

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

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<b>J.F., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 18-1668</b>
	)	<b>Issued: April 25, 2019</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>City of Industry, CA, Employer</b>	)	
_____	)	

*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On September 4, 2018 appellant filed a timely appeal from a May 18, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 11, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>2</sup>

**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).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Following the issuance of OWCP's May 11, 2017 decision, appellant submitted new evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of the case is limited to the evidence that was in the case record at the time of OWCP's 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.*

## **FACTUAL HISTORY**

On March 6, 2015 appellant, then a 58-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that her repetitive and load-bearing motions performed while in the performance of duty, caused increasing pain and discomfort in her left hip and both feet. She noted that she first became aware of her claimed condition and realized its relation to her federal employment on January 14, 2015.

In an attached statement dated March 5, 2015, appellant noted that she had felt increasing pain and discomfort in her left hip and both feet over the course of her 14 years of employment as a letter carrier. The specific employment activities she identified as having caused her injuries were standing, talking, carrying, pushing a hand truck and hamper, and climbing stairs and ramps, which she contended she performed six to eight hours per day.

In a development letter dated March 17, 2015, OWCP advised appellant that the evidence received was insufficient to establish her claim. It informed her of the type of factual and medical evidence needed to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit further evidence.

In a March 31, 2015 statement, appellant responded and detailed the work activities that affected her hip and feet and described the development of the claimed condition.

Along with her statement, appellant included a February 4, 2015 report by Dr. Hosea Brown, III, a Board-certified internal medicine specialist, who diagnosed bilateral hallux valgus deformities (permanent aggravation), left trochanteric bursitis, left gluteus medius/minimus tendinitis, and left hip degenerative joint disease and attributed these conditions to appellant's performance of her duties as a letter carrier throughout her 14-year career. She also submitted a magnetic resonance imaging (MRI) scan of the left hip, performed on January 15, 2015 and interpreted by Dr. Vikram Hatti, a Board-certified radiologist, which revealed no avascular neurosis or osseous contusion or tendinitis of gluteus versus trochanteric bursitis of the left hip.

On May 14, 2015 OWCP referred appellant for a second opinion examination with Dr. Steven Ma, a Board-certified orthopedic surgeon. In a June 11, 2015 report, Dr. Ma indicated that Dr. Brown had diagnosed conditions that were not revealed by his examination. He concluded that Dr. Brown erroneously diagnosed some conditions and there "is nothing at her place of employment that would cause" others.

By decision dated June 22, 2015, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish that her diagnosed medical conditions were causally related to the accepted factors of her federal employment. It noted that the weight of medical evidence rested with Dr. Ma's second opinion report.

Appellant subsequently requested reconsideration and submitted additional evidence. By decisions dated April 14, August 31, and October 21, 2016 and May 11, 2017, OWCP reviewed the merits of the claim, but denied modification. It found that the evidence of record was insufficient to establish that her diagnosed medical conditions were causally related to the accepted factors of her federal employment.

Appellant again requested reconsideration on October 9, 2015 and submitted additional information. In a March 31, 2015 report, Dr. Charles Herring, a Board-certified orthopedic surgery specialist, diagnosed partial tear of gluteus medius and fluteus minimus, left hip; left hip trochanteric bursitis; and left hip chondromalacia. He noted that appellant's work activities, including walking long distances, ascending and descending stairs, and entering and exiting a vehicle could cause injuries to the gluteus medius and minimus region.

In a September 24, 2015 follow-up evaluation report, Dr. Stephen Wan, a Board-certified podiatrist, diagnosed hallux valgus deformity, both feet, tailor's bunion deformity, both feet, and joint pain both feet. He opined that, while appellant's diagnoses represent an underlying and progressive condition and that there had been no history of trauma related to the onset of her symptoms, her work duties exacerbated her underlying conditions and pathologies. Dr. Wan further explained that her job duties would considerably increase her weight-load stress and that it was of a high medical probability that these work-related activities significantly exacerbated her underlying pathologies.

