dr. Khulusi noted his opinion that OWCP abused its discretion. He discounted the possibility that appellant's deteriorating back condition was due to age and attributed the changes to appellant's job duties.

In a March 10, 2016 decision, OWCP declined to reopen appellant's claim for further consideration of the merits. It found that Dr. Khulusi's September 10, 2014 and November 10, 2015 reports were cumulative and substantially similar to the July 30, 2015 report.

On June 29, 2016 appellant again requested reconsideration of the November 4, 2015 merit decision. He submitted a June 27, 2016 report from Dr. Mittleman. Dr. Mittleman reviewed medical records and concluded that appellant's work activities placed significant forces on his unstable low back and that these activities led to aggravation of appellant's lumbar pathology. He opined that appellant's lumbar spondylosis, lumbar disc protrusions, and spondylolisthesis were medically connected to factors of appellant's employment through aggravation.

By decision dated September 14, 2016, OWCP declined to reopen appellant's claim for further consideration of the merits. It found that Dr. Mittleman's report of June 27, 2016 was substantially similar to evidence previously considered in prior decisions.

Appellant again requested reconsideration on October 24, 2016. In support of his request, he submitted an October 13, 2016 report from Dr. Khulusi. Dr. Khulusi disagreed with OWCP's assessment of his report and asserted that he examined appellant, reviewed medical records, and obtained a history from appellant. He accused OWCP of falsehoods. Dr. Khulusi opined that repetitive job activities, like those performed by appellant, did cause acceleration of degeneration of the low back. He referred to his July 30, 2015 letter.

By decision dated January 3, 2017, OWCP declined to reopen appellant's claim for further consideration of the merits as he failed to comply with the requirements of 20 C.F.R. 10.606. It found that Dr. Khulusi's report was cumulative and substantially similar to evidence or documentation that was already in the case record and previously considered.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁵

⁵ *Supra* note 1.

Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁶ Section 10.608 of OWCP's regulations provides that, when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁷ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.⁸ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

In the most recent merit decision dated November 4, 2015, OWCP denied appellant's occupational disease claim finding that he had not submitted sufficient rationalized medical opinion evidence to establish a causal relationship between his employment duties and his diagnosed lumbar and hip conditions. On June 29 and October 24, 2016 appellant requested reconsideration of this decision. OWCP declined his requests for reconsideration in September 14, 2016 and January 3, 2017 nonmerit decisions.

The Board does not have jurisdiction over the November 4, 2015 merit decision and can only consider whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), which would prompt OWCP to reopen the case for merit review. The underlying issue on reconsideration is medical in nature, whether the medical evidence establishes a causal relationship between his lumbar and hip conditions, and established employment factors.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered.¹⁰

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered in support of his June 29, 2016 request for reconsideration.

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608.

⁸ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁹ *B.T.*, Docket No. 16-0785 (issued September 21, 2016); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *C.H.*, Docket No. 17-0074 (issued March 17, 2017).

Dr. Mittleman's June 27, 2016 report reiterated the opinion that appellant's lumbar spondylosis, lumbar disc protrusions, and spondylolisthesis were medically connected to factors of his employment through aggravation. He previously offered this opinion in his August 30, 2012, December 23, 2013, and July 16, 2014 reports which OWCP reviewed in prior merit decisions. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹¹

In support of his October 24, 2016 request for reconsideration, appellant submitted an October 13, 2016 report from Dr. Khulusi. Dr. Khulusi disagreed with OWCP's assessment of his report and accused OWCP of falsehoods. He asserted that repetitive job activities, like those performed by appellant, did cause acceleration of degeneration of the low back. Dr. Khulusi referred to his July 30, 2015 letter. The October 13, 2016 report is a restatement of the assertions made by him in his July 30 and November 19, 2015 reports. As such this report repeats evidence and does not constitute a basis for reopening a case under section 10.606(b)(3).¹²

The Board, therefore, finds that the additional reports from Dr. Mittleman and Dr. Khulusi are insufficient to warrant further merit review of the claim. As appellant's applications for review did not meet any of the three requirements enumerated under section 10.606(b)(3), the Board finds that OWCP properly denied the requests for reconsideration without reopening the case for a review on the merits.¹³

CONCLUSION

The Board finds that OWCP properly denied appellant's requests for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

¹¹ *Id.*; *James W. Scott*, 55 ECAB 606 (2004).

¹² *Id.*

¹³ *See A.M.*, Docket No. 16-0499 (issued June 28, 2016); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the January 3, 2017 and September 14, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 7, 2017
Washington, DC

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

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

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