

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

B.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bedford Park, IL, Employer**

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**Docket No. 12-610
Issued: August 9, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 26, 2012 appellant filed a timely appeal of the October 6, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed between the most recent merit decision dated December 9, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

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 she refused an offer of suitable work because she has a bilateral shoulder rotator cuff tear and an emotional condition. She also refused the offered position based on her attending physician's opinion that she is unable to return to work.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that appellant, a mail processing clerk, sustained bilateral shoulder calcifying tendinitis, bursitis, strain and unspecified disorders of bursae and tendons, a herniated cervical disc at C5-6, bilateral carpal tunnel syndrome, displacement of cervical intervertebral disc without myelopathy and bilateral rotator cuff (capsule) sprain and strain as a result of her federal employment. It authorized an anterior cervical discectomy and fusion which were performed on March 12, 2001, left carpal tunnel release and arthroscopic left shoulder surgery which were performed on September 25, 2002 and right rotator cuff repair surgery which was performed on October 8, 2008.

Appellant returned to modified-duty work on several occasions with intermittent disability. She stopped work on November 2, 2000 alleging a recurrence of disability causally related to her accepted employment injuries. On December 18, 2000 OWCP accepted that appellant sustained a recurrence of total disability commencing November 2, 2000.

In a May 10, 2007 decision, OWCP terminated appellant's monetary compensation effective May 12, 2007 pursuant to 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work as a part-time flexible mail processing clerk. It did not terminate her medical benefits.

By decision dated August 1, 2007, OWCP granted appellant a schedule award for two percent impairment of the right upper extremity and three percent impairment of the left upper extremity. The period of the award ran from November 1, 2003 to February 18, 2004.²

In an undated treatment note, Dr. George S. Miz, a Board-certified orthopedic surgeon, stated that appellant was planning to undergo knee reconstruction surgery. In an August 23, 2007 treatment note, he stated that her cervical complaints remained unchanged. Appellant continued to have chronic cervical pain. Dr. Miz advised that these symptoms were related to her work-related injury, resulting in a C5-C6 disc herniation for which she received treatment. He noted that appellant was under the care of Dr. Majid Serushan, a Board-certified internist, who advised her not to work in any capacity due to her multiple musculoskeletal problems. Dr. Miz stated that the C5-C6 pathology was a contributory factor. He did not recommend that appellant return to work. In an August 23, 2007 prescription, Dr. Miz advised that she had brachia neuritis or radiculitis not otherwise specified. He placed appellant off work until further notice. In a June 10, 2008 treatment note, Dr. Miz related that appellant had another rotator cuff tear on the right side which was to be addressed by Dr. Daniel P. Mass, a Board-certified orthopedic surgeon. Appellant's current cervical condition was clinically stable. She still had ongoing cervical symptoms. Dr. Miz recommended a functional capacity evaluation to determine appellant's long-term work restrictions.

In a January 28, 2008 medical report, Dr. Mass reviewed a magnetic resonance imaging (MRI) scan of the right shoulder which showed calcific tendinitis around the greater tuberosity but, not in the subacromial space. There was no arthritis. Dr. Mass advised that the MRI scan

² The Board notes that the period covered by the August 1, 2007 schedule award was prior to the termination of appellant's wage-loss compensation on May 10, 2007.

was most consistent with a full thickness rotator cuff tear of the supraspinatus tendon. He recommended arthroscopic subacromial decompression, debridement of the calcific tendinitis and rotator cuff repair. Dr. Mass stated that following surgery appellant could be on light duty, wearing a sling and not using the right arm with the hope of obtaining progressive function. He noted that she still had a neck problem that was possibly foraminal stenosis.

On September 3, 2008 appellant filed a claim for wage-loss compensation (Form CA-7) from May 12, 2007 through August 30, 2008.

In an October 1, 2008 decision, OWCP denied appellant's claim for wage-loss compensation from May 12, 2007 through August 30, 2008. It found that she did not submit adequate medical evidence to establish that she was unable to perform the duties of the offered modified position or totally disabled following the termination of her wage-loss compensation on May 10, 2007.

On January 29, 2009 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability commencing November 29, 2008 due to her accepted employment injuries. She submitted medical evidence including, a January 13, 2008 report in which Dr. Mass advised that she was unable to return to work.

On June 13, 2009 appellant filed a claim for an additional schedule award. In a May 19, 2009 report, Dr. Jeffrey E. Coe, Board-certified in occupational medicine, advised that appellant had 17 percent impairment of each upper extremity based on the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

In a June 4, 2009 decision, OWCP denied appellant's recurrence claim, finding that the termination of her compensation on May 10, 2007 under 5 U.S.C. § 8106(c) served as a penalty provision which precluded further monetary compensation. On July 2, 2009 it issued two decisions denying her claim for an additional schedule award³ and recurrence of disability on the same grounds.

