

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

|                                   |   |                              |
|-----------------------------------|---|------------------------------|
| N.F., Appellant                   | ) |                              |
|                                   | ) |                              |
| and                               | ) | <b>Docket No. 11-1002</b>    |
|                                   | ) | <b>Issued: March 5, 2012</b> |
| U.S. POSTAL SERVICE, POST OFFICE, | ) |                              |
| Cedar Rapids, IA, Employer        | ) |                              |
|                                   | ) |                              |

|   |                                     |
|---|-------------------------------------|
| <i>Appearances:</i>                             | <i>Case Submitted on the Record</i> |
| <i>Alan J. Shapiro, Esq., for the appellant</i> |                                     |
| <i>Office of Solicitor, for the Director</i>    |                                     |

**DECISION AND ORDER**

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

**JURISDICTION**

On March 15, 2011 appellant, through her attorney, filed a timely appeal from a February 10, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. 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 to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's November 16, 2009 decision. Because more than 180 days elapsed between the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for further merit review under 5 U.S.C. § 8128(a).

---

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

<sup>2</sup> For decisions issued prior to November 19, 2008, a claimant had up to 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).

## **FACTUAL HISTORY**

On January 25, 2007 appellant, then a 43-year-old window clerk, filed an occupational disease claim (Form CA-2) alleging that she developed severe pain and muscle spasms in her right arm and shoulder along with swelling and tingling in her right hand and fingers. She reported that her left hand and arm had medical restrictions which resulted in overuse of her right arm in the repetitive motion of sorting and casing mail which irritated her tendons. Appellant also noted that looking and reaching to grab case mail irritated her neck and shoulder. She reported that she first became aware of her condition and of its relationship to her employment on January 9, 2007. Appellant notified her supervisor on January 9, 2007, received medical care on January 15, 2007 and stopped work on January 16, 2007.

In a January 25, 2007 narrative statement, appellant described her employment duties noting that her right arm began hurting her while sorting letters on January 9, 2007.<sup>3</sup>

In a January 19, 2007 medical report, Dr. David Nacos, a treating physician, reported that appellant complained of right arm pain but the x-rays of her arm and hand did not reveal any abnormalities. He recommended a magnetic resonance imaging (MRI) scan due to a prior history of herniated disc.

In a January 23, 2007 MRI scan report, Dr. Chad Abernathy, a treating physician, reported that appellant's cervical spine showed either left paracentral hard disc, herniated disc or osteophyte at C5-6 with encroachment on the thecal sac and possible cervical cord. He also noted spinal stenosis at C5-6, C6-7 and a somewhat lesser degree of osteophytes in the midline.

In a January 28, 2007 attending physician's report (Form CA-20), Dr. Nacos reported that appellant had right arm pain. He checked the box marked "yes" when asked if the condition was caused or aggravated by appellant's employment activity.

In a February 15, 2007 medical report, Dr. Nacos reported that appellant's right arm had improved and noted cervical disc herniation with right radicular symptoms. In a duty status report of the same date, he placed her on limited duty for impaired right side.

On February 21, 2007 appellant accepted an offer for modified duty.

By letter dated March 8, 2007, OWCP informed appellant that the evidence of record was insufficient to support her claim. Appellant was advised of the medical and factual evidence needed and was directed to submit it within 30 days.

In an undated narrative statement, appellant described her activities outside of her federal employment. She noted that she had a history of cervical problems beginning from February 4, 1984 when she fell at work.

In support of her statement, appellant submitted a January 22, 2003 MRI scan of her cervical spine. Dr. Thomas D. Berg, Board-certified in diagnostic radiology, noted multilevel degenerative disc disease, most severe at C5-6 and C6-7.

---

<sup>3</sup> Appellant also noted that on November 12, 1997 she experienced muscle spasms in her right arm and tenderness in her right elbow for which she underwent surgery, claim No. xxxxxx991.

In a February 19, 2003 narrative statement, appellant documented her past cervical spine history from 1984 to 2003.

In medical reports dated March 2 and 16, 2007, Dr. Nacos reported that appellant's MRI scan showed a large disc just off the midline. He diagnosed herniated disc with subsequent right radicular-type pain.

Appellant also submitted physical therapy notes dated January 15 to 17, 2007 from Amy Michels, a physical therapist (PT).

By decision dated April 26, 2007, OWCP denied appellant's claim because the evidence failed to establish that a diagnosed medical condition was related to the accepted work-related events.

On April 23, 2008 appellant requested reconsideration of OWCP's decision. She stated that Dr. Nacos read her medical history since 1984 and related her injury to a fall at work on February 4, 1984. Appellant noted that she was enclosing an April 22, 2008 medical report from Dr. Nacos, as well as other medical reports documenting her original injury from 1984.

In support of her request, appellant submitted various medical records dated April 23, 1984 to January 13, 2007 documenting her previous cervical spine history. In an October 21, 1985 medical report, Dr. G.W. Howe, Board-certified in orthopedic surgery, reported that appellant initially hurt her neck when she was taking a flag down outside of work when the rope whipped back at her and caused her to fall in February 1984. Appellant complained of pain in her neck and left scapular area. Dr. Howe diagnosed degenerative disc changes of the cervical spine and noted that her injury was aggravated by the incident at work.

In a February 10, 1992 medical report, Dr. Edward Lash, Board-certified in orthopedic surgery, reported that appellant was stretching when she heard a pop and developed sudden pain in her left deep neck and down into the left shoulder blade area. He diagnosed cervical disc disease.

