United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 17-0531**
	)	**Issued: July 25, 2017**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Chillicothe, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 10, 2017 appellant, through counsel, filed a timely appeal from a November 30, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the most recent merit decision dated May 3, 2016 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] After the November 30, 2016 OWCP decision, appellant submitted additional new evidence to OWCP. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, the Board may not consider this additional evidence on appeal. 20 C.F.R. § 501.2(c)(1).

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 September 8, 2009 appellant, then a 51-year-old cook supervisor, filed a traumatic injury claim (Form CA-1) alleging that she was injured on September 3 2009 when, while leaning over a railing to close a dumpster lid, she fell four feet over a railing hitting her head on a concrete wall and landing on her buttocks. OWCP accepted the claim for scalp laceration, right elbow abrasion, left knee abrasion, cervical strain, and lumbosacral strain. It expanded her claim to include sprain of the left foot, ptosis of the left eyelid, and lower left leg joint pain. Appellant stopped work on September 3, 2009 and returned to work on September 8, 2009.

In an authorization for examination and/or treatment (Form CA-16) dated September 8, 2009, Dr. Carl Otten, a Board-certified physiatrist, diagnosed head contusion, scalp laceration, abrasion of the right elbow and left knee, cervical and lumbosacral strain. He noted by checking a box marked "yes" that appellant's condition was caused or aggravated by an employment activity.

Appellant requested to expand the accepted conditions to include piriformis syndrome.

On March 11, 2013 appellant was treated by Dr. Aaron Roberts, a Board-certified internist, after she fell approximately six feet while at work. Dr. Roberts noted findings of tenderness on palpation over the left and right sacroiliac (SI) joint and tenderness to palpation over gluteus medius piriformis region. He diagnosed SI joint dysfunction and piriformis strain of the left hip. Dr. Roberts opined that the piriformis syndrome was directly related to the original injury which caused constriction on the SI joint.

On July 11, 2013 an OWCP medical adviser concluded that piriformis syndrome was not objectively shown to be present. He indicated that the treating physician did not provide clinical testing specific for this condition and noted that findings of intermittent nonspecific tenderness to palpation or pain with range of motion were also symptoms associated with trochanteric bursitis. The medical adviser opined that the diagnosis of piriformis syndrome was not justified.

In a report dated August 15, 2013, Dr. Roberts advised that he diagnosed piriformis syndrome based on the nature of appellant's injury after a fall of six feet onto her buttocks with immediate complaints of head, back, legs, and elbow pain, tenderness over the hip and buttocks region, deep musculatures of the gluteal region, piriformis gluteus medius, and minimus musculature. He opined that a direct strike to this region can irritate the piriformis gluteus medius and minimus musculature increasing the likelihood of sciatic nerve irritation.

On May 28, 2014 OWCP denied appellant's claim to expand her accepted conditions to include piriformis syndrome. On June 2, 2014 appellant requested an oral hearing before an OWCP hearing representative. She submitted physical therapy notes dated January 21 to 28, 2015.

In a decision dated December 8, 2014, following a preliminary review, an OWCP hearing representative vacated the May 28, 2014 decision and remanded the claim for further medical development. He determined that there was a conflict of opinion between OWCP's medical adviser and Dr. Roberts, appellant's treating physician, regarding whether the accepted injury of September 3, 2009 caused or aggravated the diagnosed piriformis syndrome.

To resolve the conflict of opinion, OWCP referred appellant to an impartial medical specialist, Dr. James H. Rutherford, a Board-certified orthopedist. In a report dated April 6, 2015, Dr. Rutherford concluded that the diagnostic testing and medical evidence of record and his orthopedic evaluation did not establish that the diagnosed condition of piriformis syndrome to the left hip was causally related to the September 3, 2009 work injury.

In a decision dated June 9, 2015, OWCP denied appellant's claim for compensation. It determined that the special weight of the medical evidence, as represented by Dr. Rutherford, established that the diagnosed piriformis syndrome of the left hip was not causally related to the September 3, 2009 work injury.

Appellant requested an oral hearing which was held on February 18, 2016.

