

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

N.D., Appellant)	
)	
and)	Docket No. 18-0753
)	Issued: January 17, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Newport Beach, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 26, 2018 appellant filed a timely appeal from a November 20, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated February 16, 2017, 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 appellant's case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the November 20, 2017 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 February 17, 2016 appellant, then a 52-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she developed injuries to her neck and back due to factors of her federal employment including sitting, standing, walking on hard floors, straining her back as she removed mail from cases, jarring her back as she stamped, stapled, and hole-punched papers, bending, twisting, turning her neck and body in various directions, lifting, pushing, and carrying heavy mail. She did not state the date she first became aware of her injuries, but she first realized that her conditions were caused or aggravated by factors of her federal employment on October 30, 2015. Appellant stated that she had worked for 30 years as a clerk for 8 to 10 hours per day and 5 days per week. On the reverse of the claim form, a supervisor noted that appellant was currently working two hours per day due to orders from her physician.

In a letter dated February 19, 2016, the employing establishment controverted appellant's claim. It noted that she had been working in a modified capacity since March 2, 1992 as a result of a prior work-related injury. The employing establishment challenged the current claim due to a lack of work-related causes, as appellant had been in an accepted modified job per her previous OWCP claims since 1992, which did not include working over eight hours or outside of her assigned work restrictions.

Appellant submitted a duty status report (Form CA-17) dated January 28, 2016 from Dr. Hosea Brown III, a Board-certified internist. Dr. Brown recommended: "as needed" restrictions for continuous activities and intermittent lifting of no more than five pounds; no sitting, standing, walking, or twisting for more than one hour per day; no kneeling, bending/stooping, pulling/pushing, or reaching above the shoulder; and no driving, except to and from work. He diagnosed an aggravation of scoliosis.

In a March 11, 2016 development letter, OWCP notified appellant of the deficiencies of her claim and advised her of the type of medical evidence needed. It afforded her 30 days to submit the necessary evidence.

In a Form CA-17 dated March 10, 2016, a physician assistant reiterated the restrictions and diagnosis contained in the prior duty status report.

Appellant responded to OWCP's inquiries on March 21, 2016. She stated that she first became aware of her lower back condition while under the care of her primary care physician in the summer of 2015, but that she visited another physician's group on October 30, 2015. Appellant responded to the inquiry regarding activities outside her federal employment as not applicable.

An x-ray of appellant's lumbar spine dated November 2, 2015 revealed mild scoliosis of the lumbar spine associated with early degenerative disc disease at L2-3 and L3-4. An x-ray of appellant's cervical spine dated November 2, 2015 revealed moderate degenerative disc disease.

An x-ray of appellant's thoracolumbar spine dated November 2, 2015 revealed an S-shaped scoliosis of the thoracolumbar spine with moderate degenerative disc disease. A magnetic resonance imaging (MRI) scan study of appellant's cervical spine dated November 10, 2015 revealed moderate degenerative changes of the cervical spine resulting in moderate central canal stenosis at C5-6 and C6-7. Significant foraminal stenosis was noted at C5-6, C6-7, and T1-T2. A thoracic spine MRI scan dated November 10, 2015 revealed small bulges extending from T4-T5 down to T8-T9. A lumbar spine MRI scan dated November 12, 2015 revealed mild scoliosis and otherwise normal results.

