

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

J.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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

**Docket No. 13-1586
Issued: July 23, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 26, 2013 appellant filed a timely appeal from a January 24, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between the last merit decision, dated November 8, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's 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 to reopen his claim for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 24, 2009 appellant, then a 59-year-old mail handler, filed an occupational disease claim alleging bilateral carpal tunnel syndrome causally related to factors of his federal

¹ 5 U.S.C. § 8101 *et seq.*

employment. The claim was received by OWCP on March 31, 2008. OWCP accepted the claim for bilateral carpal tunnel syndrome on April 23, 2009.

On February 24, 2009 appellant also filed a claim for wage-loss compensation from November 14, 2008 to the present along with medical documentation.² This form was received by OWCP on April 13, 2009.

A second wage-loss claim was filed on May 29, 2009 for the period November 15, 2008 to May 31, 2009, along with a May 7, 2009 letter (received on May 11, 2009) noting that “[t]he light duty I was given in response to my doctor’s note was pushing containers weighing up to 1000 pounds across the floor and up a ramp.”³

OWCP sent a development letter, dated May 29, 2009, to appellant regarding his claims for disability compensation. In response, appellant submitted an additional report from Dr. Kim, dated August 13, 2009, in which he recommended that appellant refrain from doing any repetitive motion involving his wrists, including repetitive lifting. Dr. Kim stated, “I do not know when [appellant] may be able to go back to work without restrictions unless he has surgery to alleviate the compressive neuropathy.”

A November 6, 2009 settlement agreement from the Merit Service Protection Board (MSPB), was received by OWCP in which the employing establishment agreed to rescind the removal notice issued to appellant. However, the employing establishment instead separated him for his inability to perform the duties of the assigned position effective September 12, 2009. There was no admission of liability or guilt by appellant or the employing establishment.

By decision dated January 19, 2010, OWCP denied appellant’s claim for total disability compensation as the medical evidence did not establish total disability. It referenced the reports from Dr. Kim but found that they did not establish that appellant was unable to work. OWCP also disagreed that the MSPB settlement agreement established that appellant’s work stoppage was due to his accepted work-related condition, as it did not specify the reason for his inability to perform the position.

Appellant submitted a letter dated January 19, 2010 to OWCP in which he claimed that he could no longer do the job and that the settlement agreement had established that he was 100 percent disabled. He noted that there were no duties in the mail handler position that would be within his work restrictions.

² A medical report dated November 6, 2008, by Dr. Clifford Kim, Board-certified in internal medicine, diagnosed bilateral carpal tunnel syndrome and recommended that he avoid repetitively lifting heavy objects greater than 20 pounds. A duty status report of Dr. Kim, dated April 3, 2009, found appellant unable to lift or carry more than 20 to 70 pounds continuously or 20 to 70 pounds intermittently and unable to pull/push or perform simple grasping continuously for 7.5 hours a day.

³ A notice of proposed removal had been issued to appellant by the employing establishment on May 11, 2009 for unsatisfactory attendance. He was found to be absent without leave since February 10, 2009. The final notice of removal was issued on August 26, 2009.

On March 16, 2010 appellant requested reconsideration of the January 19, 2010 decision and submitted a medical report from Dr. Sally Masters, Board-certified in internal medicine, dated March 15, 2010. Dr. Masters found that any repetitive motion worsened appellant's condition and "[i]f his job requires repetitive motion or lifting heavy objects (greater than 10 pounds), then he is most likely unable to work and should therefore be considered disabled." Appellant argued that the medical evidence was sufficient to justify that he was unable to perform his regular employment and reiterated that there was no light duty available for a mail handler that did not require repetitive motion. He maintained that he was separated from employment due to his work injury and noted that the MSPB settlement agreement did not preclude his filing a workers' compensation claim. Appellant asserted that he filed a discrimination suit because his manager told him he had to push 1,000-pound containers as light duty.

By decision dated June 15, 2010, OWCP denied appellant's request for reconsideration without reviewing the merits of the claim finding the medical evidence speculative and the argument irrelevant.

On June 8, 2011 appellant again requested reconsideration. He argued that OWCP's initial decision did not inform him that he could obtain compensation if he was only partially disabled and the employing establishment could not accommodate his restrictions. Appellant asserted that he had provided medical evidence establishing work restrictions and indicated that the employing establishment had not provided him with an offer of modified employment. He maintained that the employing establishment "made contradictory statements about the reason for his dismissal" and "concocted an unsigned Offer of Modified Assignment which was never presented to me, stamped April 6, 2009 (FIVE WEEKS AFTER I BECAME DISABLED) within a week of my filing of a discrimination suit against my former manager." (Emphasis in the original.) Appellant claimed that had he declined to accept a modified job offer, the basis for the termination would have been the refusal, not the absence without leave.

