

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

T.B., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
Bloomington, IN, Employer**

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**Docket No. 11-1185
Issued: February 17, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 19, 2011 appellant's counsel timely appealed a February 4, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied reconsideration. The last merit decision is dated July 19, 2010, more than 180 days from the date of the filing of this appeal. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only of the February 4, 2011 nonmerit decision.

ISSUE

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

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case was previously before the Board.² Appellant, a 46-year-old former rural carrier, has an accepted claim for bilateral shoulder, elbow and wrist tenosynovitis, and left shoulder instability, which arose on or about April 21, 1998. On January 17, 2006 she returned to work as a modified sales service/distribution associate, with no loss in pay. By decision dated March 31, 2006, OWCP found that appellant's earnings as a modified sales service/distribution associate fairly and reasonably represented her wage-earning capacity. It determined that she had zero loss of wage-earning capacity (LWEC).

Effective June 9, 2007, the employing establishment abolished appellant's modified sales service/distribution associate position. Appellant later filed a claim for a recurrence of disability based on the June 9, 2007 withdrawal of her limited-duty assignment. OWCP adjudicated the recurrence claim as a request for modification of the March 31, 2006 LWEC determination. In a December 1, 2008 decision, it denied modification.³ By decision dated July 15, 2009, the Branch of Hearings & Review affirmed the December 1, 2008 decision denying modification. In a July 19, 2010 decision, the Board affirmed the hearing representative's July 15, 2009 decision.⁴

On January 7, 2011 appellant's counsel requested reconsideration of the prior disallowance of the claim. He noted that his request was timely; having been filed within one year of the last merit decision dated July 19, 2010. Counsel enclosed with his request a copy of the Board's decision in *A.J.*, Docket No. 10-619 (issued June 29, 2010).⁵ He contended that the cited decision "overturns the Board's previous decision." Counsel also noted that the reconsideration request was submitted based on all the necessary medical and factual evidence having been submitted. He did not provide any additional medical or factual evidence with the January 7, 2011 request. Counsel argued that the prior decision was "contrary to fact and law" and should be vacated.

OWCP treated counsel's January 7, 2011 submission as a request for reconsideration under 20 C.F.R. § 10.606, rather than a request for modification of the March 31, 2006 LWEC determination. By decision dated February 4, 2011, it denied the January 7, 2011 request for reconsideration and did not review the merits of the claim. OWCP explained that counsel's January 7, 2011 letter "neither raised substantive legal questions nor included new and relevant evidence," and thus, was insufficient to warrant review of the prior decision.

² Docket No. 09-2246 (issued July 19, 2010).

³ Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous. *Tamra McCauley*, 51 ECAB 375, 377 (2000). The burden of proof is on the party seeking modification of the wage-earning capacity determination. *Id.*

⁴ The Board's July 19, 2010 decision is incorporated herein by reference.

⁵ In *A.J.* the Board considered whether a limited-duty assignment was makeshift, and therefore, insufficient to support an LWEC determination. Based on the facts presented, the Board found that the limited-duty position was in fact makeshift, and thus, the original LWEC determination was erroneous. Consequently, the Board reversed OWCP's decision denying modification of the LWEC determination.

LEGAL PRECEDENT

OWCP has the discretion to reopen a case for review on the merits.⁶ An application for reconsideration, including all supporting documents, must 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.⁷ When an application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

OWCP lacks the authority to review a decision of the Board. Rather than reviewing the Board's July 19, 2010 decision, OWCP's authority extends to its own prior decisions. The last decision issued by OWCP was the hearing representative's July 15, 2009 decision denying modification of the March 31, 2006 LWEC determination. Although the Board affirmed the July 15, 2009 decision, OWCP had the authority to revisit the issue of whether appellant established a basis for modifying the March 31, 2006 LWEC determination. However, OWCP never reached the merits of that particular issue.

Counsel's January 7, 2011 request for reconsideration did not mention the March 31, 2006 LWEC determination or otherwise state a basis for reconsideration. While he enclosed a copy of a recent Board decision, counsel's January 7, 2011 request did not address the issue in the case or explain how the enclosed decision was arguably relevant. Counsel did not articulate a specific legal basis for the request, but summarily concluded that the prior decision was contrary to law and fact and should be vacated. As such, the January 7, 2011 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, counsel did not advance a relevant legal argument not previously considered by OWCP. Merely enclosing a copy of a Board decision with an otherwise nonspecific request for reconsideration does not entitle appellant to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁹ As the regulations note, an application for reconsideration must set forth arguments and evidence that satisfy one of three requirements for obtaining merit review.

Appellant failed to submit any relevant and pertinent new evidence with her January 7, 2011 request for reconsideration. Counsel noted that reconsideration was based on all the necessary medical and factual evidence having previously been submitted. He did not submit any new evidence that might arguably impact the prior decision regarding modification of the March 31, 2006 LWEC determination. Consequently, appellant is not entitled to a review of the

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2) (2011).

⁸ *Id.* at § 10.608(b).

⁹ *Id.* at § 10.606(b)(2)(i) and (ii).

merits based on the third requirement under section 10.606(b)(2).¹⁰ The January 7, 2011 request for reconsideration failed to meet the threshold requirement for further review of the March 31, 2006 LWEC determination.¹¹

CONCLUSION

The Board finds that OWCP properly denied appellant's January 7, 2011 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 17, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ *Id.* at § 10.606(b)(2)(iii).

¹¹ *See generally L.C.*, 58 ECAB 535, 538 (2007).