In a September 30, 2015 letter, Dr. Brown detailed medical conditions that "were clearly documented on the patient's MRI scan studies contrary to the opinion of Dr. Ma," including "cumulative trauma and irritation to the structure in the left hip including, but not limited to the bursae, tendons, and muscles thereby causing the production of left trochanteric bursitis as well as left hip tendinitis and left gluteus medius and minimum tendinitis." He contended that Dr. Ma "entirely ignored these employment-related factors in his medical report." Dr. Brown described appellant's job duties, including repetitive standing and carrying of weight loads up to 30 pounds, navigating steps, and climbing in and out of her work vehicle. He concluded that these activities would all considerably increase her mechanical weight-load stress and that it was of a high medical probability that these work-related activities significantly exacerbated underlying preexisting pathologies.

By decision dated April 14, 2016, OWCP reviewed the merits of appellant's claim, but denied modification of its decision. It found that Dr. Ma's opinion was entitled to greater weight because he provided a thorough and well-rationalized medical report with an accurate history, whereas Drs. Wan and Brown failed to provide an accurate history of appellant's work duties because the general description they provided did not take into account that she was on limited duty. OWCP noted evidence that the claimed conditions were present, but not related to appellant's employment duties.

On May 19, 2016 appellant requested reconsideration and submitted additional evidence. In a letter dated May 11, 2016, Dr. Brown took issue with Dr. Ma's findings, disagreed with the rationale justifying the denial of the claim, and contended that OWCP misread or ignored medical evidence in its decision of April 4, 2016. He asked OWCP to accept the following conditions: bilateral hallux valgus deformities (permanent aggravation), left trochanteric bursitis; left gluteus medius/minimus tendinitis; left trochanteric degenerative joint disease (permanent aggravation); and tailor's bunion deformity and he requested a referee examination to resolve the conflict of medical opinion in the event OWCP did not accept the additional conditions.

In a letter dated July 21, 2016, Dr. Wan contended that OWCP's April 14, 2016 decision inappropriately implied that his account had not accurately described appellant's situation because it provided a "general description" of a letter carrier's duties that did not take her "light duty" into consideration. He also disputed the weight given to Dr. Ma's opinion.

By decision dated August 31, 2016, OWCP again reviewed the merits of appellant's claim, but denied modification of its April 14, 2016 decision. It found that a referee review was not warranted because the medical report submitted on reconsideration did not support a conflict in medical opinion, it contained no new objective medical examination findings, and only referred to medical reports that had been reviewed and considered in Dr. Ma's report or on reconsideration.

On October 4, 2016 appellant requested reconsideration and submitted additional evidence that included a duty status form report (Form CA-17) dated October 4, 2016 that diagnosed a left hip bursitis condition.

By decision dated October 12, 2016, OWCP again reviewed the merits of appellant's claim, but denied modification, finding that the evidence submitted in support of the request did not provide sufficient rationale to establish causal relationship.

On February 24, 2017 OWCP received copies of physician reports and diagnostic tests dated January 14, 2015 to October 24, 2016 from Drs. Wan, Herring, Brown, and Edward Mittleman, a Board-certified family practitioner, which mostly reiterated prior diagnoses and opined that they were caused by appellant's federal employment.

By decision dated May 11, 2017, OWCP again reviewed the merits of appellant's claim, but denied modification, finding that the newly submitted evidence failed to adequately address the issue of causal relationship and did not distinguish between appellant's preexisting conditions and the effects of employment-related injury or disease.

On May 3, 2018 appellant requested reconsideration and submitted additional evidence. She submitted an April 17, 2018 report from Dr. Brown again disputing Dr. Ma's finding that "there is nothing at her place of employment that would cause" the medical conditions he diagnosed and challenged OWCP's May 11, 2017 decision that determined that the weight of medical evidence rested with Dr. Ma's report. Dr. Brown further questioned why OWCP accorded determinative weight to Dr. Ma's findings when he had failed to explain why the weight-bearing activities appellant performed on a daily basis, while in the performance of duty, had not affected her conditions.

