

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

P.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Phoenix, AZ, Employer**

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**Docket No. 14-469
Issued: June 13, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 26, 2013 appellant filed a timely application for review from a November 22, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed from April 3, 2013, the date of the most recent merit decision, to the filing of this appeal and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of her claim.

ISSUE

The issue is whether OWCP properly denied appellant's request to reopen her claim for further merit review under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 5, 2011 appellant, then a 49-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained shoulder, arm and neck pain and numbness as a result of repetitive motions in casing and delivering mail. She first became aware of her condition on March 28, 2011 and of its relationship to her employment on June 21, 2011. Appellant stopped work on April 13, 2011.² OWCP accepted her claim for right shoulder tendinitis and a tear of the lateral meniscus of the left knee on October 4, 2011 and paid appellant compensation for total disability beginning July 18, 2011.

In a work capacity evaluation dated November 30, 2011, Dr. Douglas Allen, a Board-certified orthopedist, stated that appellant could return to work for eight hours per day with restrictions of no more than eight hours of sitting, reaching, reaching above the shoulder, operating a motor vehicle or repetitive movements of the wrist and elbow; no more than four hours per day of twisting; no more than two hours per day of walking and standing; no more than one hour per day of bending/stooping or pushing; and no pulling, lifting, squatting, kneeling or climbing. On December 1, 2011 he stated that she could perform light sedentary work, with restrictions of lifting no more than 10 pounds; occasional lifting and/or carrying of such articles as dockets, ledgers and small tools; and a certain amount of standing and walking necessary to carrying out job duties.³ In a report of work restrictions dated December 22, 2011, Dr. Gehron Treme, a Board-certified orthopedist, stated that appellant could return to work on December 23, 2011 with restrictions of no lifting of more than 10 pounds, no pushing or pulling of more than 10 pounds, no lifting above the shoulder and no repetitive reaching or overhead activity.

The employing establishment offered appellant a position as a modified rural letter carrier on December 16, 2011. The physical requirements of the modified assignment included sitting for up to six hours intermittently, walking or standing for up to two hours intermittently, reaching for up to two hours intermittently, reaching above the shoulder for less than eight hours per day, twisting for less than one hour per day, bending/stooping for less than one hour per day, operating a motor vehicle at work for less than eight hours per day, operating a motor vehicle to and from work for less than eight hours per day, repetitive movements of the wrist and elbow for less than eight hours per day and pushing for less than one hour per day. Appellant refused the job offer on the same date, stating that she refused pending her physician's approval on December 22, 2011.

In a letter dated January 20, 2012, Dr. Joseph Aragon, Board-certified in the subspecialties of cardiovascular disease and interventional cardiology, stated that appellant had been instructed to stop work on April 13, 2011 and that she had not been released to return. In a letter dated February 22, 2012, he stated that she was instructed not to work from July 18 through September 27, 2011 due to right shoulder tendinitis, cervical radiculitis and a meniscus tear of the left knee.

² Appellant's Form CA-2 does not contain a date of work stoppage; however, in a later statement of accepted facts, OWCP noted that appellant had stopped work on April 13, 2011.

³ Appellant continued to submit reports of work restrictions from Dr. Allen containing identical restrictions until August 13, 2013, when he changed her restrictions to "medium work."

On January 31, 2012 OWCP referred appellant to a second opinion physician for assessment of her work-related condition. In a report dated March 22, 2012, Dr. Thomas Grace, a Board-certified orthopedist, opined that she could not return to work with restrictions due to her daytime use of narcotic medications, unless she has been released by her prescribing physician. He stated that appellant should not return to work at all, in part due to her narcotic medication and in part because she may have had a new meniscal tear or internal derangement of her left knee. Dr. Grace noted that it was undetermined when she could return to work or how long work restrictions would apply and that she had not reached a point of maximum medical improvement. In a work capacity evaluation attached to his second opinion report, he stated that appellant was not capable of performing her job with restrictions.

In a report dated March 9, 2012, Dr. Allen stated that appellant “will avoid working” until he could image her back by magnetic resonance imaging scan. In a work capacity evaluation dated April 12, 2012, he stated that she could return to work with restrictions of no more than 2 hours of walking, 1 hour of squatting, 1.5 hours of climbing, no kneeling and 8 hours of sitting.

