

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Little Rock, AR, Employer**

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**Docket No. 11-1010
Issued: November 2, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 10, 2011 appellant filed a timely appeal from a September 30, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied her request for reconsideration.¹ Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit issue in this case.

ISSUE

The issue is whether OWCP properly denied appellant's May 26, 2010 request for reconsideration under 5 U.S.C. § 8128(a).

¹ The last merit decision in this case was the August 5, 2009 decision, which denied appellant's occupational disease claim. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days elapsed between the most recent merit decision dated August 5, 2009 to the filing of this appeal on March 10, 2011, the Board lacks jurisdiction to review the merits of this case.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 10, 2008 appellant, then a 55-year-old mail handler, filed an occupational disease claim alleging that she suffered an anxiety attack, depression, and insomnia as a result of harassment for filing an Equal Employment Opportunity (EEO) complaint, intimidation from management and sexual harassment by a maintenance supervisor. She explained that there had been unauthorized access to her medical records and a change in her job hours, based upon misleading information. Appellant first became aware of her condition on October 2, 2007 and realized it resulted from her employment on March 21, 2009. She did not stop work.

In a decision dated January 6, 2009, OWCP denied her claim on the grounds of insufficient evidence to establish any compensable employment factors. It determined that the factors identified did not occur and were administrative in nature.³ By decision dated August 5, 2009, OWCP refused to modify its January 6, 2009 denial decision. In a decision dated February 3, 2010, it denied further merit review of its August 5, 2009 decision.

On May 25, 2010 appellant again requested reconsideration based on new relevant evidence not previously considered. She submitted leave analysis reports and documents relating to a grievance she filed before her employing establishment. In March 24 and July 1, 2009 grievance decisions, the employing establishment did not find sufficient evidence of harassment or discrimination and determined that the employer properly issued a Letter of Warning to appellant for unexcused absences.⁴ Appellant also submitted documents regarding a 2008 EEO grievance for harassment and discrimination for not receiving equitable overtime compared to other employees. In a September 18, 2009 decision, EEO dismissed appellant's complaint of harassment and discrimination.

In a decision dated September 30, 2010, OWCP denied appellant's request for reconsideration finding that the additional evidence submitted was insufficient to warrant further merit review. It determined that the documents submitted were immaterial to the issue for which the claim was denied and cumulative to the evidence already on record.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁵ OWCP's regulations provide that OWCP may

³ The incidents appellant alleged were: (1) her job offer hours changed and the job offer did not comply with her medical restrictions; (2) harassment from recently filing an EEO claim; and (3) continual intimidation and sexual harassment by her maintenance supervisor and coworkers.

⁴ Appellant also submitted an appeal request of the July 1, 2009 decision and a September 22, 2009 settlement agreement wherein the employing establishment agreed to remove the Letter of Warning from appellant's profile provided that she did not receive attendance-related discipline during the interim period. The settlement agreement did not admit any wrongdoing by the employer.

⁵ 5 U.S.C. § 8128(a); W.C., 59 ECAB 372 (2008); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010).

review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise her right through a request to the district OWCP.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument 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.⁷

A request for reconsideration must also be submitted within one year of the date of OWCP's decision for which review is sought.⁸ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the 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.¹⁰

ANALYSIS

The Board has no jurisdiction to review OWCP's January 6 and August 5, 2009 merit decisions denying appellant's compensation claim. As appellant did not file a timely appeal of those decisions, the Board may not review the merits of her case. The only decision the Board may review is OWCP's September 30, 2010 nonmerit decision denying appellant's request for reconsideration. The only issue before the Board, therefore, is whether OWCP properly denied appellant's May 26, 2010 request for reconsideration by determining whether her request met at least one of the three standards for obtaining a merit review of her case.

The Board finds that OWCP properly denied appellant's request for reconsideration as she did not meet any of the requirements sufficient to warrant merit review. In her May 26, 2010 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by OWCP. Appellant only contended that OWCP did not address other new relevant evidence that was not received in previous requests for reconsideration.

To support her request for reconsideration, appellant submitted various documents relating to a grievance claim she filed before her employing establishment and an EEO claim. The grievance and EEO settlement forms do not acknowledge any wrongdoing by the employing

⁶ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

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

⁸ 20 C.F.R. § 10.607(a).

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

establishment or establish compensable work factors.¹¹ Moreover, these documents are also immaterial to the case as they do not address the issue of whether appellant identified compensable work factors. OWCP denied her claim because it determined that her change in job hours did not constitute administrative error and that the evidence did not support her allegations of harassment or discrimination. The grievance and EEO documents relate to a complaint for receiving a Letter of Warning for unexcused absences and not receiving comparable overtime, which are not relevant to appellant's allegations and do not establish compensable work factors.¹² The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹³ As the grievance claim, EEO claim documents, and leave analysis reports do not address the particular issue involved, whether appellant's alleged events were compensable factors of employment, these documents do not constitute a basis for reopening a case.¹⁴

Because appellant's request for reconsideration failed to show that OWCP erroneously applied or interpreted a specific point of law, failed to advance a relevant legal argument not previously considered by OWCP, and failed to provide relevant and pertinent new evidence not previously considered by OWCP, the Board finds that OWCP properly denied further merit review of her case. The Board will affirm OWCP's September 30, 2010 decision.

On appeal, appellant alleges that her EEO and grievance claims before the employing establishment were not properly investigated and restated the incidents of alleged harassment and discrimination. None of these assertions, however, satisfies the criteria necessary to reopen a case for merit review as they do not show OWCP erroneously applied a specific point of law nor advance any new legal argument. As previously noted, the EEO and grievance claims were immaterial to appellant's claim and merely repeating various incidents and allegations does not constitute new evidence. While appellant provided additional evidence on appeal, the Board does not have jurisdiction to review that evidence as such evidence was not before OWCP at the time of its final decision.¹⁵

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

¹¹ *D.L.*, 58 ECAB 217 (2006).

¹² *See Richard Yardon*, 57 ECAB 207 (2005); *J.J.*, Docket No. 10-215 (issued July 19, 2010).

¹³ *D.K.*, 59 ECAB 141 (2007); *Johnnie B. Causey*, 57 ECAB 359 (2006).

¹⁴ With regard to claims under FECA, the Board has held that the determination of an employee's rights or remedies under other statutory authority does not establish entitlement to benefits under FECA. Under FECA, to establish disability, an employee's injury must be shown to be causally related to an accepted injury or accepted factors of his or her federal employment. For this reason, the determinations of other administrative agencies or courts, while instructive, are not determinative with regard to disability arising under FECA. Findings made by the MSPB or EEO may constitute substantial evidence relative to a claim to be considered by OWCP and the Board. *See J.F.*, 59 ECAB 331 (2007).

¹⁵ 20 C.F.R. § 501.2(c)(1).

CONCLUSION

The Board finds that OWCP properly denied appellant's May 26, 2010 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2010 nonmerit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board