

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

J.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Lauderdale, FL, Employer**

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**Docket No. 11-1313
Issued: January 5, 2012**

Appearances:
Joanne Wright, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 10, 2011 appellant, through her representative, filed a timely appeal from a March 1, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed since the most recent merit decision of April 22, 2010 to the filing of this appeal on May 10, 2011, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On September 18, 2009 appellant, then a 49-year-old carrier, filed an occupational disease claim alleging that his cervical condition worsened while performing his letter carrier

¹ 5 U.S.C. §§ 8101-8193.

duties. He became aware of his condition on March 6, 2004 and realized that it was causally related to his work duties on July 2, 2008. OWCP accepted the claim for aggravation of cervical sprain and strain and aggravation of cervical radiculitis.² Appellant stopped work on January 27, 2009 and returned to light duty on April 9, 2009.

Appellant was treated by Dr. Lucky Flores, a Board-certified family practitioner. In duty status reports dated March 22 to July 22, 2009, Dr. Flores diagnosed cervical sprain with radiculitis and returned appellant to work full time with restrictions. He opined that the cumulative effect of violations of appellant's medical restrictions was the primary cause of the aggravation of his diagnosed cervical condition. Dr. Flores diagnosed cervical sprain/strain, cervical radiculopathy, cervical spondylosis and cervical disc herniation. He recommended physical therapy and returned appellant to work with restrictions. Appellant submitted a magnetic resonance imaging (MRI) scan dated March 25, 2009, which revealed disc herniations at C6-7, C5-6, C2-3, C4-5 and mild cervical spondylosis.

On October 29, 2009 appellant filed a Form CA-7, claim for compensation, for the period February 18 to April 8, 2009. The employing establishment submitted a CA-7a, time analysis form.

In a February 4, 2009 report, Dr. Kevin McGrath, a chiropractor, diagnosed exacerbation of chronic cervical work-related injury, cervicalgia, myospasm and somatic dysfunction. In notes dated February 6 to December 4, 2009, he treated appellant for stiffness and pain in the upper back at C5-6. Dr. McGrath performed spinal adjustments on the cervical spine, ultrasound, infrared heat and therapeutic exercise. In work status reports dated November 5 to 24, 2009, he diagnosed cervical sprain and strain and returned appellant to work light duty.

On November 20, 2009 OWCP requested that appellant submit additional information regarding his claim for compensation. It requested that he submit a medical narrative addressing how he was totally disabled due to his accepted condition for the period claimed.

Appellant submitted progress notes from Dr. McGrath dated November 16, 2009 to January 20, 2010 who treated him for pain and stiffness in the right shoulder and neck. Dr. McGrath diagnosed chronic cervical radiculopathy and left shoulder sprain/strain and returned appellant to work light duty. Also submitted was a November 20, 2009 prescription note from Dr. Flores who diagnosed cervical sprain, cervical radiculitis and trapezius sprain. On December 16, 2009 Dr. Flores noted that appellant was undergoing a physical therapy treatment plan and would be totally disabled until April 8, 2009.

By decision dated February 1, 2010, OWCP denied appellant's claim for compensation for the period February 18 to March 17, 2009 finding that the medical evidence did not establish that his total disability was due to his accepted work injury. It found that Dr. McGrath, a

² Appellant filed a claim for a cervical injury which occurred on March 6, 2004. OWCP accepted appellant's claim for aggravation of cervical degenerative disc disease. This claim was consolidated with the current claim before the Board.

chiropractor, could not be considered as a physician because he did not diagnose a spinal subluxation demonstrated by x-ray.³

On February 16, 2010 appellant requested reconsideration and submitted a prescription slip from Dr. Flores previously of record. On February 10, 2010 Dr. Flores reviewed the medical records from Dr. McGrath's office and agreed with his assessment of appellant's condition and treatment plan. He noted that appellant was totally disabled from February 4 to April 8, 2009. On February 10, 2010 Dr. Flores diagnosed cervical sprain and referred appellant for physical therapy evaluation and treatment. Appellant submitted progress notes from Dr. McGrath dated December 28, 2009 to February 10, 2010, who treated him for neck pain, left-sided radiculopathy and left shoulder weakness.

In a decision dated April 22, 2010, OWCP denied modification of the February 1, 2010 decision.

On December 13, 2010 appellant requested reconsideration. On December 10, 2010 appellant, through counsel, noted that he initially sought treatment from Dr. Miriam Feliz; however, she was not accepting new patients. He referenced intake notes from Dr. Feliz who listed appellant's symptoms of tenderness on palpitation of the trapezius, muscle tightness and left shoulder pain. Appellant referenced a January 23, 2009 report of Dr. Feliz, indicating that it was attached to his reconsideration request; however, no such report was submitted. Counsel advised that appellant subsequently sought treatment from Dr. Flores who was listed on an OWCP website. Appellant asserted that Dr. Flores found him to be totally disabled from February 18 to March 17, 2009 even though he was showing improvement from physical therapy as authorized by OWCP on February 4, 2009. Appellant asserted that Dr. Flores provided a reasonable opinion with regard to his disability which was not speculative.

In a March 1, 2011 decision, OWCP denied appellant's reconsideration request finding that the request was insufficient to warrant review of the prior decision.

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 section 10.606(b)(2) of the implementing federal regulations, which provide 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 that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

³ See 5 U.S.C. § 8101(2).

⁴ 5 U.S.C. § 8128(a).

“(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

On April 22, 2010 OWCP denied modification of a February 1, 2010 decision denying appellant’s claim for compensation for total disability for the period February 18 to March 17, 2009. It found that the medical evidence did not establish that appellant’s total disability was due to his accepted injury. On March 1, 2011 OWCP denied appellant’s December 10, 2010 reconsideration request, without a merit review. The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim.

The Board does not have jurisdiction over the April 22, 2010 OWCP decision. In his December 10, 2010 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He asserted that the opinion of Dr. Flores was not speculative and supported total disability for the period claimed. Appellant noted originally seeking treatment from Dr. Feliz and referenced intake notes from him but no such reports are presently of record. Appellant subsequently sought treatment from Dr. Flores who advised that he was totally disabled from work from February 18 to March 17, 2009. He contended that OWCP authorized physical therapy as of February 4, 2009. Appellant’s general statements and allegations are not sufficient to establish that OWCP erroneously applied or interpreted a point of law or advance a point of law or fact not previously considered by OWCP. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

The underlying issue in this case, whether appellant had disability during the period of February 18 to March 17, 2009 causally related to his accepted work injury, is a medical issue which must be addressed by relevant medical evidence.⁷ A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case. Rather, he submitted business cards from his treating physicians, his chiropractor and an acupuncturist. This material does not constitute new and relevant evidence.

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

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b).

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

submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal appellant reiterated his assertion that he was treated by Dr. McGrath without knowledge that he was a chiropractor or that he was not an appropriate physician to render medical treatment under FECA. He indicated that Dr. McGrath was a doctor who was listed with OWCP as a caregiver and that he believed he was an approved doctor. Appellant indicated that he was subsequently treated by Dr. Flores who reviewed Dr. McGrath's notes and supported his disability from February 18 to March 17, 2009. The Board notes, however, that it only has jurisdiction over whether OWCP properly denied a merit review of the claim. As explained, appellant did not submit any evidence or argument in support of his reconsideration request that warrants reopening of his claim for a merit review under 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 5, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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