On May 1, 2012 OWCP sent Dr. Allen a copy of the second opinion report from Dr. Grace. The report noted that, according to OWCP records, appellant had been released to sedentary work. OWCP requested that Dr. Allen provide an updated narrative report on what treatment was needed to return her to work and that he review the light-duty job offer made on December 16, 2011 to determine whether it was within her restrictions. On May 22, 2012 it sent another similar letter to Dr. Allen, enclosing Dr. Grace’s report and requesting that he address whether appellant had injured her left knee again, whether her daytime narcotic medications remained necessary and when he anticipated she would reach maximum medical improvement and return to some type of work. Dr. Allen did not respond to OWCP’s inquiries.

On June 26, 2012 OWCP notified appellant of her entitlement to compensation benefits and her responsibility to return to work in connection with her accepted injury. It placed her on the periodic rolls starting July 1, 2012. The letter advised, “If you receive an offer of light or limited duty from your agency, advise OWCP in writing of your decision either to accept or refuse the position offered at the time you notify your agency. Refusal by a partially disabled employee to seek, accept or continue suitable work is lawful grounds for the reduction or termination of compensation.”

Dr. Allen continued to recommend that appellant could return to sedentary work in work status forms dated July 10 and September 11, 2012.

OWCP informed appellant on October 2, 2012 that the medical evidence in her file indicated that she was capable of working within certain physical limitations, but that because the employing establishment had not identified a job meeting her work limitations, or indicated that, such a job would be offered in the near future, her rehabilitation effort was to be moved to vocational planning.

On October 15, 2012 OWCP requested that the employing establishment make an offer of light-duty employment to appellant within her restrictions if possible.

The employing establishment offered appellant a position as a modified rural letter carrier, casing and delivering mail and marking up her own route on October 22, 2012. The physical requirements of the modified assignment included six to seven hours per day of intermittent sitting, less than half an hour of intermittent walking with assistance available to load, unload and perform parcel delivery; less than half an hour of intermittent standing per day; five to five and one half hours of driving; and intermittent lifting and carrying of up to 10 pounds with assistance available to load and unload parcels over 10 pounds. Appellant refused this modified assignment on December 28, 2012, stating that her physician had her on a sedentary status.

On February 22, 2013 OWCP sent a notice of proposed termination of compensation benefits to appellant. It stated that, on December 1, 2011, Dr. Allen had released her to light-duty sedentary work. OWCP noted that appellant's restrictions remained the same as of February 1, 2013. It also noted that Dr. Mitchell Seemann, a Board-certified orthopedist, had also released her to work with restrictions.⁴

Appellant responded to OWCP's proposed termination of compensation on March 5, 2013. She stated that she continued to have pain in her knee and that the modified light-duty assignment was actually her regular job. Appellant also noted that she could not fulfill the requirements of the position and stated that she had a follow-up appointment with Dr. Allen on March 19, 2013. Dr. Allen's report of March 19, 2013 recommended that she could perform sedentary work.

By decision dated April 3, 2013, OWCP terminated appellant's wage-loss compensation benefits effective April 7, 2013 after finding that she had been released to work with restrictions and refused a job offer within those restrictions. It noted that her physician had stated that she could work within restrictions and found that she had not provided any evidence to support her inability to perform the duties of the offered position.

In a work status report dated May 24, 2013, Dr. Allen stated that appellant could perform sedentary work. In a narrative report of the same date, he diagnosed her with left chondromalacia and recommended several procedures to treat her condition. On May 28, 2013 Dr. Allen stated that appellant had visited his office for a follow up on her left chondromalacia patella and ordered a functional capacity evaluation. Appellant continued to submit progress reports from him from May 22 through August 26, 2013, which were substantially similar and did not contain recommendations for work restrictions. On August 13, 2013 Dr. Allen stated that she could perform medium work, with restrictions of lifting no more than 50 pounds with frequent lifting or carrying of objects weighing up to 25 pounds and that she had reached maximum medical improvement on that date. Appellant also submitted several documents from physical therapists, including a functional capacity evaluation and a reporting form further detailing her work restrictions.

