

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

M.D., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Honolulu, HI, Employer**

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**Docket No. 12-338
Issued: August 6, 2012**

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 5, 2011 appellant, through her attorney, filed a timely appeal from a September 30, 2011 nonmerit decision finding that her June 27, 2011 request for reconsideration was untimely filed and did not establish clear evidence of error,¹ and a September 30, 2011 nonmerit decision² refusing to reopen her claim for merit review.³ Pursuant to the Federal Employees' Compensation Act⁴ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of the case.

¹ OWCP denied appellant's (Form CA-7) claim for compensation for the period February 10 to March 6, 2010 on May 6, 2010 and again following merit review on May 12, 2011.

² OWCP denied appellant's CA-7 form claim for compensation for the period May 20 through June 9, 2010 on July 29, 2010.

³ Because more than 180 days elapsed from the most recent merit decision dated July 29, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim.

⁴ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant's June 27, 2011 request for reconsideration was untimely filed and did not establish clear evidence of error; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits, with respect to her July 5, 2011 request for reconsideration, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 14, 2008 appellant, then a 41-year-old transportation security officer, filed a claim of traumatic injury to her back on August 7, 2008 when she lifted a heavy bag without assistance. OWCP accepted the claim for lumbar sprain, aggravation of preexisting degeneration of lumbar or lumbosacral intervertebral discs at L4-5 and L5-S1 and a single episode of major depression in partial or unspecified remission.

On March 2, 2010 appellant filed a CA-7 form requesting compensation for the period February 10 to March 6, 2010. OWCP denied this claim in a May 6, 2010 decision on the grounds that she did not submit medical evidence to support disability during this period.

Appellant disagreed with the decision and filed a request for a review of the written record. On December 13, 2010 OWCP remanded the claim for further medical development.

By merit decision dated May 12, 2011, OWCP denied appellant's claim on the grounds that the medical evidence established that her total disability for this period was due to nonwork-related factors.

On June 27, 2011 appellant submitted a request for reconsideration of the denial of her compensation claim for the period February 10 to March 6, 2010. In a decision dated September 30, 2011, OWCP denied her request on the grounds that it was not timely filed and did not establish clear evidence of error.

On April 22, 2010 appellant also submitted a CA-7 claim form for compensation for the period May 20 through June 9, 2010. OWCP denied this claim by decision dated July 29, 2010 as the medical evidence did not establish that appellant was totally disabled for the period in question.

On July 5, 2011 appellant requested reconsideration of the July 29, 2010 decision.

OWCP received medical documents dated 2010 and 2011, following the merit denials of appellant's claims. The reports were from Dr. Frank Izuta, Board-certified in occupational medical; Dr. Tetsuto Numato, Board-certified orthopedic surgeon; Dr. Marva Lawson, Board-certified psychiatrist; Dr. Jon F. Graham, Board-certified neurosurgeon; and Dr. Danilo E. Ponce, Board-certified psychiatrist; and psychologists Drs. Dawn S. Tomita and Michelle Kang. Most of the reports addressed appellant's medical treatment and follow-up care. The only medical report of record which addressed her disability status during the periods in question was a January 25, 2011 supplemental report from Dr. Ponce, who related that he had been asked to address whether she was totally disabled from work in her modified-duty position as of February 10, 2010, due to major depressive disorder. Dr. Ponce explained that appellant's depressive disorder as of February 10, 2010 was due to four stressors, one of which was pain.

As he was not a pain management specialist and, if pain did not constitute a basis for compensation absent objective evidence of disability, then her aggregate stressors were not work related.

By decision dated September 30, 2011, OWCP refused to reopen appellant's claim for compensation for the period May 20 to June 9, 2010 as she did not submit any additional relevant evidence or advance a relevant legal argument not previously considered by OWCP.

LEGAL PRECEDENT -- ISSUE 1

FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.⁵ OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file her application for review within one year of the date of that decision.⁶

The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board, but does not include prereducement hearing decisions.⁷

Under section 8128(a) of FECA, OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁸

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁹

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607(a).

⁷ See *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997).

⁸ 20 C.F.R. § 10.606(b).

⁹ *Id.* at § 10.608(b).

ANALYSIS -- ISSUE 1

Regarding appellant's claim for compensation for the period February 10 to March 6, 2010, OWCP improperly determined that she failed to file a timely application for review. It found that the most recent merit decision regarding this claim was issued on May 6, 2010. The Board finds, however, that appellant's June 27, 2011 request for reconsideration was timely filed.

OWCP conducted a merit review of this case in the May 12, 2011 decision, which constitutes the most recent merit review pertaining to the claim for compensation from February 10 to March 6, 2010. Appellant, therefore, had one year from May 12, 2011 to request reconsideration. Her request for reconsideration dated June 27, 2011 was timely filed and OWCP applied an erroneous standard of review.

ANALYSIS -- ISSUE 2

Regarding appellant's request for reconsideration of the denial of her claim for compensation for the period May 20 to June 9, 2010, the Board finds that OWCP properly denied merit review on September 30, 2011.

OWCP's most recent merit decision of July 29, 2010 found that appellant had not established that she was totally disabled during the period in question. Appellant timely requested reconsideration on July 5, 2011 and on September 30, 2011 OWCP denied reconsideration, without a merit review.

As noted, the Board does not have jurisdiction over the July 29, 2010 OWCP merit decision. 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 July 5, 2011 application 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 not previously considered by OWCP. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant submitted numerous medical documents following the July 29, 2010 decision. Although these reports were new to the record, the Board finds that none of the reports indicated that she was totally disabled from May 20 through June 9, 2010 due to her accepted work injury. The only medical report which actually discussed appellant's disability status during the relevant period was Dr. Ponce's January 25, 2011 supplemental report. Dr. Ponce, however, clarified his previous explanation that appellant's depressive disorder as of February 10, 2010 was due to nonwork-related stressors. OWCP properly determined that the medical reports she submitted were not new and relevant evidence to establish that she was disabled from May 20 to June 9, 2010 due to her accepted employment injury. 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 evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant submitted a timely request for reconsideration of the May 12, 2011 merit decision, but that OWCP applied an erroneous standard of review under 5 U.S.C. § 8128(a). The Board also finds that OWCP properly denied further merit review of appellant's July 5, 2011 reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 30, 2011 pertaining to review of the May 12, 2011 decision is set aside and remanded for further adjudication. The September 30, 2011 decision pertaining to review of the July 29, 2010 decision is affirmed.

Issued: August 6, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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