

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

M.B., Appellant)	
)	
and)	Docket No. 11-477
)	Issued: September 23, 2011
)	
U.S. POSTAL SERVICE, MORGAN GENERAL MAIL FACILITY, New York, NY, Employer)	
)	

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 15, 2010 appellant filed a timely appeal from a November 22, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As the last merit decision was issued June 1, 2010, more than 180 days before the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

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

¹ 20 C.F.R. §§ 501.2(c), 501.3.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. By decision dated May 1, 1995, the Board affirmed a March 1, 1993 decision finding that appellant had not established a recurrence of disability beginning December 26, 1991 due to her October 15, 1981 employment injury.³ The facts and the circumstances as set forth in the prior decision are hereby incorporated by reference.

Appellant continued to receive compensation for four hours per day based on a November 21, 1991 wage-earning capacity determination. By decision dated May 21, 2009, OWCP modified its wage-earning capacity decision to zero effective June 7, 2009 based on its termination of her compensation and authorization for medical treatment. It found that appellant had no further disability or residuals of her accepted low back syndrome and lumbosacral sprain. OWCP based its termination of her compensation on the March 26, 2009 opinion of Dr. Barry Koffler, a Board-certified orthopedic surgeon, who provided a second opinion examination. Dr. Koffler reviewed the evidence, listed findings on examination and determined that appellant's lumbar strain had resolved and that she had no residuals of her 1991 work injury.

On June 22, 2009 appellant requested reconsideration. In a June 20, 2009 letter, she argued that OWCP terminated her compensation based on a physician who did not conduct an examination. Appellant submitted a June 3, 2009 report from Dr. John B. Bieltz, an attending osteopath, who opined that appellant's condition had worsened and that the "original injury has contributed to this."

By decision dated October 30, 2009, OWCP denied modification of its May 21, 2009 termination decision. It found that Dr. Bieltz did not provide appellant's history of injury or any medical rationale and that consequently his opinion was of diminished probative value.

On March 24, 2010 appellant again requested reconsideration. She asserted that each time she attempted to work light duty she reinjured herself and that the job provided by the employing establishment was not true limited duty. Appellant submitted a February 17, 2010 report from Dr. Bieltz.⁴ By decision dated June 1, 2010, OWCP denied modification of its October 30, 2009 decision.

By letter dated September 24, 2010, appellant related that in November 1991 she returned to work for four hours per day. She retired on partial disability in 1991 due to the injury to her back. Appellant indicated that she underwent knee surgery in 2000 rather than in 1991 as specified by OWCP. She related that the knee surgery was not work related but that she "did not stop working because of my knee but because of the lower back injury...." Appellant asserted

³ Docket No. 93-2094 (issued May 1, 1995). OWCP accepted that on October 15, 1981 appellant, then a 42-year-old clerk, sustained low back syndrome and lumbosacral strain in the performance of duty. Appellant returned to part-time modified employment on November 16, 1991. By decision dated November 21, 1991, OWCP reduced her compensation benefits based on its finding that her actual earnings as a modified manual distribution clerk working four hours per day fairly and reasonably represented her wage-earning capacity.

⁴ Dr. Bieltz diagnosed degenerative disc disease. He noted that she "had an injury back in 1981 and it has gotten progressively worse with time."

that she had not received a November 21, 1991 wage-earning capacity determination. She contended that Dr. Koffler did not examine her.

On October 12, 2010 appellant requested reconsideration. In a nonmerit decision dated November 22, 2010, OWCP denied her request for reconsideration after finding that she did not submit evidence or raise argument sufficient to warrant reopening her case for further review of the merits under section 8128.

On appeal appellant asserts that she retired on partial disability. She reinjured herself working at the employing establishment as she was not provided with actual limited duty. Appellant questions why OWCP credited Dr. Koffler over Dr. Bieltz even though Dr. Koffler did not conduct a physical examination. She further alleges bias by Dr. Koffler due to her race.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ 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.⁶ 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.⁷ 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.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.⁹ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

ANALYSIS

OWCP accepted that appellant sustained low back syndrome and lumbar strain in the performance of duty. In a decision dated November 21, 1991, it reduced her compensation after finding that her part-time earnings as a modified manual distribution clerk fairly and reasonably represented her wage-earning capacity. By decision dated May 21, 2009, OWCP terminated

⁵ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that “[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.”

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

¹⁰ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

appellant's compensation after finding that she had no further disability or need for medical treatment due to her accepted employment injury. On October 30, 2009 and June 1, 2011 it denied modification its May 21, 2009 termination decision. Appellant requested reconsideration on October 12, 2010.

As noted above, the Board does not have jurisdiction over the merits of this case. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her October 12, 2010 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. In a September 24, 2010 letter and on appeal, she argued that she had retired on partial disability in 1991 rather than receiving a wage-earning capacity determination. OWCP, however, issued a wage-earning capacity in 1991 finding that appellant could earn wages as a part-time modified manual distribution clerk. A wage-earning capacity determination is a determination that a specific amount of earnings represents a claimant's ability to earn wages.¹¹ FECA does not provide a disability retirement program.¹²

Appellant also contended that she did not receive OWCP's 1991 wage-earning capacity decision. This contention is not relevant to the issue on appeal, however, which is whether she had any employment-related disability after June 7, 2009. Evidence or argument that does not address the particular issue involved does not warrant reopening a case for merit review.¹³ Further, OWCP's 1991 decision was properly addressed to appellant. Under the mailbox rule it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by the individual.¹⁴

Appellant maintained that OWCP indicated that she had knee surgery in 1991 rather than 2000 and that she stopped work because of her low back injury. The underlying issue, however, is whether she has any further disability due to her accepted low back syndrome and lumbosacral strain after June 7, 2009. That is a medical issue which must be addressed by relevant medical evidence.¹⁵ A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence with her reconsideration request showing continuing employment-related disability.

Appellant also argued that Dr. Koffler did not conduct a physical examination. However, Dr. Koffler described detailed findings on physical examination in his March 26, 2009 report. Consequently, appellant's contention does not constitute a new legal argument sufficient to warrant reopening her case for further merit review.

¹¹ See *S.M.*, 58 ECAB 166 (2006); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹² See *James L. Sutton*, 32 ECAB 1886 (1981) (a determination of disability under Civil Service Retirement provisions has no application under FECA).

¹³ *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

¹⁴ See *Joseph R. Giallanza*, 55 ECAB 186 (2003); *A.C. Clyburn*, 47 ECAB 153 (1995).

¹⁵ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

On appeal appellant questioned why OWCP relied upon Dr. Koffler over the opinion of Dr. Bieltz, her attending physician. OWCP previously explained, however, that Dr. Bieltz did not provide a history of her work injury or any rationale for his opinion and thus found it of little probative value. Appellant also alleges that Dr. Koffler was biased against her due to her race. She provided no evidence, however, in support of her argument. Mere allegations are insufficient to establish bias.¹⁶

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹⁶ See *L.W.*, 59 ECAB 471 (2008).