

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

C.H., Appellant	)	
	)	
and	)	<b>Docket No. 12-795</b>
	)	<b>Issued: August 21, 2012</b>
U.S. POSTAL SERVICE, POST OFFICE, Dayton, OR, Employer	)	
	)	

<i>Appearances:</i> Alan J. Shapiro, Esq., for the appellant Office of Solicitor, for the Director	<i>Case Submitted on the Record</i>
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**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 21, 2012 appellant, through her attorney, filed a timely appeal from an October 27, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from the last merit decision of July 18, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.<sup>1</sup>

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for reconsideration under 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On May 31, 2008 appellant, then a 35-year-old mail clerk, injured her low back while lifting a tray of mail. She filed a claim for benefits, which OWCP accepted for right lumbar

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<sup>1</sup> For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

sprain. OWCP subsequently accepted displacement of a lumbar intervertebral disc without myelopathy. Appellant stopped work on June 3, 2008, and returned to work on July 19, 2008. OWCP accepted that she sustained a recurrence of disability on September 24, 2008, and she did not return to work since that time. It paid compensation for temporary total disability.

In order to determine appellant's ability to perform work, OWCP referred her for a second opinion examination by Dr. Stephen J. Thomas, Board-certified in orthopedic surgery. In a report dated March 20, 2009, Dr. Thomas stated that her prognosis was somewhat guarded. He found that appellant could not do heavy physical work but could work in light category with no lifting over 20 pounds and no standing for more than 10 minutes at a time. He advised that she would need to be able to sit or stand as necessary.

On May 5, 2009 OWCP referred appellant for vocational rehabilitation services.

On December 7, 2010 a vocational rehabilitation counselor issued a report summarizing his efforts to find vocational training or suitable alternate employment for appellant within her physical restrictions. The vocational counselor recommended two positions listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT), one of which, general office clerk, DOT #209.562-010, was within appellant's restrictions and reasonably reflected her ability to earn wages. He found that she had the education, skills and training to qualify for job openings in this occupation. Appellant had worked for two months as a mail sorter with the employing establishment and had completed three months of computer and keyboarding courses at a community college in the fall 2009. The vocational counselor stated that there were a number of clerk jobs within a reasonable commuting distance of her home and concluded that there was a positive labor market for the office clerk job. While appellant was provided with academic training and completed a term of computer/keyboarding classes, she did not obtain a position. The vocational counselor noted that she missed appointments and did not return her telephone calls.

By notice of proposed reduction dated January 7, 2011, OWCP advised appellant of its proposal to reduce her compensation because the factual and medical evidence established that she was no longer totally disabled and that she had the capacity to earn wages as an office clerk, DOT #209.562-010, at the rate of \$423.60 a week, in accordance with the factors outlined in 5 U.S.C. § 8115.<sup>2</sup> The position was based on her experience, education, medical restrictions and labor market survey. Appellant was provided with 30 days to submit supportive evidence if she disagreed with this finding.

In a letter received by OWCP on February 7, 2011, appellant disagreed with the proposed reduction of her compensation. She asserted that she did make telephone contact with the vocational counselor, and provided copies of her telephone records. Appellant contended that she was not qualified for the office clerk position because she did not finish the computer and typing classes which would make her competitive for an actual job as a clerk. Her typing speed was only 30 words per minute and she made errors. Appellant never worked making telephone contact with the public and that she had poor communication skills. She stated that she was not familiar with Excel, had never handled bill payments and questioned the places to which the vocational counselor sent her resume before concluding that she was employable as a general

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<sup>2</sup> 5 U.S.C. § 8115.

clerk. Appellant questioned why OWCP considered her qualified as a clerk given the fact that she did not get any job interviews.

By decision dated February 9, 2011, OWCP reduced appellant's wage-loss compensation finding that the position of office clerk reasonably represented her wage-earning capacity.

By letter dated February 15, 2011, appellant, through her attorney, requested an oral hearing, which was held on May 25, 2011. At the hearing, counsel contended that her compensation was reduced as a sanction for noncooperation. He argued that the February 9, 2011 decision was not as clear as it should be and had little meaning. Counsel also contended that appellant was not adequately retrained. Appellant testified that she did not have any physical restrictions that would prevent her from working as an office clerk, but contended that she was not sufficiently trained for the position. She had never worked in an office setting and not able to complete the required courses. Appellant did not believe she was qualified to do the office clerk job because she lacked sufficient typing skills, customer service experience, quality focus, problem solving skills, market knowledge, documentation skills and at least one year of experience in a call center environment.

By decision dated July 18, 2011, an OWCP hearing representative affirmed the February 9, 2011 decision. She found that appellant held a bachelor's degree in finance and economics and met the specific vocational preparation requirement of the constructed position. The hearing representative found no support for appellant's argument that she was not vocationally qualified to perform the position of an office clerk.

By letter dated September 28, 2011, counsel requested reconsideration. He provided a copy of the Board's decision in *M.V.*, Docket 10-1642 (issued June 15, 2011) contending that the July 18, 2011 OWCP decision should be reversed.

By decision dated October 27, 2011, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require it to review its prior decision. It stated that while counsel submitted a decision by the Board, he did not present any argument based on that decision in his reconsideration request. Thus, the request did not constitute relevant evidence or warrant a merit review.

### **LEGAL PRECEDENT**

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.<sup>3</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>4</sup>

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<sup>3</sup> 20 C.F.R. § 10.606(b). *See generally* 5 U.S.C. § 8128(a).

<sup>4</sup> *Howard A. Williams*, 45 ECAB 853 (1994).

OWCP's regulations at 20 C.F.R. § 10.606 sets forth criteria for a request for reconsideration. This regulation specifically provides:

“(b) The application for reconsideration, including all supporting documents, must:

- (1) Be submitted in writing;
- (2) Set forth arguments and contain evidence that either:
  - (i) Shows that OWCP erroneously applied or interpreted a specific point of law;
  - (ii) Advances a relevant legal argument not previously considered by OWCP; or
  - (iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”

### ANALYSIS

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has he advanced a relevant legal argument not previously considered by OWCP. In support of her September 28, 2011 request for reconsideration, she submitted a copy of the Board's decision in *M.V.*, Docket No. 10-1642 (issued June 15, 2011).

In the present appeal, appellant did not articulate any reason how the *M.V.* decision was applicable to his case. Appellant did not set forth any argument as to why OWCP erroneously applied or interpreted a specific point of law, nor did appellant set forth a relevant legal argument not previously considered by OWCP.<sup>5</sup>

The Board has held that while reopening of a case may be predicated on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.<sup>6</sup> OWCP found that appellant did not present any argument based on the Board decisions he referenced in the reconsideration request. Therefore the argument proffered by her has no reasonable color of validity and does not serve as a basis for merit review. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>7</sup>

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<sup>5</sup> See also *Emmit Taylor*, Docket No. 03-1178 (issued July 21, 2004). A request for modification of a wage-earning capacity determination must be distinguished from a request for reconsideration of a prior decision. It is a request for additional compensation. A request for modification of a wage-earning capacity determination, supported by new and relevant evidence, requires a merit review and is not subject to a time limitation.

<sup>6</sup> *Cleopatra McDougal-Saddler*, 50 ECAB 367 (1999).

<sup>7</sup> See *David J. McDonald*, 50 ECAB 185 (1998).

The Board also notes that appellant has not submitted any new medical evidence which addresses the relevant issue of whether OWCP's February 9, 2011 decision reducing her compensation was proper.

OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for reconsideration on the merits of her claim under 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2012  
Washington, DC

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

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

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