

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

J.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Nashville, TN, Employer**

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**Docket No. 08-772
Issued: October 9, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 18, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' nonmerit decision dated October 22, 2007 which denied her request for reconsideration. Because more than one year has elapsed from the last adverse merit decision dated October 16, 2006 to the filing of this appeal on January 18, 2008, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether the Office properly denied appellant's request for reconsideration without conducting a merit review.

FACTUAL HISTORY

On April 3, 1999 appellant, then a 24-year-old letter carrier, was injured when her motor vehicle was hit from behind and turned over on her. She stopped work on April 3, 1999 and returned on June 12, 1999. In an April 14, 1999 report, Dr. Adele Maurer, a surgeon, explained

that appellant's vehicle was hit from behind and that she was ejected and pinned beneath her vehicle. She noted that x-rays revealed a left occipital parietal depressed skull fracture with a small subarachnoid hemorrhage. On April 29, 1999 Dr. Daniel C. Cullinane, a Board-certified surgeon, diagnosed a closed head injury with significant concussive symptoms including dizziness, light-headedness and headaches. The Office accepted appellant's claim for a concussion and closed skull fracture and paid appropriate benefits. Appellant's claim was also accepted for a right knee injury and surgery was authorized to remove a small foreign body.¹ The Office later expanded the accepted conditions to include healed skull fracture, healed open wound of the right leg, post-traumatic stress disorder (PTSD) and major depressive disorder.

On November 19, 1999 Dr. Daniel S. Javier, a Board-certified psychiatrist and neurologist, diagnosed major depressive disorder due to appellant's motor vehicle accident. On January 19, 2000 he diagnosed major depression and PTSD. On October 4, 2001 Dr. Javier removed appellant from work. In an October 10, 2001 note, he supported appellant's indefinite medical leave due to her PTSD. Dr. Javier explained that appellant experiences frequent flashbacks of the accident, hears crashing in her head while driving and panics when she hears tires screeching. He also noted that appellant had continuing physical symptoms of PTSD including headaches, stomachaches and right abdominal pain. In an October 15, 2001 work capacity evaluation, Dr. Javier stated that appellant was currently unable to work as her symptoms had worsened rather than improved on limited duty. On February 7, 2002 he determined that appellant had reached maximum medical improvement and was unable to work in any capacity due to her PTSD, which he attributed to her work-related motor vehicle accident.

On March 25, 2003 the Office referred appellant to Dr. Casey Arney, a Board-certified psychiatrist and neurologist, for a second opinion examination to determine the extent of her current work-related condition and capacity for work. In an April 3, 2003 report, Dr. Arney found that appellant had chronic severe PTSD and major depression and would likely remain totally disabled for work for many years or even permanently. In a November 25, 2003 supplemental report, he explained that, while appellant had initially returned to work in a limited-duty assignment, her PTSD had worsened over time and she was presently completely unable to work. Dr. Arney estimated that she would reach maximum medical improvement in approximately one year.

In a December 19, 2003 investigative memorandum, the employing establishment noted that appellant had been observed driving short and long distances, occasionally exhibiting aggressive driving behaviors and exceeding posted speed limits. It also noted that appellant had enrolled in classes at a nearby college and questioned appellant's ability to function in a collegiate setting when she was unable to work.

On February 12, 2004 the Office referred appellant to Dr. John J. Griffin, a Board-certified psychiatrist and neurologist, for a second opinion examination to determine whether appellant had continuing residuals of her work injury. In an April 5, 2004 report, Dr. Griffin noted appellant's history of a motor vehicle injury at work and diagnoses of generalized anxiety disorder and PTSD. He noted that, although appellant reported feeling anxiety and fear when

¹ On August 23, 1999 appellant underwent a surgery of the right leg with the removal of multiple small lipomas. She stopped work for the surgery and returned to light duty on September 1, 1999.

driving, she was able to drive a vehicle. Dr. Griffin concluded that she could work eight hours per day but was not motivated to do so. In an April 15, 2004 supplemental report, he explained that appellant's reports of concentration difficulties were inconsistent with her current academic studies. Dr. Griffin stated that aside from motivation issues appellant was capable of working in her regular job.

On June 4, 2004 Dr. Javier opined that appellant remained totally disabled for work due to symptoms of her PTSD and a risk of relapse. He attributed the inconsistencies in appellant's reported symptoms and her behavior to her head trauma.

On August 12, 2004 the Office referred appellant to Dr. Samuel Okpaku, a Board-certified psychiatrist and neurologist, for an impartial medical examination to determine the extent of her current work-related disability. On September 2, 2004 Dr. Okpaku examined appellant and diagnosed depressive disorder with previous history of PTSD, generalized anxiety disorder, personality disorder, previous head and knee injury, and a chronic stressor of her previous motor vehicle accident. He stated that appellant was able to drive herself and appeared to have reached maximum medical improvement given her stated activities of daily living and accomplishments in various transactions including brisk driving. Dr. Okpaku noted that appellant exhibited some signs of symptom magnification and that her reported fear of driving seemed subjective in light of her "brisk and sometimes aggressive driving." He concluded that appellant was able to work productively and may even benefit from working.