Appellant submitted reports from Dr. Jeffrey C. Hill, Board-certified in preventive and occupational medicine, dated August 19, 2015 to March 21, 2016 who noted that appellant fell at work and hit her head on the concrete ledge. She presented for reassessment regarding her continued, chronic work-related pain that originated in the left side of her lumbosacral spine, radiating into her left hip and left leg which began on September 3, 2009. Appellant reported improvement with injections, lidocaine patches, and pain medicine. Dr. Hill noted findings that included mild-to-moderate antalgic gait, a complete loss of lumbar lordosis, pain on range of motion in the lumbar spine, intact sensation in both legs, pain with palpation in the left buttocks, left lateral hip, and left groin, left sciatic notch tenderness, and pain on palpation of the piriformis muscle. For the left hip, there was a profound loss of flexion, extension, adduction, abduction, internal rotation, and external rotation. Dr. Hill diagnosed strain of muscle, fascia, and tendon of lower back, sprain of ligaments of lumbar spine, and pain in left hip. He noted that appellant continued to have left buttocks tenderness consistent with piriformis syndrome. Dr. Hill noted piriformis syndrome was a condition in which the piriformis muscle spasms and causes buttock pain irritating the nearby sciatic nerve causing pain, numbness, and tingling along the back of the leg and into the foot. There was no simple diagnostic test for piriformis syndrome and it was primarily diagnosed based on symptoms and on examination, including acute tenderness in the buttock and sciatica-like pain down the back of the thigh, calf, and foot. Dr. Hill opined that this problem was related to work activities.

On March 17, 2016 Dr. Brian S. Cohen, a Board-certified orthopedist, evaluated appellant's left hip. He noted that appellant had a work injury that dated back to 2009 which resulted in significant head, low back, and left hip trauma. Dr. Cohen indicated that appellant was treated extensively with anti-inflammatory medication, narcotic pain medication, physical therapy, and hip injections with limited relief. He diagnosed lumbosacral ligament sprain and acute pain of left knee. Dr. Cohen recommended a left total hip replacement.

In an April 7, 2016 letter, OWCP advised appellant that it could not approve the proposed surgery as the request to expand her claim to accept left hip piriformis syndrome had been denied.

In an April 18, 2016 treatment record, Dr. Hill referenced appellant's history, findings, and diagnoses. He noted appellant's frustration at OWCP's refusal to authorize her surgery in her accepted claim. Dr. Hill opined that appellant's problem was work related.

In a decision dated May 3, 2016, an OWCP hearing representative affirmed the decision dated June 9, 2015.

On September 9, 2016 appellant requested reconsideration and referenced a medical note from Dr. Hill dated July 25, 2016 which had not been previously considered. She indicated that based on this new evidence OWCP's decision should be vacated.

New evidence included Dr. Hill's treatment records from May 16 to November 10, 2016. He noted the injuries sustained when appellant fell off a ledge at work and hit her head. Appellant presented for evaluation of low back pain associated with numbness and tingling which originated in her lower back and radiated into her left buttocks and down her left leg. She noted the problem began on September 3, 2009. Dr. Hill diagnosed strain of muscle, fascia and tendon of the lower back, sprain of ligaments of lumbar spine, and pain in the left hip. He opined that the cause of appellant's problem was related to work activities. On July 25, 2016 Dr. Hill indicated that appellant was evaluated by a local orthopedic surgeon who opined that she would benefit from a total hip replacement due to intra-articular hip pathology. Dr. Hill opined that the denial for the hip replacement was inconsistent as appellant's claim had been accepted for pain in left hip. He indicated the motivation for the hip replacement was hip pain. Appellant also submitted evidence from Drs. Hill and Cohen that were previously of record.

Appellant also provided an August 10, 2015 report from Dr. Roberts who treated her for left hip pain. Dr. Roberts diagnosed hip pain, contusion, and hip arthritis. He indicated that appellant had extensive conservative management with minimal improvement in pain through the piriformis region and the greater trochanteric region.

In an April 24, 2015 report, Dr. Casey Chamberlain, a Board-certified physiatrist, noted that appellant had a left intra-articular hip injection. He diagnosed hip pain.

