

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

C.O., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Palatine, IL,
Employer**

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**Docket No. 11-562
Issued: November 10, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 4, 2011 appellant, through her attorney, filed a timely appeal of a December 8, 2010 Office of Workers' Compensation Programs' (OWCP) decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board will only consider the nonmerit issue.²

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² Counsel did not request that the Board review the August 25, 2010 merit decision. See 20 C.F.R. § 501.3. In the appeal letter dated December 20, 2010, counsel stated, "[W]e hereby appeal the decision of December 8, 2010." Appellant may request modification of the wage-earning capacity determination, supported by relevant evidence or argument, at any time before OWCP.

FACTUAL HISTORY

On January 21, 2001 appellant, then a 35-year-old mail processor clerk, filed an occupational disease claim alleging that she developed pain in her right shoulder due to repetitive work on a machine. She stated that she developed a rotator cuff tear. OWCP accepted appellant's claim for right shoulder tendinitis on March 15, 2001. Appellant returned to light-duty work on March 17, 2001. She returned to full-duty on July 25, 2001. OWCP subsequently accepted appellant's claim for left shoulder tendinitis on July 21, 2004.

Appellant returned to work in a light-duty position in January 2007 answering the telephone, trying return to sender mail and writing route numbers on parcels. Her physical restrictions were no repetitive use of her hands, no lifting over the shoulder, no stooping, bending, or climbing and no lifting or pushing over 10 pounds. Appellant accepted a new light-duty position on June 10, 2008 which entailed working as a city carrier driver, driving a carrier to an appointed route and picking up daily eight hours a day. The physical restrictions included no lifting, pushing or pulling over 10 pounds, no stooping, bending or climbing, seated work only and no repetitive use of hands or lifting over the shoulder.

By decision dated March 4, 2009, OWCP reduced her compensation benefits based on her actual earnings as a city carrier driver. It found that appellant began this position on June 10, 2008 and that her actual earnings fairly and reasonably represented her wage-earning capacity. OWCP found that appellant had been employed in that position for more than two months and that the work was considered suitable. It noted that appellant stopped work on December 23, 2008 due to a new injury filed under claim number xxxxxx948 and returned to restricted duty on December 30, 2008.³

Appellant filed a claim for compensation commencing August 10 through 12, 2009. She filed an Equal Employment Opportunity (EEO) complaint alleging discrimination based on physical disability due to ongoing harassment since July 30, 2009, including being forced to work outside of her restrictions on July 30, 2009 and on subsequent occasions. The employing establishment responded on September 29, 2009 and stated that appellant was not required to work outside her restrictions. The employer noted that she was instructed to sit in the parking lot in a new van for up to one hour so that the carriers that had parked their private vehicles on the lot could move out of the lot and so that no other employees could drive their vehicles on to the lot while the parking lot was repaved. Appellant was in the vehicle from 3:30 until 4:00 when her supervisor relieved her.

Dr. Robert J. Fink, a Board-certified orthopedic surgeon, examined appellant on August 28, 2009 and noted her symptoms of pain in her shoulders. He found bilateral abduction to 90 degrees with pain, positive impingement signs and weakness of external rotators in the right left shoulders. Dr. Fink recommended magnetic resonance imaging (MRI) scans. Appellant's left shoulder MRI scan demonstrated tendinitis or bursitis in the shoulder. Her right

³ The record indicates that appellant has a separate claim number xxxxxx666 due to bilateral carpal tunnel syndrome and left ganglion cyst. Appellant underwent left carpal tunnel release on March 2, 2006 and returned to limited duty on April 5, 2006.

MRI scan demonstrated mild hypertrophic inferior spurring indenting the supraspinatus tendon with early impingement. The test also revealed tendinitis or bursitis.

In a note dated October 16, 2009, Dr. Fink reviewed the MRI scans and diagnosed tendinitis of the rotator cuff on the left and joint arthrosis with impingement and tendinitis of the rotator cuff on the right. He found that appellant was totally disabled from October 28 through November 30, 2009.

On November 24 and December 14, 2009 OWCP requested additional information regarding appellant's request for right shoulder surgery. It requested additional information from appellant regarding her claimed disability on December 21, 2009.

In a letter dated January 28, 2010, OWCP noted receiving appellant's claim for wage-loss compensation for total disability beginning on August 10, 2009. It stated that appellant alleged that her light-duty assignment became more demanding on August 10, 2009 and that her work exceeded her restrictions. OWCP requested additional factual and medical evidence from appellant supporting her claim.

Dr. Mangal Yeturu, completed a report on August 10, 2009 and stated that appellant was unable to work from August 10 to 12, 2009. He indicated that appellant could return to work on August 13, 2009 with no repetitive work involving the upper extremities. Dr. Yeturu stated, "I believe that the neck pain and right shoulder pain is aggravated by the repetitive nature of the work done on Saturday August 8, 2009."

