

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

B.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gainesville, GA, Employer**

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**Docket No. 11-1276
Issued: January 18, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

In an appeal postmarked April 27, 2011 and received by the Board on May 2, 2011, appellant requested review of a November 18, 2010 decision of the Office of Workers' Compensation Programs (OWCP), denying her application for reconsideration without merit review of the claim. The record also contains an October 12, 2010 OWCP decision denying modification of a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, a notice of appeal must be filed within 180 days from the date of issuance of an OWCP final decision. Although appellant dated her appeal April 11, 2011 on the Board's application for review (Form AB-1), the appeal was not postmarked until April 27, 2011 and delivered on May 2, 2011. The Board's procedures state that if the notice of appeal is sent by United States Mail or commercial carrier and the date of delivery would result in loss of appeal rights, then the date of the postmark is used.² The date of the appeal is therefore April 27, 2011. Since this is also more than 180 days after the October 12, 2010 OWCP decision, the Board does not have jurisdiction over this decision.

¹ 5 U.S.C. § 8101 *et seq.*

² 20 C.F.R. § 501.3(f)(1).

ISSUE

The issue is whether OWCP properly found that appellant's application for reconsideration was insufficient to warrant review of the merits of her claim.

FACTUAL HISTORY

Appellant submitted a February 5, 2003 claim for compensation (Form CA-2) alleging that she sustained a back injury causally related to her duties as a rural mail carrier. OWCP accepted the claim for aggravation of a herniated lumbar disc. Appellant returned to work in a modified position in August 2004, underwent lumbar surgery on June 2005 and stopped working.

On February 6, 2006 appellant again returned to work in a modified position at four hours per day. As of April 1, 2006, she returned to a full-time modified position. By decision dated November 15, 2006, OWCP determined that actual earnings in the modified position fairly and reasonably represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115(a). It found that she had no loss of wage-earning capacity.

On August 10, 2009 OWCP received a claim for recurrence of disability (Form CA-2a) dated July 27, 2009. Appellant stated that on February 6, 2009 she received a letter from her postmaster that work was no longer available.

By decision dated October 12, 2010, OWCP denied the claim for compensation. It found that appellant had not met the criteria for modifying a wage-earning capacity determination.

Appellant requested reconsideration on November 10, 2010 by submitting an appeal request form. She resubmitted a copy of a September 21, 2010 limited-duty job offer and a September 21, 2010 supervisor letter regarding the job offer.³

By decision dated November 18, 2010, OWCP determined that appellant's reconsideration request was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains 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 evidence not previously considered by OWCP."⁵ Section

³ These documents had previously been submitted on September 27, 2010.

⁴ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application)."

⁵ 20 C.F.R. § 10.606(b)(2).

10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

As explained in the jurisdiction statement, the Board does not have jurisdiction over the October 12, 2010 OWCP decision. The issue is whether OWCP properly denied appellant's application for reconsideration without merit review of the claim.

The Board notes that while there is no time limit for a claimant to request modification of a wage-earning capacity determination,⁷ a claimant must support the request with new evidence or argument.⁸ Even if appellant's reconsideration request is characterized as a request to modify the wage-earning capacity determination, she still must meet the criteria noted above to require OWCP to review the merits of the wage-earning capacity modification issue.

In this case, appellant did not provide a new and relevant argument on the issue or show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not provide any argument with respect to the issue. As to the third standard, the submission of new, relevant and pertinent evidence, appellant did not meet this criterion. She resubmitted a September 21, 2010 job offer and informational letter that were before OWCP at the time of the October 12, 2010 final decision. Appellant therefore did not submit new evidence.

The Board accordingly finds that the record does not establish that appellant was entitled to a merit review of the claim. 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 by OWCP. Therefore, OWCP properly declined to review the merits of the claim.

On appeal, appellant argues that she should be entitled to compensation because the employing establishment had no position within her work restrictions. As the above discussion illustrates, the Board does not have jurisdiction over the merits of the modification of wage-earning capacity issue on this appeal. The Board reiterates, however, that there is no time limitation to request modification of an existing wage-earning capacity determination. Appellant may pursue the issue by submitting new and relevant evidence or argument to OWCP.

CONCLUSION

The Board finds that OWCP properly determined that a review of the merits of the wage-earning capacity issue was not warranted.

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁷ *See L.C.*, Docket No. 10-827 (issued March 4, 2011).

⁸ *See Z.J.*, Docket No. 10-2285 (issued August 11, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 18, 2010 is affirmed.

Issued: January 18, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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