

FACTUAL HISTORY

On December 5 and 26, 2001 appellant, then a 28-year-old city carrier, sustained traumatic injuries while in the performance of duty. She stopped work on January 15, 2002 and did not return. OWCP accepted her claims, assigned File Nos. xxxxxx661 and xxxxxx400,² for bilateral upper limb reflex sympathetic dystrophy, right shoulder adhesive capsulitis and contusions of the face, scalp and neck.³ Appellant was placed on the periodic rolls beginning June 16, 2002 and received disability compensation accordingly. She designated a representative.

OWCP referred appellant to Dr. Mary O. Baiyeri, a Board-certified neurologist, for an impartial medical examination. In a February 28, 2011 report, Dr. Baiyeri reviewed the medical file and conducted a physical evaluation. She noted that appellant's right shoulder adhesive capsulitis and various contusions resolved and that her remaining symptoms were inconsistent with bilateral upper limb reflex sympathetic dystrophy. Based on these findings, Dr. Baiyeri concluded that appellant was no longer disabled as a result of her work injuries.

On November 30, 2011 OWCP issued a notice of proposed termination of wage-loss compensation and medical benefits and required rebuttal evidence to be submitted within 30 days.

An envelope addressed to appellant's representative and postmarked December 1, 2011 was labeled "Attempted" and "Unknown" by the U.S. Postal Service. It contained a copy of the November 30, 2011 pretermination notice.

In a November 22, 2011 report, Dr. Neil J. Atlin, an osteopath and Board-certified anesthesiologist, related that appellant experienced left upper extremity pain, discoloration, hyperesthesia and allodynia. He diagnosed stage 2 complex regional pain syndrome.

By decision dated December 30, 2011, OWCP terminated appellant's medical and wage-loss benefits effective January 15, 2012, finding that the weight of the medical evidence established that her accepted conditions had resolved.

Appellant requested reconsideration on May 15, 2012, arguing that the November 30, 2011 pretermination notice was not properly delivered. By decision dated June 25, 2012, OWCP denied her request on the grounds that she did not submit new and relevant evidence warranting further merit review. OWCP did not address her legal contention.

² OWCP combined the claims into File No. xxxxxx400, which is designated as the master file.

³ This information was incorporated into the March 23, 2012 statement of accepted facts.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that the evidence or argument submitted by a claimant must either: (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.⁵ Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

The Board finds that appellant advanced a relevant legal argument that was not previously considered by OWCP. The standard for reopening a claim for merit review does not require the claimant to submit all evidence that may be necessary to discharge her burden of proof.⁷ A request for reconsideration predicated on a legal premise need only contain an assertion of an adequate legal premise having some reasonable color of validity.⁸ According to its procedures, OWCP must provide notice prior to termination in all cases where benefits are being paid on the periodic rolls.⁹ Pretermination notice is not required if the claimant dies, returns to work, is convicted of defrauding the FECA program, or forfeits compensation by failing to report earnings.¹⁰ Where the employee has an attorney or other representative, the original or copy of any letter sent to the claimant should also be sent to that person.¹¹ In the absence of evidence to the contrary, a notice properly addressed and duly mailed to an individual in the ordinary course of business is presumed to have been received by that individual.¹² However, this presumption is rebutted when there is evidence of nondelivery.¹³

⁴ 5 U.S.C. § 8128(a).

⁵ *E.K.*, Docket No. 09-1827 (issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

⁶ *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.608(b).

⁷ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ See *Charles A. Jackson*, 53 ECAB 671 (2002); *Daniel O'Toole*, 1 ECAB 107 (1948).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(a) (March 1997). See also *id.* at Chapter 2.1440.6(c) (pretermination notice is not needed to end daily roll payments if such payments have continued for less than a year). The Board has held that OWCP must follow its procedures and provide notice and an opportunity to respond before the termination of compensation benefits. *K.S.*, Docket No. 11-2021 (issued August 21, 2012); *Winton A. Miller*, 52 ECAB 405 (2001).

¹⁰ Federal (FECA) Procedure Manual, *id.* at Chapter 2.1440.6(c).

¹¹ *Id.* at Chapter 2.300.4(e) (February 2000). See also *id.* at Chapter 2.1200.3(b) (June 2012).

¹² *Marilyn K. Webb*, Docket No. 00-747 (issued September 19, 2001); *Newton D. Lashmett*, 45 ECAB 181 (1993) (mailbox rule).

¹³ *E.C.*, Docket No. 11-510 (issued September 8, 2011).

In the present case, OWCP issued a pretermination notice on November 30, 2011. The evidence shows that this notice was not delivered to appellant's representative.¹⁴ Therefore, appellant offered a valid legal argument that was not previously considered by OWCP. The case shall be remanded for a merit review. After such further development as is deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2012 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further merit review.

Issued: February 19, 2013
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

¹⁴ The Board notes that OWCP did not attempt to ascertain the representative's correct address.