By letter dated July 8, 2009, appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. She submitted medical evidence including a September 23, 2009 report from Dr. Serushan who advised that she suffered from pain in her shoulders, cervical spine and right knee. Dr. Serushan further advised that appellant was unable to work.

In a December 9, 2009 decision, an OWCP hearing representative affirmed OWCP's June 4 and July 2, 2009 decisions. The hearing representative found that invocation of the penalty provision of 5 U.S.C. § 8106(c) precluded appellant from receiving any monetary compensation for her accepted employment injuries.

By letter dated August 20, 2010, appellant requested reconsideration of OWCP's schedule award decision, contending that the medical evidence of record established her

³ In a prior decision dated October 20, 1999, OWCP granted appellant a schedule award for 11 percent impairment of the right upper extremity.

continuing employment-related pain and total disability. In a December 1, 2010 letter, she reiterated her contentions that she was totally disabled for work and entitled to a schedule award based on the medical evidence of record. Appellant resubmitted Dr. Miz's undated treatment note, August 23, 2007 and June 10, 2008 treatment notes and an August 23, 2007 prescription; Dr. Mass' January 28, 2008 report; Dr. Coe's May 19, 2009 report and Dr. Serushan's September 23, 2009 report.

In an October 6, 2011 decision, OWCP denied appellant's August 20, 2010 request for reconsideration. It found that her reconsideration request was not timely filed as her schedule award claim was denied on July 2, 2009. OWCP further found that the medical reports submitted by appellant were insufficient to warrant further merit review of her claim as they were duplicative of reports previously considered. Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously considered.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,⁴ 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.⁵ 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.⁶ 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.⁷

ANALYSIS

On July 2 and December 9, 2009 OWCP denied appellant's claims for a schedule award and recurrence of disability on the grounds that the May 10, 2007 termination of her wage-loss compensation under 5 U.S.C. § 8106(c) served as a penalty provision which precluded further compensation under 5 U.S.C. § 8107. In an August 20, 2010 letter, appellant requested reconsideration of the schedule award decision. In denying her request for reconsideration of the July 2, 2009 schedule award decision, OWCP found that it was untimely filed but, applied the standard for reviewing timely requests for reconsideration, finding that the medical evidence submitted was previously considered and she failed to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously considered.

⁴ 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).

⁵ 20 C.F.R. § 10.606(b)(1)-(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b); *see also M.E.*, 58 ECAB 694 (2007).

The Board finds that appellant timely filed her request for reconsideration of OWCP's denial of her schedule award claim. The Board notes that the one-year time limitation for requesting reconsideration begins to run on the date of the original OWCP decision.⁸ A right to reconsideration within one year accompanies any merit decision on the issues.⁹ The last merit decision regarding appellant's schedule award claim was issued on December 9, 2009 by the Branch of Hearings and Review upholding the July 2, 2009 denial of her claim. As appellant's request for reconsideration was dated August 20, 2010, the Board finds that it was filed within the one-year time limitation and notes that OWCP applied the standard for a timely reconsideration to the evidence submitted with appellant's request.

In support of her timely request for reconsideration, appellant resubmitted various medical records previously of record and reviewed by OWCP. The submission of evidence which repeats or duplicates evidence already of record and considered by OWCP does not constitute a basis for reopening a case and is insufficient to warrant further merit review.¹⁰ Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a relevant legal argument nor submit relevant medical evidence not previously considered by OWCP. Accordingly, OWCP properly denied appellant's August 20, 2010 request for reconsideration as she did not meet any of the three requirements under section 10.606(b)(2) sufficient to warrant merit review.¹¹

On appeal, appellant reiterated her arguments that she refused an offer of suitable work based on her continuing medical conditions and disability. The only issue on appeal is whether OWCP properly determined that her application for reconsideration was insufficient to warrant merit review. As stated, the Board finds that appellant did not meet any of the requirements of section 10.606(b)(2). She failed to establish that OWCP erroneously applied or interpreted a specific point of law, advance a new and relevant legal argument or submit relevant and pertinent evidence not previously considered by OWCP. Accordingly, OWCP properly denied appellant's August 20, 2010 request for reconsideration.

CONCLUSION

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

⁸ *Id.* at § 10.607(a); *see also A.F.*, 59 ECAB 714 (2008).

⁹ *See D.G.*, 59 ECAB 734 (2008); *Robert F. Stone*, 57 ECAB 292 (2005).

¹⁰ *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

¹¹ *See supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2012
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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

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