

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

S.K., Appellant

and

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

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**Docket No. 13-670
Issued: January 23, 2014**

Appearances:
Nolan Dennis, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2013 appellant filed a timely appeal from a December 5, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying reconsideration. The most recent merit decision of record is dated February 6, 2012. There is no merit decision within 180 days of January 30, 2013 the date appellant filed her appeal with the Board. Therefore, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

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

On appeal, appellant's representative asserts that it was unreasonable for OWCP to attempt to return appellant to work more than 12 years after she had stopped work in 1992. He contends that the medical evidence supports that a modified position offered appellant was not

¹ 5 U.S.C. § 8101 *et seq.*

suitable work as it required repetitive upper extremity motions exceeding her medical limitations.

FACTUAL HISTORY

This is appellant's second appeal before the Board in this case. By decision and order issued March 5, 1993 under File No. xxxxxx740,² the Board affirmed a February 3, 1992 decision under File No. xxxxxx130, finding that appellant had no loss of wage-earning capacity as of March 26, 1991 causally related to a herniated C6-7 disc and cervical strain sustained in an October 4, 1989 occupational motor vehicle accident. The law and facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

In File No. xxxxxx129, OWCP accepted that on October 18, 1988, appellant sustained a torn right medial meniscus with right knee dislocation and traumatic arthropathy when she stepped from her delivery vehicle. Appellant had a right knee arthroscopy on January 10, 1990 to repair the medial meniscal tear and address chondromalacia of the patella and medial femoral condyle. She stopped work in 1992 and did not return.

Under File No. xxxxxx740, on May 14, 2002, OWCP accepted that appellant sustained depression due to pain from the accepted injuries.³ It later combined her three claims under master File No. xxxxxx130.⁴

On July 3, 1990 OWCP granted appellant a schedule award for seven percent permanent impairment of the right leg. On December 22, 1994 it issued her a schedule award for an additional 13 percent right leg impairment, for a total of 20 percent.

In a July 3, 2003 letter, Dr. David F. Fardon, an attending Board-certified orthopedic surgeon, opined that a functional capacity evaluation was needed to determine appellant's work capacity. OWCP authorized a functional capacity evaluation but Dr. Michael V. Otis, an attending Board-certified family practitioner, opined on August 8, 2003 that appellant could not participate in a functional capacity evaluation due to problems with her neck, lumbar spine, right shoulder and both legs.

In a September 9, 2003 report, Dr. David H. Hague, an attending Board-certified neurosurgeon, noted evaluating appellant previously on September 12, 2001 for right cervical radicular syndrome. He diagnosed right-sided L5-S1 radiculopathy.⁵ An October 23, 2003

² Docket No. 92-1255 (issued March 5, 1993).

³ In a February 25, 2001 report, Dr. Ted Jones, an attending licensed clinical psychologist, diagnosed pain disorder with psychological factors, major depression, single episode.

⁴ OWCP terminated appellant's wage loss compensation by September 10, 1999 decision on the grounds that she refused a June 15, 1999 offer of suitable work. By decision dated and finalized February 14, 2000, it rescinded the September 30, 1999 decision, finding that the offered position was not suitable work. OWCP resumed payment of wage-loss compensation.

⁵ An October 2, 2003 magnetic resonance imaging (MRI) scan showed a significant L5-S1 disc collapse and L4-5 disc collapse, with compromise of the right L5-S1 neural foramen.

functional capacity evaluation ordered by Dr. Hague demonstrated that appellant could perform full-time light work, with frequent lifting up to 10 pounds, occasional lifting to 20 pounds, pushing and pulling up to 34 pounds, no crouching, limited stooping and no crouching or crawling. He noted that she exhibited some symptom exaggeration but that the study was reliable. OWCP authorized the evaluation. In a November 4, 2003 report, Dr. Hague reviewed the functional capacity evaluation and found it valid. He agreed that appellant could return to full-time light-duty work, noting that the work limitations set forth in the evaluation should be used by the employing establishment in formulating a job offer.

In a November 5, 2003 report, Dr. Otis noted that appellant disagreed with the functional capacity evaluation and requested that he write a letter holding her off work.

On January 8, 2004 the employing establishment offered appellant a position as a modified rural relief carrier, working return to sender mail in the special projects unit. The position required frequent lifting up to 10 pounds, occasional lifting to 20 pounds, pulling and pushing up to 34 pounds, occasional stooping and no squatting or kneeling. Appellant would be able to sit or stand as needed.

