

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

T.W., Appellant)

and)

**DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
Asheville, NC, Employer)**

**Docket No. 13-935
Issued: August 16, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 11, 2013 appellant filed a timely appeal of a February 21, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Because more than 180 days elapsed between the last merit decision of OWCP dated July 20, 2011 to the filing of this appeal on March 11, 2013, the Board lacks jurisdiction to review the merits of appellant's claim.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review only the February 21, 2013 nonmerit decision.

ISSUE

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

¹ For final adverse OWCP decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e) (2009); *R.C.*, Docket No. 10-2371 (issued July 14, 2011).

² 5 U.S.C. § 8101 *et seq.*

On appeal appellant contends that OWCP has failed to pay her retroactively for the period her compensation was suspended as she underwent a second opinion medical examination on December 2, 2011.

FACTUAL HISTORY

This case has previously been before the Board. On October 11, 2012 the Board affirmed a July 20, 2011 OWCP hearing representative's decision, which had affirmed a January 7, 2011 OWCP decision suspending appellant's compensation benefits in accordance with 5 U.S.C. § 8123 on the grounds that she refused to cooperate with a scheduled medical examination.³ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.⁴

On November 29, 2012 appellant requested reconsideration on OWCP's denial of payment of wage-loss compensation for the period January to August 2011 when OWCP suspended her compensation pursuant to 5 U.S.C. § 8123.⁵ In support of her request, appellant submitted medical and factual evidence including an October 22, 2012 work/school excuse from Dr. Richard Mays, an attending Board-certified family practitioner, stating that he examined her on November 3, 2010; an October 2, 2012 note from Dr. Mays requesting OWCP authorize Mentaz as a covered medicine; and a December 17, 2012 progress note from Dr. Jay H. Warrick, a treating Board-certified internist and rheumatologist, providing an update on appellant's condition.

By decision dated February 21, 2013, OWCP denied appellant's request for reconsideration.⁶

³ Docket No. 12-409 (issued October 11, 2012). As noted, in its October 11, 2012 decision, the Board found that OWCP properly suspended appellant's compensation benefits effective January 16, 2011 as she failed to attend the scheduled medical examination without showing good cause for her refusal. Decisions and orders of the Board are final upon expiration of 30 days from the date of issuance. 20 C.F.R. § 501.6(d). While an appellant may file a petition for reconsideration with the Board within 30 days of the date of issuance of a Board decision (20 C.F.R. § 501.7(a)), she did not file a petition for reconsideration with the Board of its October 11, 2012 decision.

⁴ On July 6, 1988 appellant, then a 34-year-old secretary/medical clerk, filed a traumatic injury claim alleging that on that day she injured her neck and back when she slipped and fell on a wet floor. OWCP accepted the claim for chronic low back pain, chronic low back strain myalgia and myositis, lumbago and low back strain myofascial pain syndrome. By letter dated October 16, 1991, OWCP placed appellant on the periodic rolls effective September 12, 1988.

⁵ Appellant requested OWCP to expand her claim to include the condition of depression and requested authorization for a scooter and bed wedges. OWCP has not issued a final decision on this claim. On February 13, 2013 OWCP issued a notice proposing to terminate her compensation benefits. However, no final decision had been issued at the time of appellant's appeal to the Board on March 11, 2013. Thus, the Board lacks jurisdiction to address these issues on appeal. 20 C.F.R. § 501.2(c); *see E.L.*, 59 ECAB 405 (2008); *Linda Beale*, 57 ECAB 429 (2006) (the Board's jurisdiction extends only to the review of final decisions by OWCP).

⁶ The Board notes that, following the February 21, 2013 nonmerit decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁷ OWCP's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by OWCP.⁸ 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.⁹ 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.¹⁰

ANALYSIS

On November 29, 2012 appellant requested reconsideration. However, she did not submit any relevant and pertinent new evidence or new relevant argument with her request. In the October 22, 2012 work excuse note, Dr. Mays stated that he saw appellant on November 3, 2010 for pain. This statement is repetitive of his February 4, 2011 note which also stated that he saw appellant on November 3, 2010. OWCP considered and rejected Dr. Mays' February 4, 2011 report in its July 20, 2011 merit decision, which was affirmed by the Board on October 11, 2012. The Board has held that evidence which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹¹ The remaining medical evidence submitted by appellant from Drs. Mays and Warrick, while new, is neither pertinent nor relevant as it does not address the issue of her failure to attend a scheduled second opinion appointment on November 3, 2010. The Board has held that the submission of evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim.¹² Because appellant did not raise new arguments or present new evidence that OWCP erroneously applied or interpreted a specific point of law; advanced any relevant legal arguments not previously considered by OWCP; or present any relevant and pertinent new evidence, she is not entitled to further review of the merits of her claim under any criteria of section 10.606(b)(3).¹³

⁷ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁸ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁹ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

¹⁰ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

¹¹ *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *H.G.*, 59 ECAB 552 (2008); *D'Wayne Avila*, 57 ECAB 642 (2006); *Denis M. Dupor*, 51 ECAB 482 (2000).

¹² *S.J.*, *supra* note 9; *L.H.*, 59 ECAB 253 (2007); *Tina M. Parrelli-Ball*, *supra* note 10.

¹³ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *W.C.*, 59 ECAB 372 (2008); *Susan A. Filkins*, *supra* note 8.

As appellant did not meet any of the regulatory requirements for review of the merits of her claim, OWCP properly denied her November 29, 2012 request for reconsideration.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen her case for further review of the merits under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 21, 2013 is affirmed.

Issued: August 16, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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