

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

P.D., Appellant

and

**U.S. POSTAL SERVICE, NORTH GRAND
POST OFFICE, Santa Ana, CA, Employer**

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**Docket No. 14-1273
Issued: January 23, 2015**

Appearances:
Jeffrey Doyle, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 12, 2014 appellant, through her representative, filed a timely appeal from a November 25, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed between the last merit decision dated October 26, 2012 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 this case.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 7, 2010 appellant, then a 59-year-old clerk, filed an occupational disease claim alleging that on November 18, 2009 she first realized that low back pain was due to her repetitive work duties.

In her January 7, 2010 statement, appellant attributed her low back pain to years of working at the employing establishment including the computer forward system (CFS) and her duties of sitting and keying. Accompanying her claim and statement, appellant provided a diagram of her workstation.

In a January 7, 2010 duty status Form CA-17, Dr. Hosea Brown, III, a treating Board-certified internist, diagnosed lumbosacral radiculitis and provided work restrictions.

By letter dated January 13, 2010, the employing establishment controverted the claim and submitted statements from Samantha Hoang, Nancy Yan, and Richard Dolfi, supervisors. Ms. Hoang, Ms. Yan, and Mr. Dolfi, indicated in their statements that at a meeting with appellant regarding her current claim that appellant informed them that she was trying to reopen prior claims, which had been closed and her injury had nothing to do with her work at CFS.

By letter dated February 4, 2010, OWCP informed appellant that the evidence of record was insufficient to establish her claim. Appellant was advised as to the medical and factual evidence required and given 30 days to provide this information.

In response to OWCP's request, appellant submitted her statement and a December 30, 2009 report from Dr. Brown who provided an employment, medical and injury history, and physical examination findings. Dr. Brown diagnosed lumbar radiculopathy/radiculitis and permanent lumbosacral degenerative disc disease aggravation. A physical examination revealed decreased lumbosacral range of motion and significant paraspinal lumbosacral musculature spasm. A review of electromyographic studies showed chronic left L5 radiculopathy. He attributed appellant's back condition to her 28 years of work at the employing establishment and her duties as a distribution clerk.

In her February 16, 2010 statement, appellant noted that her request for a union representative to be present during her meeting regarding her claim had been denied by Mr. Dolfi. She provided a brief description of her job duties and injury claims which had occurred prior to 2007 when she was transferred to CFS. Appellant noted that, following her meeting with Ms. Hoang, Ms. Yan and Mr. Dolfi, she believed a new claim should be filed as she believed her work at CFS aggravated or caused her condition. She alleged that at the CFS she was required to sit and work on a computer eight hours a day. According to appellant the position at CFS required her to turn and twist which aggravated her back condition. She also alleged that she was required to lift heavy boxes and bundles in her position at CFS.

By decision dated April 14, 2010, OWCP denied appellant's claim on the grounds that she failed to establish fact of injury. It noted that she had been informed that she needed to explain the discrepancy between her claim that her injury had been caused by her work at CFS

and the statement she made to management that her current condition was unrelated to her work at CFS.

On May 25, 2010 OWCP received appellant's April 14, 2010 request for reconsideration and medical evidence.

In a May 5, 2010 report, Dr. Brown opined that "[it] is a well-known medical fact that prolonged sitting" can permanently aggravate a preexisting lumbosacral degenerative disc condition. He stated that the medical evidence was clear that appellant's duties as a CFS clerk included repetitive twisting and turning and prolonged periods of sitting.

On April 26, 2010 the employing establishment controverted appellant's claim and provided copies of her limited-duty position. It noted that Dr. Brown's description of appellant's work duties regarding keying and stacking tubs of mail was inaccurate.

In a May 5, 2010 statement, appellant stated that her work description had been the same since becoming a rehabilitated clerk 17 years ago and prior to her current work at CFS in 2007. She stated that her current position at CFS required her to sit for eight hours per day except for breaks and her duties involved repetitive keying.

A statement signed by Cecilia Manzanares, David Daniels, Wanda Ferguson, and Regina Tripp described the processing of flats and parcels at CFS.

A June 11, 2010 statement signed by Ms. Hoang, Ms. Yan, and Mr. Dolfi provided a description of appellant's work duties at the CFS. They stated that appellant's work assignment at CFS was within her work restrictions and that it did not require any twisting, pushing, bending, or pulling. In addition, they stated that appellant was not required to sit the whole time as she could stand to process the mail.

On July 7, 2010 Ms. Hoang, Ms. Yan, and Mr. Dolfi reviewed the statement provided by Ms. Manzanares, Mr. Daniels, Ms. Ferguson, and Ms. Tripp. They stated that none of the duties described in the statement were applicable to appellant and that flat processing does not require repetitive back twisting as alleged by appellant.

By decision dated August 4, 2010, OWCP denied modification.

On May 16 and 23, 2011 appellant requested reconsideration and submitted medical and factual evidence.

In a November 10, 2008 report, Dr. Zafar S. Khan, a treating Board-certified orthopedic surgeon, noted that appellant was first seen on September 10, 2007 for back and leg complaints. He noted that appellant's back pain and prior work-related back injury had been aggravated by twisting and extended periods of sitting.

An undated statement signed by coworkers, including Ms. Manzanares, Josephine Sakim, Ms. Ferguson, Karen Woods, and Kiet Huang, provided a description of mechanized terminals and nonmechanized terminals.

In an April 9, 2011 statement, Mr. Huang indicated that in 2007 he was an on-the-job instructor and remembered helping appellant carry flats and parcels to her workstation terminal. He noted that these parcels and flats weighed from 1 to 40 pounds.

