

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

TARA CIAMPA, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Chelsea, MA, Employer**

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**Docket No. 06-387
Issued: June 9, 2006**

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On December 1, 2005 appellant filed an appeal of a September 7, 2005 decision of the Office of Workers' Compensation Programs, denying merit review of appellant's claim. Pursuant to 20 C.F.R. § 501.3(d)(2), the Board's jurisdiction is limited to decisions issued within one year of the filing of the appeal and the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly refused to reopen the claim for merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 19, 2001 appellant filed a traumatic injury claim (Form CA-1), alleging that on that date she sustained a back injury from a motor vehicle accident while in the performance of duty. The Office accepted the claim for a low back strain. Appellant returned to work at four hours per day on January 28, 2002. She continued to work part time and then stopped working on January 7, 2004. The attending physician, Dr. Julien Vaisman, a pain and

rehabilitation specialist, indicated in a work capacity evaluation (Form OWCP-5c) dated May 6, 2004 that appellant was unable to work.

The Office referred appellant to Dr. George W. Ousler, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated June 23, 2004, he provided a history and results on examination. Dr. Ousler diagnosed acute lumbosacral strain and mild degenerative disc disease at L5-S1. He indicated that the disc disease was preexisting and the employment-related aggravation would not be expected to exceed six to eight weeks and a continuing disability could not be explained from an orthopedic standpoint. Dr. Ousler completed a Form OWCP-5c, indicating that appellant could perform her usual job.

By letter dated August 25, 2004, the Office advised appellant that it proposed to terminate her compensation based on the weight of the medical evidence. Her representative submitted a September 23, 2004 letter arguing that Dr. Vaisman supported a continuing disability. Appellant submitted treatment notes dated January 22, February 12, April 2, May 6, August 30 and September 17, 2004 from Dr. Vaisman, indicating that she continued to have lumbar pain. In an attending physician's report (Form CA-20), dated September 20, 2004, Dr. Vaisman diagnosed discogenic back pain and checked a box "yes" that the condition was caused or aggravated by employment.

By decision dated November 5, 2004, the Office terminated compensation for wage loss. Following the decision, appellant continued to submit treatment notes from Dr. Vaisman regarding her condition. The diagnoses included osteoarthritis, degeneration of lumbosacral disc, intractable low back pain and myofascial pain. In a November 22, 2004 treatment note, Dr. Vaisman provided results on examination and reported that appellant would like to return to work. He stated that she could work four hours per day, three days a week, with possible increase in hours after a physical therapy program.

In a letter dated February 28, 2005, appellant, through her representative, requested reconsideration. She argued that there was a conflict in the medical opinion as the attending physician opined that appellant could work only four hours per day, three times a week. In a March 8, 2005 treatment note, Dr. Vaisman indicated that appellant was working three days per week.

In a decision dated September 7, 2005, the Office denied appellant's request for reconsideration without merit review of the claim. The Office found that the request for reconsideration and the evidence submitted were not sufficient to warrant merit review.

LEGAL PRECEDENT

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that [the Office]

¹ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by [the Office]; or (iii) constitutes relevant and pertinent evidence not previously considered by [the Office].”² Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.³

When the claimant raises a legal argument that has no reasonable color of validity, the Office is not required to reopen the case for merit review.⁴

ANALYSIS

The Office terminated appellant’s compensation for wage loss effective November 5, 2004. The Board does not have jurisdiction over that decision, as it was issued more than one year prior to the filing of the appeal. Although appellant argued that there was a delay in issuing the September 7, 2005 decision that jeopardized appellant’s ability to seek a merit review, the record does not establish an improper delay. The Office’s procedures state that if a reconsideration decision is delayed beyond 90 days from filing and jeopardizes the claimant’s right to a merit review, the Office should conduct a merit review.⁵ In this case, however, the reconsideration decision was issued nearly two months prior to the expiration of the one-year period following the November 5, 2004 merit decision.⁶ Appellant had an opportunity to request reconsideration and receive a merit review after the September 7, 2005 decision was issued. Under these circumstances, the Office was not required to issue a merit decision. The issue on appeal is whether appellant met any of the requirements for reopening a case for merit review. As to the first requirement, appellant did not show that the Office erroneously applied or interpreted a specific point of law. The Office terminated compensation for wage loss on the grounds that the medical evidence, as represented by Dr. Ousler, did not establish a continuing employment-related disability.

Appellant raised a legal argument on reconsideration that there was a conflict under 5 U.S.C. § 8123(a),⁷ since Dr. Vaisman, contrary to the opinion of second opinion physician Dr. Ousler, did not support a return to full-time work. The relevant issue, however, is whether any work restrictions were causally related to the December 29, 2001 employment injury. In this regard, Dr. Ousler offered an opinion, based on a complete background, that appellant did not have a continuing employment-related disability. Dr. Vaisman did not address the issue; the

² 20 C.F.R. § 10.606(b)(2).

³ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁴ *Norman W. Hanson*, 40 ECAB 1160 (1989).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004).

⁶ An application for reconsideration must be sent within one year of the Office decision for which review is sought. 20 C.F.R. § 10.607 (1999).

⁷ Section 8123(a) provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.

checking of a box “yes” in a form report is of little probative value.⁸ To the extent that appellant is arguing that a conflict exists based on evidence submitted after the termination decision, the continuing treatment notes from Dr. Vaisman discuss appellant’s condition but do not address the issue of causal relationship with employment. Dr. Vaisman provided a number of diagnoses but did not discuss how a diagnosed condition was causally related to the employment injury. The legal argument that a conflict in the medical evidence existed has no reasonable color of validity in this case and is not sufficient to warrant reopening the claim for merit review.⁹

With respect to the submission of new and pertinent evidence following November 5, 2004, the record does not contain probative medical evidence on the issue presented. As noted above, Dr. Vaisman continued to treat appellant but did not provide any pertinent evidence on the issue of disability causally related to the employment injury of December 29, 2001.

The Board accordingly finds that appellant did not meet any of the requirements of section 10.606(b)(2) in this case. She did not show that the Office erroneously applied or interpreted a specific point of law, did not offer a new legal argument with a reasonable color of validity or submit new and relevant evidence to the issue presented. The Office, therefore, properly declined to reopen the case for a review of the merits of the claim.

CONCLUSION

Appellant did not meet the requirements of 20 C.F.R. § 10.606(b)(2) and, therefore, the Office properly denied the claim without review of the merits.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated September 7, 2005 is affirmed.

Issued: June 9, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees’ Compensation Appeals Board

David S. Gerson, Judge
Employees’ Compensation Appeals Board

⁸ See *Barbara J. Williams*, 40 ECAB 649, 656 (1989).

⁹ See *Norman W. Hanson*, *supra* note 4.