In an August 23, 2011 e-mail, the employing establishment related that appellant had been offered a modified job offer (the record contains such an offer that had been sent *via* a facsimile on April 3, 2009 and marked as received on April 6, 2009) consistent with his medical restrictions. The employing establishment claimed that he had not accepted it; rather he chose to file for total disability. Appellant was later terminated due to his failure to provide medical documentation to establish that he was unable to perform the modified work offered to him. The employing establishment had agreed in the MSPB settlement that he could not perform his assigned duties, but asserted that the "parties never came to an agreement as to why [appellant] could not perform the work which he was offered." It noted that it had provided to appellant the limited-duty job offer dated April 3, 2009, but it was declined. The document was not signed by either the employing establishment or appellant but he referred to it in his May 7, 2009 letter.

By decision dated November 8, 2011, OWCP denied modification of its January 19, 2010 decision. It noted that appellant had not filed a workers' compensation claim until February 2009 and thus the employing establishment would not have considered his absence from work commencing November 2008 to be due to a work-related injury and would have had no obligation, at that time, to have offered a limited-duty position. OWCP recognized that appellant had been offered a limited-duty assignment once the restrictions had been established

by his treating physician, Dr. Kim on April 3, 2009. It also found that the MSPB settlement agreement did not establish that appellant had been separated due to his carpal tunnel syndrome.

On October 30, 2012 appellant requested reconsideration. He contended that the employing establishment did not have limited duty available for mail handlers who had injuries to the upper extremities. Appellant also asserted that he was not removed due to poor attendance. He noted that the employing establishment submitted an “unsigned and undelivered” offer of modified work after he had been off work for five months. Appellant related that he was not aware of his carpal tunnel syndrome until November 2008 but submitted medical evidence containing work restrictions to the employing establishment at that time. He explained that Dr. Kim’s duty status report was dated April 3, 2009 and not the date of the examination on December 11, 2008, because on the date of the examination Dr. Kim had failed to sign it. Appellant also stated that the “limited-duty job offer, of which you have a copy, was unsigned and never presented to me and should not be accepted as legitimate.”

By decision dated January 24, 2013, OWCP denied appellant’s request for reconsideration after finding that he had not submitted evidence or raised an argument sufficient to warrant reopening his claim for further merit review under section 8128(a). It reviewed his contentions set forth in his October 30, 2012 statement and found that they duplicated arguments previously addressed in the November 8, 2011 decision.

On appeal, appellant contends that OWCP reviewed the merits of his claim in its January 24, 2013 decision. He maintained that management did not provide him with light-duty employment. Appellant asserted that he did not receive a copy of the modified job offer dated five months after he became disabled.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ 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.⁶ 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.⁷

⁴ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.”

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

ANALYSIS

The only decision before the Board in this appeal is the January 24, 2013 nonmerit decision of OWCP, denying appellant's application for review. There is no OWCP merit decision within the Board's jurisdiction.⁸

OWCP accepted that appellant sustained bilateral carpal tunnel syndrome. Appellant filed a claim for compensation beginning November 14, 2008 and continuing. In a merit decision dated January 19, 2010, OWCP found that he had not established that he was totally disabled. It noted that appellant was removed from employment effective September 12, 2009 due to an inability to perform his employment and that an MSPB settlement agreement did not establish that he was removed as a result of his work injury. In a subsequent merit decision dated November 8, 2011, OWCP found that the medical evidence failed to establish disability from November 15, 2008 and continuing.

Appellant has failed to show that OWCP erroneously applied or interpreted a specific point of law and has not advanced a relevant legal argument not previously considered by OWCP. In his October 30, 2012 request for reconsideration, his only submission was a statement disputing OWCP's decision. Appellant argued that he had established disability and that the employing establishment had made contradictory statements about whether it had offered a modified job offer. These arguments were not new, but had been reiterated in several successive requests for reconsideration. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁹

Further, the underlying issue in this case is whether appellant established, through rationalized medical evidence, that he was disabled from performing his position. His lay opinion in this regard is insufficient to discharge his burden of proof, as the Board has held that lay individuals are not competent to render a medical opinion.¹⁰

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered by OWCP, it properly denied her reconsideration request.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁸ *Supra* note 1.

⁹ *J.P.*, 58 ECAB 289 (2007).

¹⁰ *Gloria J. McPherson*, 51 ECAB 441 (2000).

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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