

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

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M.G., Appellant)	
)	
and)	Docket No. 11-324
)	Issued: September 9, 2011
U.S. POSTAL SERVICE, POST OFFICE,)	
New York, NY, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 17, 2010 appellant filed a timely appeal from a June 16, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration.¹ Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit issue in this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹ The last merit decision in this case was the December 7, 2009 OWCP decision which denied appellant's occupational disease claim. For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. See 20 C.F.R. §§ 501.2(c) and 501.3.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 20, 2009 appellant, then a 30-year-old letter carrier, filed an occupational disease claim alleging that she sustained carpal tunnel syndrome and wrist sprain as a result of lifting, pulling and casing mail everyday at work. She first became aware of her condition and realized it was related to her employment on January 27, 2009. Appellant stopped work on August 15, 2009.

In a March 31, 2009 magnetic resonance imaging scan report, Dr. Carlos Benitez, a Board-certified radiologist, observed a signal abnormality within the dorsal and peripheral aspect of appellant's left wrist, which suggested a partial tear. He noted that masses and cysts were not found within the carpal tunnel or Guyon's canal. Dr. Benitez diagnosed a single abnormality within the dorsal peripheral triangular fibrocartilage (TFC) suggestive of a partial tear, thinning of the central TFC without a full-thickness perforation and mild tenosynovitis of the third and second extensor tendon compartments.

In an April 1, 2009 electromyogram (EMG) and nerve conduction study, Dr. Kiril Kiproviski, a Board-certified psychiatrist and neurologist, evaluated appellant for left hand pain. He noted that her cognitive and sensory examinations were normal and that her Tinel's sign was negative at both wrists and elbows. Dr. Kiproviski diagnosed mild right median neuropathy at the wrist and concluded that this was a mildly abnormal EMG and nerve conduction study. He also observed evidence of a mild right median neuropathy at the wrist, which was currently asymptomatic.

In an August 14, 2009 report, Dr. Salil Gupta, a Board-certified orthopedic surgeon, noted that appellant denied any numbness, tingling, paresthesias and motor or sensory function lost in her left wrist, but complained of persistent pain in the ulnar aspect of her wrist. Upon examination, he observed that her left upper extremity was neurovascularly intact with no signs of any skin or vascular lesions. Appellant had no tenderness to palpation dorsally over the distal radius and no tenderness to palpation of neither the scapholunate (SL) nor luno-triquetral (LT) ligaments. Dr. Gupta assessed that she had a TFC tear that was not improving with conservative treatment. He reported on August 20, 2009 that he treated appellant for carpal tunnel syndrome and a sprained wrist and she was unable to return to work due to left wrist problems. Dr. Gupta noted that her conditions were possibly due to work.

In an October 26, 2009 report, Dr. Gupta opined that appellant suffered from persistent carpal tunnel syndrome, a persistent TFC tear of her left wrist, and a mass in the dorsal aspect of her wrist that appeared to be rising from her SL ligament. He recommended that she undergo a carpal tunnel release with excision of her mass on the dorsal side of her wrist and stated that this was more of a priority than the pain in the region of her TFC.

By decision dated December 7, 2009, OWCP denied appellant's claim finding insufficient medical evidence to establish fact of injury. It accepted that her work as a letter carrier required repetitive sweeping, casing, sorting and delivering mail, but determined that

diagnostic testing did not support Dr. Gupta's diagnosis of carpal tunnel syndrome or that she had a wrist sprain causally related to her employment.³

On June 2, 2010 appellant submitted a request for reconsideration alleging that her conditions were work related and that she obtained a second opinion regarding her conditions. In a September 24, 2009 return to work slip, Dr. Gupta noted her diagnosis of wrist sprain and authorized her to return to light duty. In an October 21, 2009 emergency room report, Dr. Gideon Zahler, an emergency resident physician, noted that appellant complained of a left wrist sprain two days prior.

In a January 21, 2010 report, Dr. Andrew J. Feldman, Board-certified in orthopedic surgery, stated that he examined appellant for a second opinion and noted that she was treated by Dr. Gupta for carpal tunnel. Appellant had a positive EMG. Dr. Feldman reviewed her medical and social history and conducted a physical examination that was consistent with carpal tunnel syndrome and a ganglion in the posterior region of her wrist. He recommended appellant undergo a carpal tunnel release and removal of the ganglion cyst.

By decision dated June 16, 2010, OWCP denied appellant's request for reconsideration because her request did not raise any new argument or contain relevant evidence not previously considered by it. It found that the evidence submitted either did not relate to her occupational disease claim or was not relevant to the issue of whether a condition was diagnosed in connection with her factors of employment.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁴ OWCP's regulations provide that it may review an award for or against compensation at anytime on its own motion or upon application. The employee shall exercise his right through a request to the district Office.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by it; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶

³ On February 1, 2010 appellant filed a traumatic injury claim alleging that on January 16, 2010 she strained her left lower back when lifting mail at work and submitted hospital records dated January 18 and 25, 2010 regarding medical treatment for a lumbosacral strain and noting a date of injury of January 16, 2010. She also submitted a handwritten statement regarding the alleged January 16, 2010 back injury and additional medical reports regarding her claimed back injury.

⁴ 5 U.S.C. § 8128(a); *see also* *W.C.*, 59 ECAB 372 (2008); *D.L.*, Docket No. 09-1549 (issued February 23, 2010).

⁵ 20 C.F.R. § 10.605; *see also* *R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁶ *Id.* at § 10.606(b); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

A request for reconsideration must also be submitted within one year of the date of OWCP's decision for which review is sought.⁷ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁹

ANALYSIS

On June 16, 2010 OWCP denied merit review of appellant's claim on the grounds that the evidence she submitted was irrelevant because it did not relate to her occupational disease claim and did not address the particular issue in this case, which was whether she sustained a diagnosed condition causally related to her federal employment. The Board finds that the case is not in posture for decision.

In support of her request for reconsideration, appellant submitted various hospital records dated January 2010 regarding medical treatment for a lumbosacral strain and noting a date of injury of January 16, 2010 and an October 21, 2009 hospital report indicating that she sprained her wrist two days prior. This evidence is not relevant to the underlying issue in this case pertaining to her carpal tunnel syndrome and left wrist sprain.¹⁰ Moreover, the September 24, 2009 form report of Dr. Gupta is duplicative of the physician's prior reports and not sufficient to warrant further review.¹¹

On reconsideration appellant submitted new medical evidence pertaining to her claim. In a January 21, 2010 report, Dr. Feldman reviewed her medical and social history, noting the positive EMG and conducted an examination. He concluded that appellant's history and examination were consistent with carpal tunnel syndrome and ganglion cyst. This report is relevant to the issue in OWCP's December 7, 2009 decision, and was not previously considered. It constitutes relevant and pertinent evidence sufficient to warrant further merit review. The requirements for reopening a case for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge appellant's burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.¹² If OWCP should determine that the new evidence submitted lacks probative value,

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *See Johnnie B. Causey*, 57 ECAB 359 (2006) (Submission of evidence not bearing on particular issue insufficient for merit review).

¹¹ *See Richard Yadron*, 57 ECAB 207 (2005) (Duplicative evidence does not warrant reopening a case for merit review).

¹² *Billy B. Scoles*, 57 ECAB 258 (2005); *see also Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹³ The case shall be remanded to OWCP to conduct a merit review of the entire record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).¹⁴

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2010 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for a review of the merits.

Issued: September 9, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

¹⁴ The Board notes that appellant submitted additional evidence following the June 16, 2010 nonmerit decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.