In a statement dated January 30, 2010, appellant stated that she worked outside her restrictions on August 8, 2009 causing her shoulder injury to be aggravated. She stated that her light-duty assignment as shuttle driver ended on December 22, 2008. Appellant stated that her duties on August 8, 2009 did not comport with her restrictions.

Dr. Fink completed a note on February 1, 2010 and stated that appellant had undergone a thorough course of nonoperative treatment for her right and left shoulders including physical therapy and injections. He recommended surgery on the right shoulder for impingement syndrome. Dr. Fink submitted a series of form reports supporting appellant's ongoing disability for work due to impingement of the rotator cuff.

By decision dated March 4, 2010, OWCP denied appellant's claim for recurrence of disability beginning August 8, 2009, finding that she had not submitted evidence warranting modification of her wage-earning capacity determination.

On March 10, 2010 counsel requested an oral hearing before an OWCP hearing representative.

OWCP's medical adviser reviewed the record on April 7, 2010 and recommended authorization of appellant's right shoulder surgery. On April 12, 2010 Dr. Fink again stated that conservative care had failed to improve appellant's shoulder symptoms and requesting authorization for arthroscopy with Neer acromioplasty first on her right and then her left shoulder. He performed an open Neer acromioplasty of the right shoulder and arthroscopic partial synovectomy of the right shoulder on May 21, 2010.

Counsel appeared at the oral hearing on June 9, 2010 and argued in the alternative, that appellant had established a new injury, sustained a recurrence and that the original wage-earning capacity determination was in error. In a statement dated June 14, 2010, appellant stated that she was not able to work limited duty on August 10, 2009 as her upper extremity was painful and paralyzed. She attributed her condition to the work she performed on August 9, 2009 which consisted of repeatedly backing up a vehicle.

By decision dated August 25, 2010, an OWCP hearing representative found that appellant had not met her burden of proof to modify the March 4, 2009 wage-earning determination. He found that no physician had provided medical rationale or objective findings to support that there was a material worsening of her condition so that she was no longer able to work limited duty as of August 10, 2009.

Appellant requested reconsideration on August 28, 2010. She submitted work status forms addressing her current condition dated September 8, October 13 and November 24, 2010 as well as progress notes dated August 4, September 8 and October 13, 2010. Appellant also submitted notes from a physical therapist. She resubmitted her May 21, 2010 operative report.

OWCP entered appellant on the periodic rolls on October 4, 2010 authorizing compensation at the augmented rate beginning September 25, 2010 and continuing in the amount of \$2,815.56 every 28 days.

By decision dated December 8, 2010, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was not relevant to her claim and was inconsequential to the issues in the August 25, 2010 decision.

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.⁴ Section 10.606(b) of the Code of Federal Regulations provide 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.⁵ Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but does 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.⁶

⁴ 5 U.S.C. §§ 8101-8193, 8128(a).

⁵ 20 C.F.R. § 10.606.

⁶ *Id.* at § 10.608.

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷ The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁸

ANALYSIS

OWCP issued a wage-earning capacity determination on March 4, 2009 based on her actual earnings as a city carrier driver. Appellant claimed additional periods of total disability and OWCP denied modification of the March 4, 2009 decision on March 4, 2010. Appellant, through her attorney, requested an oral hearing and by decision dated August 25, 2010 OWCP's hearing representative found that appellant had not submitted the necessary medical evidence to establish a material change in the nature and extent of her injury-related condition or other basis for modifying the wage-earning capacity determination. To reopen the case for merit review, which in this case would evaluate modification of the wage-earning capacity determination, appellant must meet one of the requirements of 10.606(b)(2).⁹ In appellant's request for reconsideration, she submitted medical evidence bearing on her current condition which was for the period on and after September 8, 2010. The form reports submitted did not mention her disability beginning on or after August 8, 2009 and are not relevant to the issue of whether appellant sustained a material change in her injury-related condition beginning on that date. Appellant also submitted several physical therapy notes. A physical therapist's reports are not medical evidence as a physical therapist is not a physician under FECA.¹⁰ As such the physical therapy notes are not relevant to the issue of whether appellant has submitted sufficient medical evidence to establish a change in the nature and extent of her injury-related condition or whether the original wage-earning capacity determination was in error. Appellant did not submit any argument in support of her reconsideration request. The Board accordingly finds that appellant did not meet any of the requirements of section 10.606(b)(2) and is not entitled to a merit review of this case.

Appellant may request modification of the wage-earning capacity determination, supported by relevant new evidence or argument, at any time before OWCP.

CONCLUSION

Appellant was not entitled to a merit review since she did not meet any of the requirements of 20 C.F.R. § 10.606(b).

⁷ *M.E.*, 58 ECAB 694 (2007).

⁸ *Id.*

⁹ *L.C.*, 58 ECAB 535 (2007); *Z.J.*, Docket No. 10-2285 (issued August 11, 2011).

¹⁰ 5 U.S.C. §§ 8101-8193, 8101(2); *Thomas R. Horsefall*, 48 ECAB 180 (1996).

ORDER

IT IS HEREBY ORDERED THAT the December 8, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 10, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board