On July 14, 2005 the Office referred appellant to Dr. John Lamb, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant had continuing physical disability as a result of her work injury. In a report dated August 1, 2005, Dr. Lamb diagnosed complaints of right knee pain without objective abnormalities but with a history of mechanical symptoms. He determined that pending the results of a scheduled magnetic resonance imaging (MRI) scan, appellant could return to work without restrictions. In an August 10, 2005 MRI scan report, Dr. Kimberly Brennan, a Board-certified diagnostic radiologist, diagnosed mild chondromalacia involving the medial patellar facet and an otherwise normal study.

On August 22, 2005 the Office proposed termination of appellant's wage-loss compensation on the grounds that the medical evidence established that appellant was no longer disabled for work due to her accepted conditions. Appellant disagreed with the Office's proposed decision on September 14, 2005 and submitted reports from Dr. Javier and Dr. Dawne Kimbrell, Ph.D., a psychologist, in support of continued disability.

In a September 9, 2005 report, Dr. Kimbrell stated that, despite appellant's attempts to improve her activity level, she was still vulnerable to frequent panic attacks, particularly when she hears sirens. She also noted that appellant's husband was due to deploy to Iraq soon and that this may have a negative impact on appellant's recovery from her PTSD. In a report also dated September 9, 2005, Dr. Javier explained that appellant had permanent brain and right leg damage due to her accident. He stated that her PTSD was "buried but not resolved" and that he supported her continued total disability for work.

By decision dated February 17, 2006, the Office finalized its termination of appellant's compensation benefits for her accepted right leg laceration effective March 19, 2006. In an amended decision dated October 16, 2006, it finalized its termination of appellant's compensation benefits, effective October 29, 2006, for all accepted conditions. The Office noted that the claim remained open for payment of medical benefits for appellant's accepted PTSD.

On October 6, 2007 appellant requested reconsideration. In an October 2, 2007 statement accompanying her request, she asserted that, as the Office had accepted her claims for major depressive disorder and PTSD, she was entitled to continuing benefits. Appellant argued that the Office agreed to continue paying benefits for her PTSD and therefore agreed that she had not yet recovered from her injury. She also asserted that Dr. Javier and Dr. Kimbrell, her treating psychiatrist and psychologist, should constitute the weight of the medical evidence rather than Dr. Okpaku, who only examined her once for a brief period of time. Appellant stated that her treating doctors had a superior understanding of her condition and that their opinion that she was still totally disabled for work should outweigh Dr. Okpaku's opinion that she could continue working.

By decision dated October 22, 2007, the Office denied appellant's request for reconsideration without conducting a merit review on the grounds that the evidence submitted was insufficient.

LEGAL PRECEDENT

Under section 8128 of the Federal Employees' Compensation Act, the Office has discretion to grant a claimant's request for reconsideration and reopen a case for merit review. Section 10.606(b)(2) of the implementing federal regulation provides guidance for the Office in using this discretion.² The regulation provides that the Office should grant a claimant merit review when the claimant's request for reconsideration and all documents in support thereof:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”³

Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁴ When reviewing an Office decision denying a merit review, the function of the

² 20 C.F.R. § 10.606(b)(2).

³ *Id.*

⁴ 20 C.F.R. § 10.608(b).

Board is to determine whether the Office properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁵

ANALYSIS

The Board finds that the Office properly denied appellant's request for reconsideration without conducting a merit review of the claim. To require the Office to reopen her claim for a merit review, appellant must meet one of the three requirements set forth in section 10.606(b)(2).⁶ She must show that the Office erroneously applied or interpreted a point of law, advance a new and relevant legal argument or submit new and relevant factual or medical evidence. The Board finds that appellant did not meet any of the above listed requirements.

In her October 2, 2007 statement, appellant asserted that the Office's acceptance of her claims for PTSD and major depressive disorder and its continued payment of compensation reflected the Office's acknowledgement that she had not fully recovered from her work injury. The Board finds that this argument does not show that the Office erroneously interpreted or applied a point of law and is not a relevant legal argument because the Office's October 16, 2006 termination decision clearly found that appellant had no further disability from work due to her accepted conditions and further stated that the claim remained open for payment of medical benefits for the accepted PTSD. Appellant cited no authority for her assertion that the payment of medical benefits for her PTSD supported that she remained totally disabled for all work. Instead, the Board has held that payment of medical benefits is not limited to the period of entitlement to compensation for disability.⁷ Thus, appellant's argument has no reasonable color of validity and is not a basis for requiring the Office to reopen her claim for a merit review.⁸ Similarly, her general argument that the reports of her physicians should represent the weight of the evidence is insufficient to require a merit review. The Board notes that the underlying issue is medical in nature and that the Office considered all the medical evidence before terminating compensation. Appellant has not submitted any new and relevant medical evidence to support her assertion. She also has not submitted any new evidence or cited any authority to support that any particular aspect of Dr. Okpaku's examination was inadequate or improper. The Board finds that appellant's assertions do not require the Office to reopen appellant's claim for a merit review.

Appellant submitted no new medical evidence in support of her request for reconsideration. Her request was predicated entirely upon the above noted arguments set forth in

⁵ *Annette Louise*, 54 ECAB 783 (2003).

⁶ *Supra* note 2.

⁷ *See T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007) (the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability).

⁸ *See M.E.*, 58 ECAB ____ (Docket No. 07-1189, issued September 20, 2007) (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).

her October 2, 2007 letter. The Board finds that appellant has not met any of the above listed three regulatory criteria and the Office was not required to reopen her claim for a merit review.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration without reopening the claim for a merit review because appellant failed to meet the three regulatory criteria justifying a merit review.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 9, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board