In a report dated January 28, 2016, Dr. Brown noted that he had examined appellant for complaints of an occupational injury to her neck, upper back, and lower back. He reported that appellant had worked for the past 30 years as a clerk for 8 to 10 hours per day and 5 days per week and noted the duties of her position. Dr. Brown further noted that her duties required appellant to sit, stand, and walk on hard floors for prolonged periods of time, straining her back as she removed mail from a case; to transfer parcels, which required her to repetitively flex and extend her neck, thoracic, and lumbar spine; to bend beyond her waist, twisting and turning her neck and body in various directions, and to lift, push, and carry various amounts of mail. He noted that appellant had a prior work-related injury to her right wrist under OWCP File No. xxxxxx728. Dr. Brown noted his review of diagnostic testing and performed a physical examination. On examination he noted significant discomfort upon performance of cervical spine range of motion exercises, with significant spasm of the paraspinal cervical and lumbosacral musculature. Appellant had reduced range of motion of the cervical spine and lumbar spine and a weakly positive Lasegue test. Dr. Brown diagnosed: a permanent aggravation of degenerative joint disease of the thoracic and cervical spine; permanent aggravation of kyphoscoliosis of the thoracic and lumbar spine; permanent aggravation of degenerative joint disease of the lumbosacral spine; and thoracic intervertebral disc syndrome without myelopathy. He noted that appellant had been working approximately eight hours daily in October, and that after provision of the appropriate restrictions, she was currently working approximately two hours on a daily basis. Dr. Brown opined that appellant's diagnosed conditions were a direct result of the performance of the duties of her position as a clerk throughout her 30-year employment history and that her duties clearly increased the biomechanical load to the cervical, thoracic, and lumbar spine, thereby causing cumulative trauma in the form of progressive desiccation, degeneration, deterioration, and inflammation.

In a Form CA-17 dated April 8, 2016, a nurse practitioner reiterated the diagnoses and restrictions contained in the prior duty status reports.

By decision dated April 18, 2016, OWCP denied appellant's claim for compensation finding that the medical evidence submitted was insufficient to establish an injury or condition causally related to the accepted factors of her federal employment.

In a Form CA-17 dated May 6, 2016, a physician assistant reiterated the diagnosis and restrictions from the prior duty status reports, adding only that appellant should be able to take a five-minute break as needed.

In a Form CA-17 dated June 16, 2016, Dr. Brown advised that appellant could return to work on that date and listed a diagnosis of scoliosis aggravation.

On November 28, 2016 appellant requested reconsideration of OWCP's April 18, 2016 decision. With her request, she submitted a November 10, 2016 letter from Dr. Brown who noted that although it was clear that appellant had a history of childhood scoliosis, it was also reasonable to emphasize the fact that she had performed her duties as a clerk for the employing establishment for 30 years. He explained in greater detail the physical requirement of appellant's work including repetitively extending and flexing her cervical, thoracic, and lumbar spine and lifting of mail when transporting them to various locations throughout the employing establishment. Dr. Brown explained that these types of employment activities increased the biomechanical load to appellant's spine, thereby causing cumulative trauma, accelerating and aggravating degenerative joint disease. He concluded that given the facts of this case, appellant's injuries had been established as causally related to her employment. Dr. Brown stated that in the alternative, he requested appellant be sent for a secondary medical evaluation.

In a report dated November 10, 2016, Dr. Brown noted decreased range of motion of appellant's cervical and lumbar spine with discomfort and spasm. He noted that appellant continued to work two hours per day with restrictions and tolerated her current level of activity, though with significant challenges.

In a statement dated November 11, 2016, appellant explained that she had been diagnosed with scoliosis when she was nine years old and she began working at the employing establishment in 1986. She noted that some of the tasks she was assigned caused occasional pain in her back and that in October 2015 the pain became so severe that she could no longer perform the necessary duties of her federal employment.

By decision dated February 16, 2017, OWCP denied modification of its April 18, 2016 decision finding that while Dr. Brown had asserted a relationship existed between appellant's preexisting conditions and factors of her federal employment, but had not explained the nature of the underlying conditions and their natural course absent the work factors.

On August 14, 2017 appellant requested reconsideration. With her request for reconsideration she submitted Form CA-17's dated May 11 and July 6, 2017 from Dr. Brown. Appellant also resubmitted Dr. Brown's January 28, 2016 report.

