

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

A.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Harrison, MI, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-851
Issued: August 27, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 28, 2012 appellant filed a timely appeal of a September 6, 2011 decision of the Office of Workers' Compensation Programs (OWCP), denying her application for reconsideration without merit review of the claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the September 6, 2011 decision. Since more than 180 days elapsed from the last merit decision on June 9, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 21, 2001 appellant, then a 55-year-old window clerk, sustained a left shoulder sprain. OWCP accepted the claim for left shoulder strain, left shoulder impingement syndrome and left shoulder tendinitis. The record indicates that appellant had a prior claim in September 1990 for injuries resulting from repetitive work duties. This claim was accepted for bilateral rotator cuff tendinitis, degeneration of the bilateral acromioclavicular joints and bilateral carpal tunnel syndrome. Appellant worked intermittently and then returned to a full-time light-duty position on May 18, 2003.² She filed a recurrence of disability claim commencing July 8, 2003.

By decision dated January 20, 2005, OWCP denied the claim for a recurrence of disability. An OWCP hearing representative remanded the case for further development in a decision dated February 23, 2006, finding that OWCP had not fully considered the evidence with respect to the 1990 claim.

In a decision dated March 22, 2006, OWCP found that compensation benefits for the 1990 claim had been terminated on March 25, 2000 and, therefore, no evidence from prior claims would be relevant to the recurrence of disability claim. By decision dated December 20, 2007, an OWCP hearing representative again remanded the case for further development. The hearing representative directed OWCP to refer appellant for a second opinion examination on the issue of whether the shoulder surgeries in 2005 and 2006 were employment related and whether appellant had any employment-related total disability on or after July 8, 2003.

OWCP referred appellant to Dr. Jeffrey Lawley, an osteopath. In a report dated February 16, 2008, Dr. Lawley provided results on examination and recommended additional diagnostic testing. By report dated February 29, 2008, he opined that appellant could have worked after July 8, 2003 with restrictions as to over shoulder use of hands, as well as repetitive pushing, pulling and lifting. In a report dated August 8, 2008, Dr. Lawley opined that appellant's hand and shoulder complaints were not a result of a work injury on March 21, 2001.

By decision dated August 22, 2008, OWCP denied the claim for compensation commencing July 8, 2003. In a decision dated September 16, 2009, an OWCP hearing representative again remanded the case. The hearing representative found Dr. Lawley's reports were not based on a complete background and directed OWCP to secure a supplemental report.

In a report dated October 12, 2009, Dr. Lawley opined that appellant's upper extremity complaints were not related to work duties and any shoulder strain from March 21, 2001 had resolved. He opined that the shoulder surgeries were not employment related and appellant could have continued to work with restrictions after July 2003.

² The record indicates that by decision dated May 4, 2004 OWCP found an overpayment of compensation as appellant received compensation for wage loss after her return to work on May 18, 2003. By decision dated March 10, 1996, the Board affirmed an overpayment but remanded the case as to the amount and waiver of the overpayment. Docket No. 04-1974 (issued March 10, 1996).

In a decision dated December 14, 2009, OWCP denied the claim for compensation commencing July 8, 2003. By decision dated June 9, 2010, an OWCP hearing representative affirmed the December 14, 2009 decision.

On June 8, 2011 appellant, through her representative, requested reconsideration. She argued that OWCP had improperly relied on Dr. Lawley's reports and minimized the opinions of appellant's treating physicians, which supported total disability. Appellant did not identify specific supporting evidence. The request for reconsideration generally contended that her due process and equal protection rights had been violated.

In a November 11, 2010 report, Dr. Joseph Yacisen, an osteopath, stated that the left shoulder surgery had been discussed. On December 14, 2010 she underwent left shoulder arthroscopic surgery and superior labral tear from anterior to posterior repair. Appellant submitted reports dated December 29, 2010, January 26 and March 17, 2011 from Dr. Yacisen, providing results on examination.

By decision dated September 6, 2011, OWCP denied the application for reconsideration without merit review of the claim.

LEGAL PRECEDENT

FECA provides that OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.³ The employee shall exercise this right through a request to the district OWCP. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁴

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by OWCP in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (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 evidence not previously considered by OWCP.⁵

A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.605 (1999).

⁵ *Id.* at § 10.606(b)(2).

⁶ *Id.* at § 10.608.

ANALYSIS

Appellant submitted an application for reconsideration of the June 9, 2010 OWCP decision, denying a claim for compensation commencing July 8, 2003. With respect to the first standard, showing that OWCP erroneously applied or interpreted a specific point of law, she did not meet this standard. Appellant did not identify any specific point of law or show that OWCP erroneously applied or interpreted the law. She disagreed with OWCP's conclusions as to the probative value of the medical evidence, without establishing that OWCP erroneously applied or interpreted a specific point of law.

With respect to the second standard, advancing a relevant legal argument not previously considered by OWCP, appellant also failed to meet this standard. The application for reconsideration generally stated that OWCP violated appellant's due process and equal protection rights, without providing any additional explanation, citation to legal precedent, or any other supporting evidence. Where the legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.⁷

As to the third standard, the submission of new, relevant and pertinent evidence, appellant also failed to meet this standard. The medical evidence submitted from Dr. Yacisen, while new evidence, is not relevant and pertinent to the medical issue in the case. Dr. Yacisen does not discuss an employment-related total disability on or after July 8, 2003, or provide any relevant new information on the issue.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). 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 submit relevant and pertinent evidence not previously considered by OWCP. In accord with 20 C.F.R. § 10.608, OWCP properly declined to review the merits of the claim.

On appeal, appellant submitted a letter stating that she felt that she had proved her claim. She stated that she had worked for years sorting mail and continued to have pain in her arms, hands and shoulders. The Board notes that the only issue presented on appeal is the denial of merit review by OWCP in the September 6, 2011 decision. For the reasons noted above, the Board finds that OWCP properly found the application for reconsideration was not sufficient to warrant merit review.

CONCLUSION

The Board finds that OWCP properly denied merit review of the claim.

⁷ See *Norman W. Hanson*, 40 ECAB 1160 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 6, 2011 is affirmed.

Issued: August 27, 2012
Washington, DC

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

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

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