Appellant refused the offer on January 21, 2004, asserting that Dr. Otis found her totally disabled for work. In a January 19, 2004 report, Dr. Otis held appellant off work due to probable cervical radiculopathy into the left arm. Appellant also contended that the job offer did not consider work restrictions for her right knee and depression. In a March 12, 2004 letter, she asserted that she could not return to work due to chronic pain from the accepted injuries. Appellant submitted additional medical evidence.

In an April 29, 2004 report, Dr. Jeffrey A. Uzzle, a Board-certified physiatrist performing an impairment rating for Dr. Otis, opined that appellant had chronic neck, back and right knee pain and scattered radiculopathies related to the accepted injuries. He stated that appellant was unlikely to return to work as she had been unemployed for 12 years. Dr. M. Taite Seals, an attending otolaryngologist, opined on May 10, 2004 that appellant's complaints of dizziness might be due to emotional stress. Dr. Otis submitted May 11 and June 21, 2004 reports finding atrophy and weakness in the right knee and active cervical and lumbar radiculopathy related to the accepted injuries. He found appellant totally and permanently disabled due to her physical and mental conditions.

In a September 16, 2004 letter, OWCP advised appellant that the modified carrier position offered to her on January 8, 2004 was suitable work. It also advised her of the penalty provisions under 5 U.S.C. § 8106(c) for refusing suitable work. If appellant did not accept the position and did not provide valid reasons, OWCP would terminate her entitlement to wage-loss compensation and schedule awards. It afforded appellant 30 days to submit additional evidence and argument regarding whether she could perform the offered position.

In an October 5, 2004 statement, received by OWCP on October 12, 2004, appellant responded that the offered modified rural carrier position violated restrictions imposed by Dr. Otis and an employing establishment physician.

In an October 28, 2004 memorandum, OWCP noted that the employing establishment confirmed that appellant had not accepted the offered position or reported for duty. The modified rural letter carrier position remained open and available to her.

By decision dated October 28, 2004, OWCP terminated appellant's wage-loss compensation benefits and schedule award entitlement effective that day on the grounds that she refused an offer of suitable work. It found that appellant had not provided acceptable reasons for refusing the offered position.

In a November 24, 2004 letter, appellant requested a review of the written record. She submitted a November 9, 2004 report from Dr. Otis noting he continued treating appellant for neck and back pain due to degenerative disc disease.⁶

By decision dated June 22, 2005,⁷ an OWCP hearing representative affirmed OWCP's October 28, 2004 decision terminating appellant's wage-loss compensation and schedule award entitlement. The hearing representative found that appellant "was properly advised of the sanctions regarding failure to work after suitable work ha[d] been secured." The hearing representative found that appellant's October 5, 2004 reasons for refusing the offered position were "not a part of the record at the time that OWCP issued its October 28, 2004 termination decision. As evidence was not received within 30 days of the September 16, 2004 letter, OWCP properly terminated appellant's compensation benefits."

From October 18, 2005 to September 24, 2010, appellant made seven requests for reconsideration of the June 22, 2005 decision, asserting the position was medically unsuitable. OWCP denied modification by decisions dated November 25, 2005, October 20, 2006, November 9, 2007, August 26, 2008, September 25, 2009 and November 12, 2010. It also issued a May 4, 2007 decision denying reconsideration. OWCP also issued a December 16, 2010 decision denying appellant's request for an oral hearing. Appellant continued to submit reports from Dr. Otis through May 15, 2010, noting the onset of noninsulin dependent diabetes and the continuation of her musculoskeletal conditions and depression.

In a November 2, 2011 letter, appellant's representative requested reconsideration. He reiterated prior arguments that OWCP did not follow its procedures when it ordered appellant to undergo a functional capacity evaluation and then finding the January 8, 2004 job offer to be suitable work. The representative provided copies of OWCP's procedures, letters to and from appellant's elected representative and his November 1, 2011 statement asserting misconduct by the employing establishment. He submitted reports from Dr. Otis dated March 31, 2010 and November 14, 2011 noting continuing neck, back and lower extremity symptoms.

