

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

B.M., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, New Orleans, LA,
Employer**

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**Docket No. 12-983
Issued: November 28, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 4, 2012 appellant filed a timely appeal from the February 14, 2012 merit and the March 5, 2012 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). 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 merits of this case.²

ISSUES

The issues are: (1) whether appellant established that she sustained migraines, neck, upper back and shoulder blade conditions causally related to her employment; and (2) whether OWCP properly refused to reopen her case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted new evidence with her appeal to the Board. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

FACTUAL HISTORY

On November 18, 2011 appellant, then a 51-year-old mail processing clerk, filed an occupational disease claim alleging that her migraines and muscle spasms in her upper back, shoulder blades and neck were employment related. She first became aware of this condition on July 29, 2011, but did not realize it was employment related until October 28, 2011.

By letter dated December 30, 2011, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised as to the type of medical and factual evidence to submit and given 30 days to provide this information.

Appellant subsequently submitted medical and factual evidence as noted below. In an undated statement, she noted that she suffers from a pinched nerve in her neck which causes muscle spasms in her lower back, neck and shoulder blades and migraines.

In a July 13, 2011 clinic note, Dr. James C. Butler, a treating Board-certified orthopedic surgeon, related that appellant had worked for the employing establishment for 27 years which involved repetitive movements and work. He noted that she had a history of chronic low back and neck pain which he opined was caused or aggravated by her repetitive work duties and movements.

In a November 11, 2011 work status report, a physician diagnosed appellant with cervical disc disease and was released to sedentary work.³ The physician indicated a period of disability ending on November 13, 2011.

On December 8, 2011, Patricia H. Thompson, a nurse practitioner, stated that appellant was disabled from working on November 26 and 29 and December 2 to 21, 2011 due to neck pain due to pinched nerves.

By decision dated February 14, 2012, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that she had sustained an injury in the performance of duty. It stated that she had failed to identify which work events had caused her claimed injuries.

On February 23, 2012 appellant requested reconsideration.

By decision dated March 5, 2012, OWCP denied reconsideration.

³ The physician's signature on the form is illegible.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁴ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁶

OWCP regulations define the term occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift.⁷ To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁸

If a claimant does establish an employment factor, she must submit medical evidence showing that a medical condition was caused by such a factor.⁹ The medical evidence required to establish causal relationship is generally rationalized medical opinion evidence from a physician. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that appellant failed to meet her burden of proof.

Appellant has the burden to submit a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition, medical evidence establishing the presence or existence of the disease or condition for which

⁴ *Supra* note 1.

⁵ *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁶ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ 20 C.F.R. § 10.5(ee). *See S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Donald W. Wenzel*, 56 ECAB 390 (2005).

⁸ *D.U.*, Docket No. 10-144 (issued July 27, 2010); *Frankie A. Farinacci*, 56 ECAB 723 (2005); *Roy L. Humphrey*, 57 ECAB 238 (2005).

⁹ *C.D.*, Docket No. 09-1881 (issued April 20, 2010); *Effie Morris*, 44 ECAB 470 (1993).

¹⁰ *D.S.*, Docket No. 09-860 (issued November 2, 2009); *I.J.*, 59 ECAB 408 (2008); *B.B.*, 59 ECAB 234 (2007); *Solomon Polen*, 51 ECAB 341 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

compensation is claimed and medical evidence establishing that the diagnosed condition is causally related to the implicated employment factors.

In developing appellant's claim for an occupational disease, OWCP requested that she submit a personal statement identifying specific factors which she attributed caused or aggravated her migraines and muscle spasms in her upper back, shoulder blades and neck. It also requested that appellant submit medical evidence describing how the implicated employment factors caused or aggravated the conditions she identified. Appellant did not provide the factual statement requested by OWCP.

Furthermore, appellant did not submit any medical evidence establishing a diagnosis and causal relationship between her condition and factors of her federal employment. Although OWCP informed her of the deficiencies in the evidence, she did not submit sufficient factual and medical evidence to establish her claim.¹¹ Therefore, appellant did not meet her burden of proof to establish that she sustained an employment-related injury.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹² OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.¹³ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁴ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.¹⁵

ANALYSIS -- ISSUE 2

In her February 23, 2012 request for reconsideration, appellant asked only that her case be reviewed. She did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP.

¹¹ See *O.W.*, Docket No. 09-2110 (issued April 22, 2010); *Donald W. Wenzel*, *supra* note 7.

¹² 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application.

¹³ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

¹⁴ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁵ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

Appellant also did not submit any pertinent new and relevant evidence with her reconsideration request. Consequently, she is not entitled to further merit review of her claim under section 10.606(b)(1)-(3).¹⁶

OWCP did not abuse its discretion by denying her reconsideration.¹⁷

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a neck condition, upper back condition, shoulder blade condition and migraines causally related to factors of her federal employment. The Board further finds that OWCP properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 5 and February 14, 2012 are affirmed.

Issued: November 28, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁶ 20 C.F.R. § 10.606(b)(1)-(3). *See L.D.*, 59 ECAB 648 (2008); *Desiderio Martinez*, 55 ECAB 245 (2004).

¹⁷ *See Susan A. Filkins*, 57 ECAB 630 (2006).