

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

E.S., Appellant

and

**ENVIRONMENTAL PROTECTION AGENCY,
Philadelphia, PA, Employer**

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**Docket No. 11-476
Issued: September 9, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2010 appellant filed a timely appeal of a June 14, 2010 Office of Workers' Compensation Programs' (OWCP) decision denying further merit review.¹ Because over 180 days has elapsed between the most recent merit decision of March 11, 2009 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review only the nonmerit decision.

ISSUE

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

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). As OWCP's decision was issued on June 14, 2010, the 180-day computation begins June 15, 2010. One hundred and eighty days from June 15, 2010 was December 13, 2010. Since using December 15, 2010, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 10, 2010, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On December 24, 1999 appellant, then a 47-year-old environmental protection specialist, filed a traumatic injury claim alleging that she injured her right shoulder and arm while moving files on December 15, 1999. On January 21, 2000 her family doctor, Dr. Harry M. Carnes, noted appellant's statements of severe neck pain and spasms radiating to her shoulder, right arm and hand with numbness and tingling from the elbow to hand. He diagnosed severe cervical musculoskeletal discomfort. Dr. Carnes referred appellant to Dr. Charles E. Wilkins, Jr., a Board-certified orthopedic surgeon, who first examined appellant on December 18, 1999 and diagnosed strains of the neck and upper back.

OWCP accepted appellant's claim for cervical strain on March 6, 2000. Appellant filed a recurrence of disability claim on April 25, 2000 alleging that on April 3, 2000 she stopped work due to a recurrence of the December 15, 1999 employment injury. She submitted medical evidence in support of her recurrence from Dr. Wilkins. In a treatment note dated December 29, 1999, Dr. Wilkins stated that appellant had a history of stiff neck for 10 years and that on December 15, 1999 appellant awoke with a stiff neck and moved files at work on December 15, 1999. In a letter dated January 28, 2000 and addressed to Dr. Carnes, Dr. Wilkins diagnosed cervical radiculopathy based on an electromyogram. OWCP received this report on March 27, 2000. Due to a conflict of medical opinion evidence, in a February 11, 2003 decision³ the Board set aside OWCP decisions dated October 29, 2001 and August 26, 2002 and remanded the case for referral to an impartial medical specialist. The Board again reviewed appellant's claim for recurrence on February 1, 2007⁴ and found that the report of the impartial medical specialist, Dr. Menachem Meller, a Board-certified orthopedic surgeon, was entitled to the weight of the medical evidence and failed to establish a causal relationship between appellant's accepted employment injury and her alleged recurrence of disability instead attributing her current condition of mild spondylotic spur or hard disc at L5-6 and very mild degenerative disc bulge at C6-7 to age-related arthritis rather than her accepted lifting injury.

Following the Board's February 1, 2007 decision, appellant requested reconsideration before OWCP and submitted an additional report from Dr. Wilkins diagnosing cervical radiculopathy as a result of the accepted employment injury and opining that appellant sustained a recurrence of this condition in April 2000 rather than ordinary age-related degenerative discogenic changes. The Board reviewed this report in a decision dated March 11, 2009⁵ and found that the report was not sufficient to establish appellant's claim or to create a conflict with Dr. Meller. In a March 11, 2009 decision, the Board affirmed OWCP's May 6, 2008 decision denying appellant's claim for recurrence of disability on April 3, 2000 as causally related to her December 15, 1999 employment injury. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Appellant requested reconsideration on March 10, 2010. She argued that OWCP improperly accepted her claim for cervical strain rather than cervical radiculopathy as initially diagnosed by Dr. Wilkins. Appellant also argued that as her recurrence occurred within 90 days

³ Docket No. 03-57 (issued February 11, 2003).

⁴ Docket No. 06-1754 (issued February 1, 2007).

⁵ Docket No. 08-2235 (issued March 11, 2009).

of her return to work the level of evidence that she was required to produce was a lesser standard.

By decision dated June 14, 2010, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that her arguments were not new and relevant. It noted that she had previously argued that her claim should be accepted for cervical radiculopathy and that the standard advanced by appellant was not applicable as she was arguing for an expansion of the accepted claim rather than a recurrence of a previously accepted condition.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁶ Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁷ Section 10.608 of OWCP's regulations provide that, when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁸

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. 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

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits on the grounds that the arguments she submitted in support of her request for reconsideration were not new and relevant. Appellant contended that OWCP failed to accept her claim for cervical radiculopathy, but the Board previously addressed this argument in the March 11, 2009 decision and order. The Board considered Dr. Wilkins opinion that appellant's claim should have been accepted or expanded to include cervical radiculopathy and found that his report was not sufficient to meet appellant's burden of proof.

In regard to appellant's argument that OWCP accorded her a lower standard in evaluating her claimed recurrence as it occurred within 90 days of her return to work, the Board finds that

⁶ 5 U.S.C. §§ 8101-8193, 8128(a).

⁷ 20 C.F.R. § 10.606.

⁸ *Id.* at § 10.608.

⁹ *M.E.* 58 ECAB 694 (2007).

this argument is not relevant to appellant's situation. OWCP accepted her claim for cervical strain and she returned to light-duty work. Appellant then claimed a recurrence of disability, but attributed this recurrence to an additional condition not previously included in the record before OWCP. It was only after she filed her claim for recurrence in April 2000 that she began to submit medical evidence supporting her claim for cervical radiculopathy. As appellant was in fact arguing that her accepted conditions should be expanded, the lesser standard for a recurrence within 90 days of return to work is not applicable and not relevant to the reasons for which OWCP denied her claim, the failure to submit medical evidence establishing that her December 1999 employment injury resulted in cervical radiculopathy. For these reasons, the Board finds that she was not entitled to a review of the merits of her claim.

CONCLUSION

The Board finds that appellant failed to submit relevant and new arguments requiring OWCP to reopen her claim for consideration of the merits on June 14, 2010.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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