

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

C.K., Appellant)

and)

U.S. POSTAL SERVICE, MANAGEMENT)
SECTION CENTER, Baltimore, MD, Employer)

**Docket No. 12-1487
Issued: January 23, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 2, 2012 appellant filed a timely appeal from nonmerit decisions of the Office of Workers' Compensation Programs (OWCP) dated March 30 and June 18, 2012 denying her requests for reconsideration. Because more than 180 days has elapsed between the last merit decision dated July 8, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. 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 the March 30 and June 18, 2012 nonmerit decisions.

ISSUE

The issue is: (1) whether OWCP properly determined on March 30 and June 18, 2012 that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been on appeal to the Board. On February 7, 2003 the Board affirmed an October 8, 2002 decision denying appellant's claim for wage-loss compensation for the period March 2 to 12, 2002 due to the lack of competent medical evidence supporting her disability claim.² In the second appeal on March 11, 2010, the Board found an unresolved conflict in the medical evidence between Dr. Robert W. Macht, an examining Board-certified surgeon, and Dr. Arnold T. Berman, OWCP's medical adviser and Board-certified orthopedic surgeon, regarding the extent of appellant's left leg impairment.³ Thus, the Board set aside the March 14 and October 6, 2008 OWCP decisions and remanded the case for resolution of the unresolved conflict in the medical opinion evidence as to whether appellant had any permanent impairment. The Board, in a third appeal issued on July 8, 2011, affirmed a May 14, 2010 schedule award decision based on the opinion of Dr. Barry J. Waldman, a Board-certified orthopedic surgeon.⁴ It also affirmed a July 1, 2010 decision denying her request for a merit review. The facts and the circumstances of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

Subsequent to the Board's July 8, 2011 decision appellant submitted a copy of a December 9, 2010 New York State Board for Professional Misconduct statement of charges which Dr. Waldman had been reprimanded by the State of Maryland. It alleged that Dr. Waldman had been placed on probation for one year on or about December 16, 2009 for failing to meet the standard of care in the case of two patients. In her October 9, 2011 letter, appellant argued that as Dr. Waldman had been on probation at the time of his examination of her that he was not appropriate to act as an impartial medical examiner.

On December 22, 2011 appellant requested reconsideration. She noted that she had been diagnosed with Piriformis Syndrome of the buttocks which she attributed to her employment injury.

By decision dated March 30, 2012, OWCP denied appellant's reconsideration request.

In an April 5, 2012 letter, appellant requested reconsideration of her schedule award claim. In support of her request, she submitted medical evidence including a December 22, 2011 report from Dr. Morvarid Yousefi, an examining physician; a February 18, 2002 report from Kenneth Miller, a physical therapist; a page from an April 30, 2003 functional capacity evaluation; an upper extremity diagram; and a May 15, 2003 office note from Family practice. Dr. Yousefi provided physical findings and diagnosed left sided Piriformis syndrome.

² Docket No. 03-139 (issued February 7, 2003). On May 9, 2002 appellant, then a 46-year-old mail processor, filed a traumatic injury claim alleging that she injured her lower back on January 26, 2002 while bending over to pull a full tray of mail. OWCP accepted the claim for a lumbar strain/sprain on September 24, 2002. Appellant resigned from the employing establishment effective June 14, 2003.

³ Docket No. 09-1142 (issued March 11, 2010).

⁴ Docket No. 10-1926 (issued July 8, 2011).

By decision dated June 18, 2012, OWCP denied appellant's reconsideration request.⁵

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ 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) constitute relevant and pertinent new evidence not previously considered by OWCP.⁷ 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.⁸ 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.⁹

ANALYSIS

Appellant requested reconsideration in letters dated December 22, 2011 and April 5, 2012. She contended that OWCP erred in its schedule award determination and requested OWCP to accept the condition of Piriformis Syndrome of the buttocks. By decisions dated March 30 and June 18, 2012, OWCP denied appellant's request for a merit review. The question is whether appellant's requests met one of the three criteria for obtaining a merit review of her case.

Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law not previously considered. She continued to contend that her impairment rating should be based on the rating provided by Dr. Macht in both her December 22, 2011 and April 5, 2012 reconsideration requests. This argument has previously been considered by both the Board and OWCP.¹⁰ Thus, it is insufficient to reopen the case for further merit review.

⁵ Appellant requested OWCP to accept the additional condition, Piriformis Syndrome of the buttocks as causally related to her accepted employment injury. The Board's jurisdiction is limited to reviewing final decisions of OWCP issued under FECA. 20 C.F.R. § 501.2(c). OWCP has not formally adjudicated whether it should expand acceptance of the claim to include Piriformis Syndrome of the buttocks and thus the issue is not before the Board at this time. *Id.*

⁶ 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 anytime on her own motion or on application.

⁷ 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).

⁸ *Id.* at § 10.607(a). *See S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

¹⁰ Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case on its merits. *See Eugene F. Butler*, 36 ECAB 393 (1984).

In her December 22, 2011 request for reconsideration, appellant contended Dr. Waldman to be an inappropriate physician to act as an impartial medical adviser since he had allegedly been placed on probation for one year by the Maryland Physician Board. In support of her contention, she submitted a December 9, 2010 statement of charges by the New York Bureau of Professional Misconduct. This statement of charges, however, does not establish the underlying facts. This document does not establish that Dr. Waldman had been put on probation for one year beginning December 19, 2009. The record does not contain a copy of any disciplinary action by the State of Maryland against Dr. Waldman. Thus, there is no probative evidence, concerning Dr. Waldman that would be relevant to the underlying issue of permanent impairment. Consequently, the argument does not have a reasonable color of validity such that it would warrant reopening her case for merit review.¹¹

Appellant did not submit any pertinent new and relevant medical evidence with her requests for reconsideration which was relevant to her schedule award claim. None of the medical evidence submitted by appellant discusses an impairment rating. Although the December 22, 2011 report by Dr. Yousefi was new to the record, it did not address the issue of lower extremity impairment under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, A.M.A., *Guides* (6th ed. 2009).¹² Appellant did not provide any new medical evidence relevant to the issue of impairment to her left leg impairment. Consequently, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).¹³

The Board finds that OWCP properly determined that appellant was not entitled to further consideration of the merits of her claim pursuant to any of the three criteria under 20 C.F.R. § 10.606(b)(2), and thus OWCP properly denied her December 22, 2011 and April 5, 2012 requests for reconsideration.

CONCLUSION

The Board finds that, as appellant did not meet the criteria of 20 C.F.R. § 10.606(b)(2), OWCP properly refused to reopen the case for merit review.

¹¹ *M.E.*, 58 ECAB 694 (2007); *Elaine M. Borghini*, 57 ECAB 549 (2006).

¹² *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *R.M.*, 59 ECAB 690 (2008); *Dwayne Avila*, 57 ECAB 642 (2006) (evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim).

¹³ 20 C.F.R. § 10.606(b)(2)(1) and (2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 18 and March 30, 2012 are affirmed.

Issued: January 23, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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