In a letter dated August 3, 2017, Dr. Brown explained that appellant's preexisting scoliosis was a medical condition that involved an abnormal accentuated curvature of the thoracic and lumbar spine, which could be aggravated by certain biomechanical factors. Specifically, Dr. Brown noted, while scoliosis would already significantly diminish range of motion in the thoracic and lumbar spine, it could be aggravated by the performance of any biomechanical maneuver involving repetitive extension and flexion of her spine. He contended that this repetitive extension and flexion occurred when appellant was lifting, transferring, pushing, and pulling parcels of mail and letters in a repetitive fashion for prolonged hours on a daily basis. Dr. Brown further explained that the process of transferring various parcels at the employing establishment clearly involved twisting, turning, extending, and flexing her thoracic and lumbar spine, thereby increasing the biomechanical load to these areas with the result of permanently aggravating her preexisting scoliosis and manifesting as the acceleration and permanent aggravation of cumulative trauma in the form of advanced degenerative disc disease of the cervical, thoracic, and lumbar spine. Dr. Brown also noted that appellant's duties included "stuffing" mail into a case, which

required that she exert more force when pulling parcels out of the case, increasing the biomechanical load to her cervical, thoracic, and lumbar spine on a chronic basis. Consequently, this increased biomechanical load was transmitted to her spine, accelerating and permanently aggravating the degenerative process in her cervical, thoracic, and lumbar spine, as well as permanently aggravating her preexisting scoliosis and manifesting severe pain and discomfort in all the aforementioned areas. Dr. Brown noted that this cumulative trauma to appellant's spine would not be present absent these factors of employment, and that therefore, it was clear that these factors had contributed substantially to the permanent aggravation and acceleration of the degenerative process to her cervical, thoracic and lumbar spine. He noted that, despite appellant's modified duty due to a separate injury, she had continued to perform repetitive processing of mail through casing, which had continued the cumulative trauma to her spine. Dr. Brown reiterated the findings of the diagnostic studies for appellant's spine, noting that her thoracic intervertebral disc syndrome without myelopathy and kyphoscoliosis had been permanently aggravated by factors of her federal employment.

In a report dated August 3, 2017, Dr. Brown noted decreased range of motion of the cervical and lumbar spine with discomfort and spasm. He recommended that appellant continue to work within her restrictions, continue her home therapeutic activities and oral pharmacological regimen, and have an independent medical examination.

In a Form CA-17 dated November 14, 2017, Dr. Brown recommended: continuous restrictions "as needed" and intermittent restrictions of lifting no more than five pounds; sitting, standing, and twisting no more than one to two hours per day; climbing from zero to half an hour per day; no kneeling, bending/stooping, pulling/pushing, or reaching above the shoulder; and driving a vehicle to and from work only. He also recommended walking restrictions, but they were partially illegible.

By decision dated November 12, 2017, OWCP denied appellant's request for reconsideration without reviewing the merits of her claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.³

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (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 If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁵ If the

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

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.⁶

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ For OWCP decisions issued on or after August 29, 2011, the date of the request for reconsideration is the "received date" as recorded in the integrated Federal Employees' Compensation System (iFECS).⁸

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

The underlying issue is whether appellant has submitted sufficient medical evidence to establish that the accepted factors of her federal employment caused or aggravated her lumbar, thoracic, and cervical spine conditions.

In support of her request for reconsideration appellant submitted additional medical evidence from Dr. Brown. In his letter dated August 3, 2017, Dr. Brown discussed appellant's preexisting condition, her employment history, her employment duties, and his findings on prior examinations and discussed in detail his opinion as to how and why her accepted employment factors were sufficient to have resulted in her current diagnoses. The Board finds, upon review of the new evidence submitted on reconsideration, that it is relevant and pertinent new evidence on the underlying issue of causal relationship.

As such, the Board finds that OWCP improperly denied a merit review in its decision of November 12, 2017. Dr. Brown's August 3, 2017 report contained rationale on causal relationship that was not previously considered by OWCP. Therefore, OWCP was required to reopen the case for merit review upon reconsideration.

The Board accordingly finds that appellant met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3) in her reconsideration request of August 14, 2017. Appellant submitted relevant and pertinent new evidence not previously considered. Thus, pursuant to 20 C.F.R. § 10.608, OWCP improperly denied merit review. The case shall therefore be remanded to OWCP for further consideration of the merits of appellant's claim to be followed by an appropriate merit decision.

⁶ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁷ *Id.* at § 10.607(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). *See also C.B.*, Docket No. 13-1732 (issued January 28, 2014).

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 17, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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