Appellant submitted physical therapy reports dated November 7 to 21, 2016. A computerized tomography (CT) scan of the head dated November 16, 2016 revealed no acute intercranial hemorrhage.

In a November 30, 2016 decision, OWCP denied appellant's September 6, 2016 request for reconsideration as the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[4] OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in

[4] 5 U.S.C. § 8128(a).

section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[5]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[6]

ANALYSIS

OWCP denied appellant's request to expand her claim to include the condition of piriformis syndrome because the medical evidence failed to support that the condition was present and causally related to the work injury of September 3, 2009. On September 6, 2016 appellant requested reconsideration which OWCP denied on November 30, 2016, without a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. On September 9, 2016 she requested reconsideration and referenced a medical note from Dr. Hill dated July 25, 2016 which had not previously been considered. Appellant indicated that, based on this new evidence, OWCP's decision should be vacated. This note does not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant developed piriformis syndrome causally related to the accepted employment injury of September 3, 2009. That is a medical issue which must be addressed by relevant new medical evidence.[7]

Appellant also did not submit any relevant and pertinent new medical evidence in support of her claim. She submitted a March 21, 2016 report from Dr. Hill and a March 17, 2016 report from Dr. Cohen. However, these reports are duplicative of evidence previously submitted and were considered by OWCP in its earlier decision dated May 3, 2016. Evidence that repeats or

[5] 20 C.F.R. § 10.606(b)(3).

[6] *Id*. at § 10.608(b).

[7] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[8]

Appellant provided Dr. Hill's treatment records from May 16 to November 10, 2016. Dr. Hill noted her treatment for injuries sustained when she fell off a ledge at work and hit her head on September 3, 2009. He diagnosed strain of muscle, fascia, and tendon of the lower back, sprain of ligaments of lumbar spine, and pain in the left hip. Dr. Hill opined that the cause of appellant's problem was related to work activities. These reports are substantially similar to his reports dated from August 19, 2015 to April 18, 2016 previously submitted and considered by OWCP in it decision dated May 3, 2016 and found deficient. 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.[9]

In a July 25, 2016 report, Dr. Hill indicated that appellant was evaluated by a local orthopedic surgeon who recommended a total hip replacement due to intra-articular hip pathology causing her hip pain. He questioned OWCP's denial of authorization for a hip replacement noting that appellant's claim was accepted for pain in left hip. This report is not relevant as it is similar to his April 18, 2016 report which also questioned OWCP's denial of her surgery request.[10]

On August 10, 2015 Dr. Roberts treated appellant for left hip pain and diagnosed hip pain, contusion, and hip arthritis. He indicated that appellant had extensive conservative management with minimal improvement in pain through the piriformis region and the greater trochanteric region. Similarly, an April 24, 2015 report from Dr. Chamberlain noted that appellant underwent a left intra-articular hip injection and he diagnosed hip pain. This evidence is not relevant, however, as the underlying issue is whether the accepted employment conditions should be expanded to include piriformis syndrome. In these reports, the physicians fail to specifically address whether the accepted employment incident on September 3, 2009 had caused or aggravated the diagnosed medical condition.[11] Therefore, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

Appellant submitted physical therapy reports dated November 7 to 21, 2016. The Board has held that treatment notes signed by a physical therapist are not considered medical evidence as these providers are not a physician under FECA.[12]

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[8] *See Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[9] *Id.*

[10] *See id.*

[11] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case. *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[12] *See David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the FECA); 5 U.S.C. § 8101(2) (this subsection defines a ''physician'' as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

Other evidence including diagnostic testing failed to address whether the accepted employment injury of September 3, 2009 caused or aggravated the diagnosed medical condition.

The Board accordingly finds that appellant failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered. 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 November 30, 2016 decision of the Office of Workers' Compensation Programs is affirmed.[13]

Issued: July 25, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[13] The record contains a Form CA-16 dated September 8, 2009 and signed by the employing establishment. The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim. *See D.M.*, Docket No. 13-0535 (issued June 6, 2013); *Val D. Wynn*, 40 ECAB 666 (1989). *See also* 20 C.F.R. § 10.300; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.3(a)(3) (February 2012). Upon return of the case record, OWCP should address this issue.