

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

T.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Galvin, WA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 11-983
Issued: December 2, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 11, 2011 appellant filed a timely appeal from the November 22, 2010 and January 12, 2011 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP) denying her request for further review of her claim. As more than 180 days elapsed from the last merit decision of August 5, 2010 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction over the nonmerit decisions.

ISSUE

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

On appeal, appellant makes numerous arguments concerning the merits of the case. She contends, *inter alia*, that the medical evidence supports her claim, that she was returned to regular duty against her doctor's orders and that there was an improper statement of accepted facts. Appellant also contends that her claim was timely filed as her supervisor had notice of the

¹ 5 U.S.C. § 8101 *et seq.*

injury. She further argues that her rights were jeopardized as OWCP delayed issuing a decision on her request for reconsideration.

FACTUAL HISTORY

On October 5, 2009 appellant, then a 49-year-old postmaster, filed a traumatic injury claim alleging that, on November 18, 1998, she suffered an L5-S1 herniated disc while moving Christmas packages and mail.² By decision dated April 20, 2010, OWCP denied her claim for the reason that it was not timely filed. On May 17, 2010 appellant requested review of the written record. By decision dated August 5, 2010, OWCP's hearing representative affirmed the April 20, 2010 decision.

On October 29, 2010 appellant requested reconsideration. She argued that the medical evidence and documents in the file were directly contrary to OWCP's finding, and that denying opening her claim was a gross abuse of discretion in that she sustained an injury on November 18, 1998 and that her supervisor was aware of this fact. Appellant also contended that documents were scanned into the wrong file or misplaced, that she was harassed by her supervisor, that the medical evidence supported her claim and made further arguments concerning the merits of her claim. She also submitted medical evidence to support her claim.

By decision dated November 22, 2010, OWCP denied appellant's request for reconsideration without reviewing the merits of the case. It noted that she had not submitted any new evidence that showed that the employing establishment was aware of her injury within 30 days of November 18, 1998. OWCP noted that the only other new evidence did not address timeliness of filing.

On December 15, 2010 appellant requested reconsideration. She again alleged that her supervisor knew of her injury. Appellant contended that she gave written notice of her injury within 30 days and that she should be paid for the damage to her body.

By decision dated January 12, 2011, OWCP denied appellant's request for reconsideration without reviewing the merits of the claim.³

² OWCP had accepted appellant's claim for an injury that occurred on December 2, 1997 for a sprain lumbar region.

³ The Board notes that, on January 14, 2011, appellant again requested reconsideration. Appellant then appealed to the Board on March 11, 2011. OWCP issued a decision in this case on April 18, 2011 denying her request for reconsideration. However, the Board obtained jurisdiction over this appeal on March 11, 2011, prior to the issuance of the April 18, 2011 OWCP decision. Thus, the Board finds the April 18, 2011 decision null and void as both the Board and OWCP cannot have jurisdiction over the same issue in the same case at the same time. *See Douglas E. Billings*, 41 ECAB 880 (1990) (the Board and OWCP may not exercise simultaneous jurisdiction over the same issue.)

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ its 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 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

OWCP denied appellant's traumatic injury claim as it found that it was not timely filed. The record indicates that she alleged that on November 18, 1998 she suffered an injury while moving Christmas packages and mail. Appellant did not file her claim until over 10 years later on October 5, 2009. The last merit decision in this case, OWCP's hearing representative's affirmance of the denial of her claim as it was not timely filed, was issued on August 5, 2010. As previously stated, this decision was issued over 180 days prior to the filing of this appeal on March 11, 2011 and, accordingly, the Board does not have jurisdiction to review the merits of the case.⁸ The only issue before the Board is whether OWCP properly denied appellant's reconsideration request.

In appellant's requests for reconsideration, she reiterates that her supervisor had timely notice of her claim. This argument had been considered and rejected by OWCP's hearing representative in the last merit decision on August 5, 2010. Appellant made numerous arguments on appeal that appear to address the merits of the claim. She also made various arguments that her case was mishandled. However, the only relevant issue is whether appellant timely filed her traumatic injury claim, which involves whether she provided notice of injury to the employing establishment. Appellant's arguments with regards to whether she was injured and whether the medical evidence supports her injury are not pertinent or relevant to this issue. Furthermore, any allegations with regards to mishandling the medical evidence and other documents or allegations regarding harassment are not relevant to the issue as the claim was denied for failure to file the claim in a timely manner. Finally, appellant contends that she was entitled to a merit review as her request for reconsideration of the August 5, 2010 decision was delayed by over 90 days and that this jeopardized her appeal. OWCP procedures provide that when an OWCP decision is delayed more than 90 days after a request for reconsideration is filed

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[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 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *Id.* at § 501.3(e).

and the delay jeopardizes appellant's right to a merit review before the Board, OWCP should conduct a merit review.⁹ Appellant's argument is without merit. There was no prejudice to appellant because the last merit decision in this case was issued on August 5, 2010. Appellant's Board appeal from the merit decision would need to have been filed with this Board by February 1, 2011. She rather filed a request for reconsideration with OWCP on January 14, 2011.¹⁰ Appellant had filed for reconsideration with OWCP on October 29 and December 15, 2010, upon which OWCP promptly acted issuing decisions dated November 22, 2010 and January 12, 2011, respectively. There is no obligation to conduct a merit review if the maximum time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of a claimant's request for reconsideration.¹¹

Because appellant did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP, it did not abuse its discretion in denying her request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for merit review under a 5 U.S.C. § 8128(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.9 (January 2004).

¹⁰ *See supra* note 3.

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 12, 2011 and November 22, 2010 are affirmed.

Issued: December 2, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board