In an April 25, 2011 statement, Ms. Manzanares stated she had been a supervisor in the CFS unit from January to May 2008. She described the work for nonmechanized terminals as requiring constant bending to lift 775 mail tubs and turning and twisting while keying in mail. Ms. Manzanares stated that appellant was assigned on a daily basis to this operation since arriving in 2007. She stated that it would be impossible to key in mail on the terminals while standing.

In an April 29, 2011 statement, Ms. Ferguson stated that appellant had been a clerk since 2007 at CFS where she keyed in mail on the flat forwarding terminal system.

By decision dated August 15, 2011, OWCP denied modification.

On July 24, 2012 appellant requested reconsideration. In support of her claim, she resubmitted evidence previously submitted.

Appellant submitted a copy of a July 17, 2007 notice of recurrence (Form CA-2a) with an injury date of March 30, 1990 under OWCP File No. xxxxxx500.² She noted that she did not stop working following the March 30, 1990 injury and referred to a “Dr. Gibson,” who reportedly had set medical restrictions for her. Appellant claimed that her low back pain was employment related and that she was trying to reopen her claim under OWCP File No. xxxxxx500.

In a July 25, 2012 statement, appellant denied stating that her current claim had nothing to do with her duties at CFS. Instead she alleged that her supervisors misinterpreted her as she had stated that her duty status form, which concerned restrictions following her surgery, had nothing to do with the filing of her current claim. Appellant again reiterated that she sustained a new work injury which is why she filed the current claim.

By decision dated October 26, 2012, OWCP denied modification.

On October 4, 2013 appellant requested reconsideration and submitted modified job offers from 1996, 1997, 2007, and 2008. On October 8, 2013 OWCP received a previously submitted November 10, 2008 report from Dr. Khan and factual evidence as set forth below.

In her statement, which was cosigned by her representative, appellant provided a history of responsibilities and job status prior to 2007 and the conditions at CFS that she alleged caused her lower back injury. She contended that the job offer at CFS in 2007 was not based on her work restrictions. Appellant listed her medical treatment including lower back surgery on October 17, 2007 and light-duty jobs at CFS for the period October 17, 2007 through January 7,

² The record reveals that on August 23, 1990 OWCP accepted appellant’s occupational disease claim for a temporary aggravation of lumbar spondylosis.

2010, when she filed her current occupational disease claim. In concluding she provided a brief description of her work conditions during the period July to October 2007.

In an October 22, 2013 statement, Ms. Hoang responded to appellant's appeal letter. She denied appellant's allegations that she was offered a CFS job in 2007 without medical documentation and noted that appellant did not file a claim until January 7, 2010. Ms. Hoang stated that appellant was only assigned to flat forwarding and never was assigned to dispatching or parcel work. Next, she related that employees were assigned to keying if they knew how to key and they were not required to load or dispatch their own mail.

By decision dated November 25, 2013, OWCP denied reconsideration.³ It noted that appellant had filed a claim for a back injury under OWCP File No. xxxxxx500, that the claim had been accepted for temporary aggravation of lumbar spondylosis and that her claims for a recurrence of disability had been denied in July 2007 and February 2009.

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

ANALYSIS

On January 7, 2010 appellant filed a claim for an occupational disease injury, which OWCP denied by decisions dated April 14 and August 4, 2010, August 15, 2011 and October 26, 2012. OWCP found that she failed to establish fact of injury as she initially stated that her injury was due to her current job at CFS and later stated that it was not. On October 4,

³ The Board notes that, following the November 25, 2013 decision, OWCP received additional evidence. 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).

⁴ 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 any time on his own motion or on application.

⁵ 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).

⁶ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁷ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

2013 appellant disagreed with OWCP's October 26, 2012 decision and requested 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 the claim. In her October 4 2013 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument not previously considered. Appellant reiterated her arguments that her current condition was due to her job duties at CFS and at no time did she state that she was trying to reopen a previously closed claim. She also reargued that her job duties at CFS were not within her work restrictions.

In her most recent narrative, appellant provided a history of responsibilities and job status prior to 2007 and the conditions at CFS that she alleged caused her lower back injury. She contended that the job offer at CFS in 2007 was not based on her work restrictions. Appellant listed her medical treatment including lower back surgery on October 17, 2007 and light-duty jobs at CFS for the period October 17, 2007 through January 7, 2010, when she filed her current occupational disease claim. In concluding, she provided a brief description of her work conditions during the period July to October 2007.

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence or new argument, but appellant did not submit any pertinent new and relevant evidence or argument in this case. In support of her claim, appellant submitted modified job offers from 1996, 1997, 2007, and 2008, and her statement. The Board notes that submission of this statement and the modified job offers did not require reopening appellant's case for merit review. OWCP denied her claim finding that she had failed to establish fact of injury. Neither the modified job offers nor appellant's statement describing her low back surgery on October 17, 2007 and the light jobs she held is relevant and pertinent to the underlying issue in this case, *i.e.*, that her job duties required her to perform repetitive work; she did not address the inconsistencies in the factual evidence. Thus, the submissions were not sufficient to require OWCP to reopen her claim for consideration of the merits.⁸

Appellant also submitted a November 10, 2008 report by Dr. Zahar which had been previously submitted and considered by OWCP. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁹ Appellant did not submit any pertinent new and relevant factual evidence addressing this issue. Thus, OWCP properly denied her request for reconsideration

As appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3), pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for reconsideration of the merits of her case.

⁸ See *James W. Scott*, 55 ECAB 606 (2004).

⁹ *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007); *D'Wayne Avila*, 57 ECAB 642 (2006).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 25, 2013 is affirmed.

Issued: January 23, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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