

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

S.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jacksonville, FL, Employer**

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**Docket No. 12-715
Issued: August 2, 2012**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 13, 2012 appellant, through her representative, filed a timely appeal from the December 28, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied reconsideration. As more than one year has elapsed from the issuance of OWCP's October 30, 2006 decision to the filing of the appeal on February 13, 2012,¹ pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's October 7, 2007 reconsideration request.

¹ For final adverse decisions of OWCP issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on and after November 19, 2008, a claimant has 180 days to appeal to the Board. *See* 20 C.F.R. § 501.3(e) (rev. 2008).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On September 25, 1993 appellant, a 37-year-old temporary letter carrier, sustained a traumatic injury in the performance of duty when she was chased by a dog and fell to the ground. OWCP accepted her claim for an abrasion to the right thigh, lumbosacral strain and contusion to the back. Appellant did not stop work at the time of injury but began limited duty.

In an April 9, 2003 decision, OWCP reduced appellant's compensation on the grounds that her earnings in the position of Modified TE Markup Clerk fairly and reasonably represented her wage-earning capacity.

When her appointment expired on May 13, 2004, appellant claimed compensation for wage loss. In November of that year she advised that she was still able to perform the limited duty under the restrictions outlined by her treating physician, but the employing establishment chose to terminate her employment, which entitled her to compensation until she was either rehabilitated or trained for another position within her restrictions or until she fully recovered from the accepted injury. As she was neither, appellant argued that she was due compensation from the date listed on her Form CA-7.

OWCP denied her claim on November 22, 2004. On March 21, 2006 an OWCP hearing representative affirmed the denial, as appellant had not met her burden of demonstrating that the determination of her wage-earning capacity should be modified. Appellant's representative had argued that the position was "made for her in order to keep her employed," but the hearing representative found no evidence that OWCP's wage-earning capacity determination was erroneous.

On October 30, 2006 OWCP reviewed the merits of appellant's claim but denied modification of its prior decision. It found that the medical evidence did not establish a material change in the nature and extent of the accepted injury-related condition that would render appellant totally disabled.

Appellant requested reconsideration on October 7, 2007. She argued that she had not recovered from her September 25, 1993 employment injury and that medical reports over the last 14 years consistently found she was still totally disabled from the position she held when injured. Appellant argued that all modified limited-duty positions were makeshift rather than regular work with no restrictions. She argued that the employing establishment withdrew her limited duty, causing a recurrence of total disability.

Appellant identified certain points of law, for example, that the general test for determining wage-earning capacity was whether injury-related impairments prevented the employee from performing the kind of work she was doing when injured. She cited a case in which the Board found that withdrawal of limited duty established a recurrence, as well as cases establishing that OWCP has the burden of justifying modification of compensation benefits.

OWCP denied appellant's request for reconsideration without reviewing the merits of her claim. On appeal, due to its delay in transmitting the case record, the Board remanded the case

to OWCP for reconstruction and proper assemblage of the case record and for an appropriate decision to fully protect appellant's appeal rights.³

In a December 28, 2011 decision, OWCP again denied appellant's request for reconsideration without reviewing the merits of her claim. It found that her request did not meet at least one of the three criteria for obtaining a merit review. OWCP noted that appellant's argument that she was still totally disabled from the job she held when injured was repetitious, as was her argument that her modified limited-duty jobs were makeshift. Further, the medical evidence failed to address the issue of disability for work. It also failed to address medical conditions not accepted in appellant's claim or her ability to perform her date-of-injury job, which was immaterial to the issue of her subsequently established wage-earning capacity.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.⁴ 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.⁵

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁶ 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.⁷

ANALYSIS

The most recent merit decision in this case is OWCP's October 30, 2006 decision denying modification of its April 9, 2003 wage-earning capacity determination. Appellant sent her October 7, 2007 reconsideration request within one year of OWCP's October 30, 2006 decision. Her request is therefore timely. The question for determination is whether her request met at least one of the three standards for obtaining a merit review of her case.

³ Docket No. 08-0397 (issued October 24, 2008).

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606.

⁶ *Id.* § 10.607(a).

⁷ *Id.* § 10.608.

In her reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She identified several points of law, but she did not show how OWCP erroneously applied or interpreted them.

Appellant did not advance a relevant legal argument not previously considered by OWCP. She argued that she had not recovered from her September 25, 1993 employment injury and that medical reports over the last 14 years consistently found her totally disabled from the position she held when injured. But that is not the relevant issue. OWCP did not find that appellant had recovered or that she was fully capable of returning to her date-of-injury position. Rather, it found that her September 25, 1993 employment injury, which was accepted for an abrasion, a muscle strain and a contusion, did not totally disable her for all work in 2003. Appellant had demonstrated her capacity to perform modified duty over a sufficient period of time to establish some level of wage-earning capacity. The question, therefore, was not whether she was capable of performing her date-of-injury position, but whether the accepted medical conditions had materially changed such that she was no longer capable of performing the modified assignment upon which OWCP based its April 9, 2003 wage-earning capacity determination.

Appellant argued that her modified assignments were makeshift, but this was previously considered by an OWCP hearing representative on March 21, 2006.

Appellant further argued that the employing establishment's withdrawal of limited duty caused a recurrence of disability. This is, again, not a relevant legal argument. With a formal wage-earning capacity determination in place, the issue is not one of recurrence. The issue is whether the wage-earning capacity determination should be modified under the customary criteria.⁸

Appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. Whether the April 9, 2003 wage-earning capacity determination should be modified on the grounds that a material change in the nature and extent of the accepted medical conditions caused appellant to become totally disabled from performing the duties of her modified assignment on or about May 13, 2004, when her appointment expired, is a medical issue that should be addressed by relevant medical evidence.⁹ Appellant submitted no medical evidence with her October 7, 2007 reconsideration request.

The Board has reviewed the record following OWCP's October 30, 2006 merit decision for any relevant and pertinent new medical evidence. Although some reports described what happened on September 25, 1993, none of them adequately acknowledged the accepted conditions of abrasion, lumbosacral strain and contusion, or addressed how those particular

⁸ Once OWCP issues a formal decision on wage-earning capacity, the rating should be left in place until the claimant requests resumption of compensation for total wage loss for more than a limited period of disability, in which instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination. *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

⁹ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

medical conditions had materially worsened¹⁰ such that appellant was no longer physically able to perform her modified assignment following the expiration of her appointment on May 13, 2004.¹¹

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). She 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 by OWCP. Accordingly, pursuant to 20 C.F.R. § 10.608, OWCP properly denied a merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's October 7, 2007 reconsideration request.

¹⁰ One physician stated that appellant's initial injuries transformed into thoracolumbar strain, chronic myofascial pain syndrome, fibromyalgia, chronic low back pain, chronic cervical pain and status post sprain right thumb. He added that appellant had anxiety or panic attacks and depression, fatigue and difficulty focusing. The physician did not address appellant's claim that she became totally disabled on May 14, 2004.

¹¹ Appellant did not initially allege that her disability for work beginning May 14, 2004 was medical in nature. As she explained in November 2004, she was still able to perform her limited duty under the restrictions outlined by her treating physician. Appellant's argument for compensation was instead a legal one, that the termination of her employment entitled her to compensation, as she was neither rehabilitated nor trained nor fully recovered from her employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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