

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

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| <b>S.C., Appellant</b>                   | ) |                                   |
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| <b>and</b>                               | ) |                                   |
|  | ) | <b>Docket No. 11-1395</b>         |
| <b>U.S. POSTAL SERVICE, POST OFFICE,</b> | ) | <b>Issued: September 22, 2011</b> |
| <b>Winterville, NC, Employer</b>         | ) |                                   |
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*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On May 26, 2010 appellant filed a timely appeal from the December 17, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this nonmerit decision. The Board has no jurisdiction to review OWCP's October 19, 2010 merit decision denying appellant's recurrence claim, as she filed her appeal more than 180 days after the date of that decision.<sup>2</sup> The only issue the Board may review on this appeal, therefore, is whether OWCP properly denied appellant's request for reconsideration.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The latest date to appeal OWCP's October 19, 2010 decision was April 18, 2011. Appellant filed her appeal a month later.

## ISSUE

The issue is whether OWCP properly denied appellant's December 1, 2010 request for reconsideration, pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On January 12, 2007 appellant, then a 34-year-old rural carrier, sustained an injury in the performance of duty, while casing mail, she reached up high and felt something pinch in the right side of her neck. OWCP accepted her claim for a cervical disc herniation and paid compensation for temporary total disability on the periodic rolls.

On February 17, 2009 appellant returned to work at no wage loss in a modified assignment the postmaster created specifically for her. In a decision dated May 20, 2009, OWCP determined that her actual earnings in this modified assignment fairly and reasonably represented her wage-earning capacity in the open labor market. Appellant demonstrated the ability to perform restricted duties for more than two months.<sup>3</sup>

Appellant stopped work on July 6, 2010 and claimed compensation for total disability through August 23, 2010. She saw Dr. Kurt Voss, a Board-certified orthopedic surgeon, the next day. Dr. Voss noted that appellant showed no significant improvement following a shoulder injection. He held her off work pending a magnetic resonance imaging (MRI) scan of the right shoulder. The August 3, 2010 MRI scan showed mild acromioclavicular degenerative changes with small inferiorly directed osteophytes. There was also mild subacromial subdeltoid bursitis and mild bursal surface fraying of the supraspinatus fibers. Appellant again claimed compensation for total disability from August 28 to October 8, 2010.<sup>4</sup>

In a decision dated October 19, 2010, OWCP denied appellant's claim for wage-loss compensation on the grounds that the evidence was insufficient to establish that the claimed recurrence of disability was due to her accepted work injury. It explained that a recurrence of disability was defined as an inability to work after an employee had returned to work, caused by a spontaneous change in the a medical condition that resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. OWCP further explained that increased subjective complaints were insufficient to show a material worsening of the accepted medical condition: "Objective evidence (physical findings, x-rays, etc.) must be submitted with your doctor's medical reasoning of how and why your injury-related medical condition has materially worsened." Noting the belief of the doctor that appellant had also injured her shoulder on January 12, 2007, OWCP denied expansion of her claim to include the right shoulder.

On December 1, 2010 appellant requested reconsideration of OWCP's October 19, 2010 decision. She stated that her doctor "had this form and his office lost it and finally called me that they had found my paperwork." Appellant stated that she was injured and in a lot of pain. She

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<sup>3</sup> Appellant accepted another modified assignment on June 1, 2009.

<sup>4</sup> Appellant's claim for wage-loss compensation thus appears to be for a closed period of about three months.

submitted a copy of OWCP's October 19, 2010 decision. Appellant highlighted language stating that medical documentation must show a material worsening of the accepted work-related condition, and how her doctor had failed to explain how the injury-related condition materially changed to the point that she could no longer perform the physical requirements of the position she held when she stopped work on July 6, 2010. OWCP received a copy of the MRI scan ordered by appellant's doctor, a study it originally received in August 2010.