On September 17, 2013 appellant requested reconsideration. With her request for reconsideration, she submitted work restrictions from Dr. Allen from September 11, 2012

⁴ OWCP did not provide a date for Dr. Seemann's report and no physician by that name appears in the case record.

through August 13, 2013. Dr. Allen indicated that appellant could not perform more than sedentary work until his report of August 13, 2013.

In a decision dated November 22, 2013, OWCP denied appellant's request for reconsideration after finding that she had not submitted evidence or raised an argument sufficient to warrant reopening her case for further merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), the regulations provide that the evidence or argument submitted by 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 Section 10.608(b) of the regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁷ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁸ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁹

ANALYSIS

OWCP accepted that appellant sustained right shoulder tendinitis and a tear of the lateral meniscus of the left knee due to duties of her federal employment on October 4, 2011. On April 3, 2013 it terminated her compensation for wage-loss benefits effective April 7, 2013 after finding that she had refused a suitable job offer that was within her medical restrictions. In a decision dated November 22, 2013, OWCP denied appellant's request for reconsideration.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of her claim. In her September 17, 2013 request for reconsideration, she did not establish that OWCP erroneously applied or interpreted a specific point of law.

⁵ 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

⁶ *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495, 499 (2008).

⁷ See *Daniel Deparini*, 44 ECAB 657, 659 (1993).

⁸ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

⁹ *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

The relevant issue upon reconsideration was whether the offer of work dated October 22, 2012 was suitable and within appellant's medical restrictions at that time.¹⁰ Appellant submitted several reports regarding her work restrictions from Dr. Allen dated from September 11, 2012 through January 25, 2013, which were received by OWCP on October 23, 2013. A review of the record indicates that these reports were before OWCP at the time of its April 3, 2013 decision. Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.¹¹ Dr. Allen's work status reports dated from September 11, 2012 through January 25, 2013 were previously of record and were considered in OWCP's April 3, 2013 decision. Therefore, these reports were insufficient to require a merit review of appellant's claim.

Appellant submitted a work status report from Dr. Allen dated August 13, 2013, stating that she could perform medium work, with restrictions of lifting no more than 50 pounds with frequent lifting or carrying of objects weighing up to 25 pounds and that she had reached maximum medical improvement on that date. While this report was not previously of record, it is irrelevant to the grounds upon which OWCP denied her claim. It did not support appellant's claim that the offer of work dated October 22, 2012 was unsuitable and outside her work restrictions; instead, it indicated that she was currently able to work under restrictions less onerous than those previously recommended by Dr. Allen after December 1, 2011. Appellant also submitted progress reports from Dr. Allen dated from May 28 through August 13, 2013. While these reports stated that she had symptoms of left chondromalacia, they did not contain any information regarding her work restrictions and therefore did not address the issue on which OWCP's decision was based. As such, these reports were not relevant and were insufficient to warrant reopening the case for further merit review under section 8128(a).

Appellant submitted several reports from physical therapists, including a functional capacity evaluation and a form further detailing her work restrictions. While this evidence was not previously of record, it too is irrelevant to the grounds upon which OWCP denied her claim. Physical therapists do not qualify as physicians under FECA and therefore their reports do not qualify as probative medical evidence supportive of a claim for federal workers' compensation, unless such reports are countersigned by a physician.¹² Neither, the functional capacity evaluation or the reporting form were countersigned by a physician. Therefore, these reports are of no probative value on the issue of whether the offer of work dated October 22, 2012 was suitable and within appellant's medical restrictions at that time. A claimant may be entitled to merit review by submitting new and relevant evidence, but she did not submit any relevant factual evidence in this case.

On appeal, appellant argues that the job offer from the employing establishment was not suitable. As noted above, the Board does not have jurisdiction over the merits of this claim. Consequently, the Board does not have jurisdiction to determine whether the job offer was

¹⁰ See 20 C.F.R. § 10.517.

¹¹ See *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *supra* note 7.

¹² See 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 n.4 (2000) (regarding physical therapists).

suitable. The Board only has jurisdiction to determine whether appellant met the requirements of 20 C.F.R. § 10.606(b)(3).

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 13, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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