In a January 21, 2003 medical report, Dr. Wayne Janda, Board-certified in orthopedic surgery, reported that appellant complained of back, shoulder and arm pain. He noted that her pain began in October 2002 and was aggravated by riding in vehicles and sitting. Dr. Janda also noted that she had right elbow surgery in November 1999. He diagnosed cervical radicular syndrome, left upper extremity, with suspected C6-7 radiculopathy. Dr. Janda also noted cervical spondylosis and arthritic spurring with impingement or a potential new disc problem.

In a January 31, 2007 medical report, Dr. Abernathy reported that appellant complained of neck pain with intermittent radiation into the right upper extremity since January 9, 2007. He noted that she presented neck and intermittent right arm pain consistent with the C5-6 and C6-7 degenerative changes as demonstrated by MRI scan. In medical notes dated April 16 to September 21, 2007, appellant had follow-up visits with Dr. Abernathy. In his September 21, 2007 note, Dr. Abernathy noted that he did not have any work restrictions for her from a neurological standpoint.

On June 26, 2008 appellant accepted an offer of modified assignment.

By decision dated July 25, 2008, OWCP denied appellant's claim finding that the evidence did not contain a physician's opinion which established a condition in her neck causally related to factors of her federal employment. It specifically noted that no medical report from Dr. Nacos dated April 22, 2008 was received.<sup>4</sup>

On July 6, 2009 appellant requested reconsideration of OWCP's July 25, 2008 decision. She reported that her current condition related back to her injury which started in 1984. Appellant stated that, although she had surgery on May 16, 2007, she received physical therapy both before and after her surgery. She also noted that she was released from light duty until July 9, 2007. Appellant stated that she was resubmitting Dr. Nacos' April 22, 2008 letter along with a letter from Postmaster Larry Sanders who would verify that she fell at work at the employing establishment.

In a July 6, 2009 statement, Mr. Saunders reported that appellant fell on the morning of February 4, 1984 because the rope of a flagpole broke when she was taking the flag down. He noted that she had missed several periods of work since that date due to neck and shoulder pain.

Appellant submitted an October 11, 1985 x-ray report from Dr. Gardner who noted narrowing of the C5-6 disc space consistent with degenerative disc disease. She also submitted physical therapy notes dated May 1 and September 7, 2007.

In an April 22, 2008 medical report, Dr. Nacos reported that appellant sustained a neck injury in February 1984 and was diagnosed with cervical disc disease at C4-5, C5-6 in October 1985 by Dr. Howe. He noted that she later had herniated cervical discs. Dr. Nacos opined that appellant's cervical instability and disc disease had continued to be a problem and subsequently lead to more cervical problems with her herniated discs in 2007.

By decision dated November 16, 2009, OWCP affirmed its July 25, 2008 decision finding that the medical evidence submitted did not support a condition that resulted from appellant's work exposure. It also noted that the system did not contain any record of a traumatic injury claim filed from 1984.

By letter dated November 13, 2009, the employing establishment controverted the claim. It stated that appellant had seven claims since her employment with the postal service over the past 29 years.

On November 12, 2010 appellant, through her representative, requested reconsideration of OWCP's decision dated November 16, 2009. She stated that Dr. Howe's October 17, 1985 medical report provided a diagnosis and that Dr. Nacos' letters were sufficient to meet her burden of proof. In support of her request, appellant submitted a position description for her employment as a mail processing clerk and distribution clerk. She also noted that she was enclosing copies of medical reports from Dr. Howe and Dr. Lash.

By decision dated February 10, 2011, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence.

---

<sup>4</sup> The senior claims examiner also noted that she reviewed all of appellant's other case files, claim Nos. xxxxxx991, xxxxxx854 and xxxxxx971. No report from Dr. Nacos was present in any of the files.

## LEGAL PRECEDENT

To reopen a case for merit review under section 8128(a), 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>5</sup> Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>6</sup>

## ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

In her November 12, 2010 request for reconsideration, appellant stated that Dr. Howe's October 17, 1985 medical report provided a diagnosis and that Dr. Nacos' letters were sufficient to meet her burden of proof. In support of her request, she submitted a position description for her employment as a mail processing and distribution clerk. Appellant also noted that she was enclosing copies of medical reports from Dr. Howe and Dr. Lash. She has not otherwise provided argument or evidence of sufficient probative value to show that Dr. Howe and Dr. Lash's medical reports were sent and received by OWCP. The record before the Board contains no such report.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her November 12, 2010 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant apparently failed to submit any medical evidence addressing a medical diagnosis causally related to her accepted employment factors as a mail clerk. There is no indication that a medical report concerning causal connection was received by OWCP. Appellant's argument was that her injury was employment related and she referenced the medical reports of Dr. Howe and Dr. Nacos. OWCP had already considered this evidence in its previous merit decisions. Appellant also submitted a position description for a mail and distribution clerk. This position description, however, is not relevant to the issue at hand. The underlying issue in this case was whether appellant established a diagnosed condition causally related to her accepted employment factors. That is a medical issue which must be addressed by relevant medical evidence.<sup>7</sup> A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant did not submit any new and relevant medical evidence.

---

<sup>5</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>6</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>7</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). 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. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review in the February 10, 2011 decision.<sup>8</sup>

**CONCLUSION**

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated February 10, 2011 is affirmed.

Issued: March 5, 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

---

<sup>8</sup> *Sherry A. Hunt*, 49 ECAB 467 (1998).