

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

K.J., Appellant

and

**U.S. POSTAL SERVICE, RUGBY STATION,
Brooklyn, NY, Employer**

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**Docket No. 12-18
Issued: April 24, 2012**

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 September 28, 2011 appellant filed a timely appeal of the April 8, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), denying her request for reconsideration.¹ Because more than 180 days elapsed from the most recent merit decision dated June 4, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

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 April 8, 2011, the 180-day computation begins April 9, 2011. Since using October 14, 2011, 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 September 28, 2011, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that a medical report from an attending physician is sufficient to establish that she has continuing residuals of her accepted employment injuries.

FACTUAL HISTORY

OWCP accepted that on December 3, 1998 appellant, then a 26-year-old letter carrier, sustained a left knee and lumbosacral sprain when she tripped on stairs at work. She stopped work on the date of injury and returned to limited-duty work on December 21, 1998. Appellant stopped work on January 15, 1999 and returned to limited-duty work on January 26, 1999. On September 18, 2004 she stopped work and filed a recurrence of disability claim as she was advised by management that work was no longer available. OWCP paid appellant appropriate wage-loss compensation for total disability.

In a September 22, 2008 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective September 28, 2008. It found that an April 2, 2008 medical report of Dr. Michael P. Rafiy, a Board-certified orthopedic surgeon and OWCP referral physician, represented the weight of the medical evidence and established that she no longer had any residuals or disability causally related to her accepted December 3, 1998 employment injuries.

In a January 5, 2009 report, Dr. Pran N. Sood, an attending Board-certified orthopedic surgeon, obtained a history of the December 3, 1998 employment injuries and appellant's medical treatment and social background. He listed findings on physical and x-ray examination of the neck, lower back and left hand, hip and leg. Dr. Sood advised that appellant had low back pain with left lower extremity radiculopathy, coccyalgia of the left hip, rule out sacroiliac joint pathology, chronic cervical pain with cervical spondylosis and left upper extremity radiculopathy rule out left carpal tunnel and headache that was "most likely" secondary to her cervical problem. He stated that he did not have a diagnosis at that point and recommended additional diagnostic testing of the cervical and lumbosacral spines, and left hip and upper extremity.

In a January 29, 2009 report, Dr. Sood reviewed notes given to him by appellant, which revealed diagnoses of chronic lumbosacral and left hip strain and left wrist and neck sprain. He stated that the sprain was the reason for her symptoms for almost seven to eight years and intermittent disability for work. Dr. Sood further stated that the diagnosed conditions were not sufficient for him to make recommendations for appellant's work and future treatment and disability. He noted that x-rays of the cervical spine performed on the date of his examination were consistent with mild cervical spondylosis. X-rays of the lumbosacral spine were normal. Dr. Sood recommended additional diagnostic testing to establish a diagnosis for appellant's injuries, the cause of the diagnosis and her work capacity.

By decision dated May 1, 2009, an OWCP hearing representative affirmed the September 22, 2008 termination decision. The hearing representative found that the medical

evidence subsequently submitted by appellant was not sufficient to overcome the weight accorded to Dr. Rafiy's medical report.

In a June 4, 2010 decision, OWCP reviewed the merits of appellant's claim and denied her April 26, 2010 request for modification of the termination.

By letter dated March 22, 2011, appellant requested reconsideration.

In an October 14, 2010 report, Dr. Sood listed a history of the December 3, 1998 employment injuries and appellant's medical treatment. He advised that x-ray examinations of the low back, hips and knee demonstrated no fracture or dislocation. Appellant had coccyalgia of the left hip. X-rays of the cervical spine were consistent with moderate spondylosis and altered C curve and showed moderate arthrosis. A 2009 magnetic resonance imaging scan was consistent with positive tenderness in the midline posteriorly and paralumbar disc disease with annular bulge foraminal stenosis at L3-L4. An electromyogram suggested L4 radiculopathy/myelopathy secondary to the above findings. Dr. Sood advised that his objective findings continued to show that appellant had decreased range of motion of the spine, guarded movement, a painful gait, limited ability to squat, sit and bend and decreased internal rotation of the hip by 10 degrees. The left suprascapular and supraclavicular regions were positive for tenderness. Dr. Sood opined that appellant's original and present symptoms were secondary to the 1998 employment injuries. Appellant's impairment was permanent and she could only perform modified light-duty work with limitations. Dr. Sood addressed her treatment plan which included rehabilitation, epidural injections for the lower back and appropriate bracing. There was no plan to perform surgery. In an October 14, 2011 work capacity evaluation, Dr. Sood reiterated appellant's physical limitations for an eight-hour workday.

In an April 8, 2011 decision, OWCP denied appellant's request for reconsideration, finding that the medical evidence was insufficient to warrant further merit review of her claim. It determined that Dr. Sood's opinion that her unresolved pain resulting from the accepted employment injury was cumulative and repetitious of his prior reports.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,³ 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.⁴ 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

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the 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).

⁴ 20 C.F.R. § 10.606(b)(1)-(2).

of the date of that decision.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

ANALYSIS

In the most recent merit decision dated June 4, 2010, OWCP denied modification of the termination of appellant's wage-loss compensation and medical benefits on the grounds that she no longer had any residuals or disability causally related to her accepted December 3, 1998 employment-related injuries. On March 22, 2011 appellant requested reconsideration and submitted medical evidence. In an April 8, 2011 decision, OWCP denied her request for reconsideration without a merit review of her claim, finding that the medical evidence submitted was cumulative and repetitive of evidence previously considered in its prior decisions and not relevant.

Dr. Sood's October 14, 2011 report listed objective test results which revealed coccyalgia of the left hip, moderate spondylosis and altered C curve and moderate arthrosis of the cervical spine, tenderness in the midline posteriorly and paralumbar disc disease with annular bulge foraminal stenosis at L3-L4 and L4 radiculopathy/myelopathy. He advised that these findings continued to show that appellant had decreased range of motion of the spine, guarded movement, painful gait, limited ability to squat, sit and bend, decreased internal rotation of the hip by 10 degrees and tenderness in the left suprascapular and supraclavicular regions. Dr. Sood opined that her symptoms were secondary to the December 3, 1998 employment injuries, that the impairment was permanent and that she was only capable of performing modified light-duty work with restrictions. Although this evidence reiterated his prior findings that appellant had continuing lumbosacral, left hip and cervical problems, Dr. Sood offered a new opinion finding that these problems were directly related to the accepted employment-related injuries. The medical evidence provided medical rationale in support of his opinion addressing the relevant issue of whether OWCP properly terminated appellant's compensation on the grounds that she no longer had any residuals causally related to her employment-related left knee and lumbosacral conditions. The Board finds that Dr. Sood's October 14, 2010 report constituted relevant and pertinent new evidence not previously considered.⁶ Therefore, OWCP improperly refused to reopen appellant's case for further review of the merits.

To obtain merit review, appellant is not required to submit evidence sufficient to establish her claim. She need only provide evidence that is relevant and pertinent new and not previously considered by OWCP.⁷ Dr. Sood's report meets these requirements. The case will, therefore, be remanded for consideration of this physician's report, together with the previously submitted evidence of record and a decision on the merits of appellant's claim.

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.606(b)(2).

⁷ *Billy B. Scoles*, 57 ECAB 258 (2005).

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a) in its April 8, 2011 decision.

ORDER

IT IS HEREBY ORDERED THAT the April 8, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action consistent with this decision of the Board.

Issued: April 24, 2012
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