Additionally, appellant submitted medical reports and diagnostic test interpretations from Drs. Herring, Brown, and Wan dated March 31, 2015; July 6 and 11, and November 14, 2017; and February 12 and April 9, 2018 that note the same general diagnoses that Dr. Brown had previously identified in his February 4, 2015 report. In the March 31, 2015 report, Dr. Herring noted that appellant's job required walking long distances, going up and down stairs, and getting in and out of a vehicle. He again opined that these activities could cause injuries to the gluteus medius and minimus region.

In the July 6 and 11, 2017 reports, Drs. Herring and Wan, respectively, reiterated prior diagnoses. Dr. Herring recommended cortisone injection, but indicated that he could not provide it without authorization from OWCP. Dr. Wan recommended palliative care and certain types of footwear.

In the November 14, 2017 report, Yung Ho Cho, a Board-certified radiologist, interpreted an MRI scan study of appellant's hips conducted on October 26, 2017. He noted moderate grade tendinopathy of the right gluteus minimum tendon at its insertion, mild tendinopathy of the left

gluteus minimum tendon at its insertion, partial tear at the musculotendinous junction of the left gluteus maximus and small tear of the left gluteus maximus and small partial tear of the left gluteus medius tendon at its insertion, and small bilateral hip joint effusions. In the February 12 and April 9, 2018 reports, Dr. Brown reviewed the MRI scan study findings and reiterated prior diagnoses.

By decision dated May 18, 2018, OWCP denied appellant's request for reconsideration without conducting further merit review.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, 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.<sup>3</sup>

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>4</sup> 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.<sup>5</sup>

Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>6</sup> Likewise, the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>7</sup>

### **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).

The Board finds that appellant has not established that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a new and relevant legal argument not previously considered. Thus, she is not entitled to a review of the merits of the claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).<sup>8</sup>

On reconsideration appellant submitted Dr. Brown's April 17, 2018 report in which he contended that OWCP had improperly accorded determinative weight to Dr. Ma's findings as the

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<sup>3</sup> 20 C.F.R. § 10.606(b)(3).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(b).

<sup>6</sup> *J.P.*, 58 ECAB 289 (2007).

<sup>7</sup> *L.H.*, 59 ECAB 253 (2007).

<sup>8</sup> 20 C.F.R. § 10.606(b)(3); *see also B.H.*, Docket No. 18-0889 (issued November 21, 2018).

basis for denying appellant's occupational disease claim. However, while this report is new, OWCP had previously considered this same argument of Dr. Brown as he had articulated in his prior reports in its April 14, August 31, and October 12, 2016 decisions. Additionally, it previously considered this argument and denied modification of earlier decisions in its May 18, 2018 decision, noting that appellant had not submitted any new legal argument after he requested reconsideration of its last decision. The Board has found that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>9</sup> Therefore, Dr. Brown's report is insufficient to require OWCP to conduct a merit review.

Appellant also submitted medical and diagnostic reports from Drs. Herring, Brown, and Wan dated March 31, 2015 to April 9, 2018. The Board notes that these reports are substantially similar to reports previously of record, which had previously been considered by OWCP and found insufficient to establish that appellant's diagnosed medical conditions were causally related to the accepted factors of her federal employment.<sup>10</sup> As previously noted, evidence which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.<sup>11</sup> In addition appellant submitted a November 14, 2017 report of Dr. Cho interpreting the October 26, 2017 MRI scan. However, this report is irrelevant to the issue of causal relationship as diagnostic studies lack probative value as they do not address whether the employment incident caused any of the diagnosed conditions.<sup>12</sup> Thus, appellant is not entitled to a review of the merits of the claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly 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.<sup>13</sup>

### 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).

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<sup>9</sup> *J.P.*, 58 ECAB 289 (2007).

<sup>10</sup> This evidence is cumulative and substantially similar to evidence that was already contained in the case file and previously considered. *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>11</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

<sup>12</sup> See *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

<sup>13</sup> See *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); (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 May 18, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2019  
Washington, DC

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

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

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