

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

---

**A.R., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
St. Louis, MO, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 11-1358  
Issued: January 3, 2012**

*Appearances:*

*John S. Evangelisti, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 16, 2011 appellant, through her attorney, filed a timely appeal from a February 25, 2011 Office of Workers' Compensation Programs' (OWCP) decision denying her request for reconsideration. As more than 180 days elapsed from the date of the last merit decision of August 27, 2010 to the filing of the current appeal on May 16, 2011, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over only the nonmerit decision.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

---

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On December 11, 2008 appellant, then a 48-year-old mail handler equipment operator, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right arm and elbow injury in the performance of duty on December 11, 2008 when struck by a forklift. OWCP accepted her claim for contusion of right shoulder and upper arm, right rotator cuff shoulder sprain and right olecranon bursitis.

In an April 1, 2009 report, Dr. Mark A. Roesler, a chiropractor, indicated that appellant was diagnosed with cervical and thoracic sprain/strain with radiculopathy and subluxations. He opined that she sustained a new injury when she was struck by a forklift and was likely to have recurrence of her neck condition due to the new injury.

In a September 22, 2009 report, Dr. Peggy Boyd Taylor, a family medicine physician, reported that appellant was struck by a forklift on December 11, 2008. She diagnosed subluxations at C5, T1 and L1, as well as degenerative cervical disc. Dr. Taylor opined that appellant was totally disabled for work from September 18 to 30, 2009.

On October 2, 2009 appellant filed a notice of recurrence commencing September 18, 2009.

By letter dated October 21, 2009, the employing establishment controverted appellant's claim based on the lack of medical evidence supporting the claimed periods of disability.

In a November 3, 2009 report, Dr. Taylor diagnosed herniated C6-7 cervical disc, cervical radiculopathy, right rotator cuff strain, tendinitis right olecranon and multiple contusions and abrasions of the right upper extremity. She noted that an electromyogram of the upper extremities demonstrated mild C7 irritation and left median nerve entrapment syndrome at the left wrist consistent with carpal tunnel syndrome of moderate degree. Dr. Taylor opined that appellant did not respond to out-patient physical therapy and was in need of neurosurgical and pain specialist consultations.

By decision dated January 12, 2010, OWCP denied appellant's claim for a recurrence of total disability finding that the medical evidence submitted was insufficient to establish disability commencing September 18, 2009 causally related to the accepted employment injury.

Appellant's attorney requested a telephonic hearing which was held before an OWCP hearing representative on April 7, 2010.

By decision dated June 1, 2010, OWCP's hearing representative affirmed the January 12, 2010 decision finding that the evidence submitted was not sufficient to establish that appellant sustained a recurrence of disability commencing September 18, 2009 causally related to the December 11, 2008 employment injury.

On June 9, 2010 appellant's attorney requested reconsideration and submitted an April 22, 2010 narrative statement from appellant and a June 3, 2010 report by Dr. Robert P. Poetz, a Board-certified family medicine physician, who diagnosed herniated nucleus pulposus C6-7 to the left and status post left C6-7 foraminotomy and advised that the herniated disc was a

result of the injury sustained on December 11, 2008. A ruptured disc would be rare in a 49-year-old woman who was otherwise healthy. Dr. Poetz explained that, since appellant had no prior multilevel degenerative disc disease, no other injury between December 11, 2008 and the onset of symptoms at the end of January 2009, and given the fact that the disc would most likely be traumatic in origin, it would have to be a result of her most recent trauma which occurred on December 11, 2008. In his opinion, her mechanism of injury, in which she had fallen and had a sudden impact with a wall resulting in deceleration of her fall would have caused her neck to hyper bend and therefore result in a herniated disc.

By decision dated August 27, 2010, OWCP denied modification of the June 1, 2010 decision.

On November 24, 2010 appellant's attorney requested reconsideration and submitted a November 3, 2010 report by Dr. Poetz who quoted from Dr. Roesler's April 1, 2009 report, Dr. Taylor's September 22, 2009 report and his own June 3, 2010 report.

By decision dated February 25, 2011, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit relevant and pertinent new evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>2</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>3</sup>

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by 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.<sup>4</sup> 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.<sup>5</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>6</sup>

---

<sup>2</sup> 5 U.S.C. § 8101 *et seq.* 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).

<sup>3</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>7</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup>

### **ANALYSIS**

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by OWCP; and she has not submitted relevant and pertinent new evidence not previously considered by OWCP.

In support of her November 24, 2010 reconsideration request, appellant submitted a November 3, 2010 report by Dr. Poetz who reiterated opinions from his June 3, 2010 report and statements from Dr. Roesler's April 1, 2009 report and Dr. Taylor's September 22, 2009 report. The Board finds that submission of this report did not require reopening her case for merit review as it presented evidence previously considered. OWCP denied appellant's claim based on the lack of supportive medical evidence and this report repeats evidence already of record. It is cumulative and does not constitute relevant and pertinent new evidence. Therefore, it is not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. Because she only submitted cumulative and repetitive evidence with her request for reconsideration, the Board finds that she did not meet any of the necessary requirements and she is not entitled to further merit review.<sup>9</sup>

### **CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's claim for further consideration of the merits of her claim under 5 U.S.C. § 8128.

---

<sup>7</sup> See *A.L.*, *supra* note 4. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>8</sup> *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>9</sup> See *L.H.*, 59 ECAB 253 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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