

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

S.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Dacono, CO, Employer

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**Docket No. 12-1107
Issued: January 22, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 24, 2012 appellant filed a timely appeal from the November 21, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her reconsideration request. As more than 180 days elapsed from the issuance of OWCP's May 26, 2011 merit decision to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review only the November 21, 2011 nonmerit decision.

ISSUE

The issue is whether OWCP properly denied appellant's September 5, 2011 reconsideration request.

FACTUAL HISTORY

On August 27, 2010 appellant, a 28-year-old rural carrier, filed a traumatic injury claim alleging that she injured her back on August 26, 2010 while lifting a full tray of mail, turning and placing it in a hamper.

¹ 5 U.S.C. § 8101 *et seq.*

In a November 5, 2010 decision, OWCP denied appellant's claim for workers' compensation benefits. It found that the August 26, 2010 incident occurred as alleged, but that she did not submit a well-reasoned medical opinion explaining how that specific incident caused her diagnosed back condition. OWCP noted that appellant had a recent history of chronic back pain.

On February 22, 2011 Dr. Nicholee Theiss, Board-certified in family medicine, advised that she was appellant's primary care physician for several years. She noted that appellant had a history of chronic thoracic back pain due to a bulging disc at T11-12. When Dr. Theiss examined appellant on September 8, 2010 following the work injury, not only was her thoracic back pain exacerbated, but she now had left lumbar back pain and radicular symptoms. Her examination showed limited range of motion and tenderness in those areas.

Dr. Theiss noted that emergency room x-rays were reportedly normal. An imaging study showed mild disc degeneration and moderate bilateral facet arthritic changes at L4-5 resulting in mild central canal stenosis and narrowing of the exit zones for the L5 nerve roots. "As supported by my findings on September 8, 2010, it is my medical opinion that not only did the injury sustained on August 26, 2010 exacerbate her chronic thoracic back pain but it also caused new lumbar back pain with radiculopathy."

OWCP reviewed the merits of appellant's claim and denied modification of its prior decision. It found that none of the medical evidence provided her physician's opinion, with medical rationale and objective findings, supporting a causal relationship between the August 26, 2010 incident and her diagnosed back condition. OWCP noted that pain was generally a symptom and not a firm medical diagnosis. More specifically, it found that the medical evidence did not explain how lifting and turning with a tray of mail caused appellant's current condition "in light of the fact that it's clear you have a preexisting condition of osteoarthritis of the thoracic vertebrae with bulged discs and scoliosis."

On September 5, 2011 appellant requested reconsideration. She submitted Dr. Theiss' August 18, 2011 report. Dr. Theiss explained that, prior to the August 26, 2010 injury, appellant did not have any low back pain or radicular symptoms. Since the injury, however, she continued to have constant pain in the low back and left leg. Appellant continued to have intermittent paresthesias and numbness in the left leg as well, secondary to the injury. Dr. Theiss stated: "I believe that when [appellant] lifted and turned with the tray of mail this day, the weight of the tray on the vertebral column and the subluxation of the vertebrae on each other impinged upon nervous system tissue and damaged this nervous system tissue permanently, resulting in pain and radiculopathy." He noted that appellant's examination consistently showed tenderness and her symptoms were unchanged despite maximum medical management.

In a November 21, 2011 decision, OWCP denied appellant's reconsideration request without reviewing the merits of her case. It found Dr. Theiss' August 18, 2011 report duplicative.

On appeal, appellant argued that she was injured on the job and deserves compensation. She believes that her physician has given excellent evidence.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.² An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain 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 new evidence not previously considered by OWCP.³

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁴ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

As noted, appellant did not file a timely appeal of OWCP's most recent merit decision of May 26, 2011. For that reason, the Board has no authority to review that decision or the merits of her injury claim. The only decision that the Board may review is OWCP's November 21, 2011 nonmerit decision denying appellant's reconsideration request. The only issue that the Board may, therefore, decide is whether OWCP properly denied that request.

To support her reconsideration request, appellant submitted the August 18, 2011 report of Dr. Theiss, her attending physician, who discussed, for the first time, the physiological mechanism of the August 6, 2010 injury. Dr. Theiss explained that, when appellant lifted and turned with the tray of mail, the weight of the tray on the vertebral column and the subluxation of the vertebrae on each other impinged upon nervous system tissue and damaged this tissue permanently, resulting in pain and radiculopathy. This report provided additional explanation on the issue of causal relationship.

The Board has conducted a limited review of Dr. Theiss' February 22, 2011 report and can find no similar explanation of the mechanism of injury. The rationale Dr. Theiss provided in her August 18, 2011 report is new and relevant.⁶ It directly addresses OWCP's previous finding that the medical evidence did not explain how lifting and turning with a tray of mail caused appellant's current condition.

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606.

⁴ *Id.* § 10.607(a).

⁵ *Id.* § 10.608.

⁶ *See* Fed. R. Evid. 401 ("relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequent to the determination of the action more probable or less probable than it would be without the evidence).

To obtain a reopening of her case for a merit review, appellant need not submit evidence that cures all the deficiencies in her claim and establishes her entitlement to compensation.⁷ She need only submit evidence that is relevant and pertinent new evidence not previously considered by OWCP.⁸ The Board finds that appellant has submitted such evidence and is therefore entitled to a merit review of her case. The Board set aside OWCP's November 21, 2011 decision denying reconsideration and will remand the case for a merit review and *de novo* decision on her injury claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's September 5, 2011 reconsideration request. Appellant is entitled to a merit review of her case.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further action in conformance with this decision.

Issued: January 22, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

⁷ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁸ See 20 C.F.R. § 10.606(b)(3)(iii). See also *Mark H. Dever*, 53 ECAB 710 (2002).