In a decision dated December 17, 2010, OWCP denied appellant's request for reconsideration. It found that the request met none of the standards for reopening her claim for a merit review.<sup>5</sup>

On appeal, appellant argues that her doctor noted from the beginning that she had pain in her neck, shoulder and arm. She indicated that she had submitted a statement from her doctor explaining that she did not have a new injury; she was just getting worse. Appellant stated that the employing establishment did not honor her restrictions, and that the hard work she did made her condition worse. She added that she went to a doctor for all the stress this has been causing her. She stated that she had post-traumatic stress disorder, severe depression and anxiety with panic attacks. Appellant referred to a second-opinion examination in 2008, which found that she had cervical radiculopathy but on the opposite side from her original problem, which was gone, so it was difficult to tell exactly what relationship the new radiculopathy had to the original problem. Appellant states that she has new medical information that she will submit to the Board, but the Board may not consider new evidence on appeal.<sup>6</sup>

### **LEGAL PRECEDENT**

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.<sup>7</sup> An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>8</sup>

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<sup>5</sup> On December 22, 2010 after the denial of appellant's request, OWCP received a duty status report dated December 6, 2010. As this evidence was not before OWCP when it issued its December 17, 2010 decision, the Board has no jurisdiction to review it on appeal. The Board has no jurisdiction to review new evidence. 20 C.F.R. § 501.2(c)(1). Appellant may submit new evidence to OWCP together with a request for reconsideration, as described in the appeal rights attached to OWCP's October 19, 2010 decision. She has until October 19, 2011 to file a timely request for reconsideration of that decision.

<sup>6</sup> See 20 C.F.R. § 501.2(c)(1).

<sup>7</sup> 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.606.

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.<sup>9</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>10</sup>

### ANALYSIS

Appellant made her December 1, 2010 request for reconsideration within one year of OWCP's October 19, 2010 merit decision denying her recurrence claim. Her request was therefore timely. The question is whether appellant's request met one of the three standards for obtaining a merit review of her case.

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument not previously considered by OWCP. Instead, appellant stated that she was injured and experienced pain. She indicated that her doctor had found some paperwork, a form his office had lost. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence not previously considered by OWCP, but appellant submitted no such evidence to support her request for reconsideration. Appellant submitted a copy of OWCP's October 19, 2010 decision, but that was not new. OWCP received a copy of the August 2010 MRI scan, but that evidence was duplicative of evidence previously received and considered by it. Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.<sup>11</sup> Evidence that does not address the particular issues involved also constitutes no basis for reopening a case.<sup>12</sup>

The underlying issue in appellant's case is whether her total disability beginning July 6, 2010 was a result of what happened at work on January 12, 2007, while casing mail, she reached up high and felt something pinch in the right side of her neck. She must show that the accepted employment injury -- a cervical disc herniation -- materially worsened such that she could no longer perform the specific duties of her modified assignment. Appellant must show that the January 12, 2007 employment injury also resulted in injury to her right shoulder, and that it was an employment-related right shoulder injury that kept her off work from July to October 2010. These are both medical issues that must be resolved by probative medical opinion evidence. OWCP addressed both these issues and reviewed the relevant evidence in its October 19, 2010 merit decision. Appellant submitted nothing further that was new or relevant to these issues.

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<sup>9</sup> *Id.* at § 10.607(a).

<sup>10</sup> *Id.* at § 10.608.

<sup>11</sup> *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

<sup>12</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

As appellant's request for reconsideration did not meet one of the standards for obtaining a merit review of her case, the Board finds that OWCP properly denied her request. The Board will therefore affirm its December 17, 2010 decision.

Appellant argues on appeal that she complained of right shoulder pain from the beginning. Her doctor confirmed that she had evidence of cervical radiculopathy, but this is not the same as an injury to the right shoulder. It is a cervical spine injury with neurological symptoms radiating from the cervical spine to the right shoulder and arm. Appellant refers to a second-opinion doctor in 2008. Dr. Voss found that the cervical radiculopathy to the right shoulder and arm was now gone and replaced with radiculopathy to the opposite side. The evidence submitted does not explain, in a convincing way, how appellant's disability for work from July to October 2010 was a result of what happened on January 12, 2007. Appellant submitted no new medical opinion evidence from her physician.

Appellant notes on appeal that the employing establishment did not honor her restrictions, and that the hard work she did made her condition worse. She is thereby describing not a recurrence of disability, not a spontaneous change in her cervical disc herniation, but a new injury, an intervening injury caused by new exposure to working conditions. Appellant is free to pursue a claim for a new injury, but that would be separate from the recurrence claim OWCP adjudicated on October 19, 2010. She adds that she is suffering from psychological problems. Appellant is also free to pursue a consequential injury claim, essentially that the January 17, 2010 cervical disc herniation was such that it led to the development of a diagnosed psychological injury, but again, that would be separate from the recurrence claim OWCP adjudicated on October 19, 2010.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's December 1, 2010 request for reconsideration. Appellant's request did not meet one of the three standards for obtaining a merit review of her case.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 22, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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