By decision dated February 6, 2012, OWCP denied modification of the November 12, 2010 decision on the grounds that the new evidence submitted did not demonstrate that the

⁶ On January 10, 2005 OWCP issued appellant a schedule award for nine percent permanent impairment of each arm. In a February 3, 2005 letter, appellant requested a hearing regarding the January 10, 2005 schedule award, contending that Dr. Uzzle's report demonstrated a greater percentage of permanent impairment.

⁷ On May 11, 2005 OWCP issued a decision reversing OWCP's October 28, 2004 decision, finding that OWCP did not follow its procedures. The June 22, 2005 decision supersedes the May 11, 2005 decision.

October 28, 2004 decision was in error. It found that appellant's representative did not provide allegations of procedural errors by OWCP. OWCP further found that Dr. Otis' March 21, 2010 report was previously of record and considered before the November 12, 2010 decision and that the November 14, 2011 report addressed lumbar pain but not the work capacity issue.

In October 19 and 22, 2012 letters, appellant's representative requested reconsideration. He reiterated prior arguments that OWCP did not follow its procedures in terminating appellant's wage-loss compensation. The representative submitted copies of congressional correspondence, and medical reports from Dr. Otis dated from February 6 to August 7, 2012 noting continued musculoskeletal and psychiatric symptoms.

In a December 5, 2012 decision, OWCP denied reconsideration on the grounds that appellant had not submitted any new or relevant and pertinent evidence not previously considered.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁸ section 10.606(b)(2) of Title 20 of the Code of Federal 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) constitute relevant and pertinent new evidence not previously considered by OWCP.⁹ 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), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS

OWCP accepted that appellant sustained cervical and lumbar disc herniations, a torn right medial meniscus and consequential depression. She remained off work from 1992 and received compensation for total disability. The functional capacity evaluation obtained by Dr. Hague demonstrated that appellant could perform full-time light-duty work with restrictions.

On January 8, 2004 the employing establishment offered appellant a full-time modified rural carrier position within Dr. Hague's restrictions. Appellant refused the position on January 21, 2004, contending that it exceeded her medical restrictions. She submitted reports from Dr. Otis, an attending Board-certified family practitioner, holding her off work. OWCP advised appellant by September 16, 2004 letter that the offered position was suitable work and her unjustified refusal would result in termination of her wage-loss compensation. It afforded her 30 days to submit additional evidence. Appellant responded by October 5, 2004 letter that the offered position exceeded restrictions due to her collapsed lumbar discs. OWCP then issued

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(2).

¹⁰ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

its October 28, 2004 decision terminating her wage-loss compensation benefits and schedule award eligibility, finding her reasons for refusal were insufficient. In response to appellant's November 22, 2004 request for a review of the written record, OWCP issued a June 22, 2005, OWCP decision affirming the October 28, 2004 termination.

Following seven denials of modification and one denial of reconsideration issued from October 18, 2005 to February 6, 2012, appellant, through her representative again requested reconsideration in October 19 and 22, 2012 letters, reiterating prior arguments that OWCP violated its procedures in terminating appellant's wage-loss compensation. He submitted congressional correspondence, and medical reports from Dr. Otis noting continued musculoskeletal and psychiatric symptoms from February to August 2012. On December 5, 2012 OWCP issued a nonmerit decision denying reconsideration on the grounds that the evidence submitted was irrelevant to the issue of suitable work. The Board finds that the denial of reconsideration was proper.

The representative's assertions that OWCP violated its procedures in terminating appellant's compensation repeat his arguments previously considered and rejected by OWCP pursuant to the seven denials of modification and one denial of reconsideration issued from October 18, 2005 to February 6, 2012. Therefore, his arguments have been previously considered by OWCP.¹¹ Dr. Otis' reports and the congressional correspondence do not address the underlying issue of suitable work. Therefore, they are not relevant to the claim. The Board has held that the submission of evidence which does not address the particular issue involved does not comprise a basis for reopening a case.¹²

Accordingly, the Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). She 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. Pursuant to 20 C.F.R. § 10.608, OWCP properly issued its December 5, 2012 decision denying merit review.

On appeal, appellant's representative asserts that it was unreasonable for OWCP to attempt to return appellant to work and that the offered position was not suitable work. These arguments concern the merits of the claim, which are not before the Board on the present appeal. The Board notes that OWCP previously considered and rejected this argument pursuant to multiple prior requests for modification and reconsideration.

CONCLUSION

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

¹¹ *Mark H. Dever*, 53 ECAB 710 (2002).

¹² *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 5, 2012 is affirmed.

Issued: January 23, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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