

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

W.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Palm Desert, CA, Employer**

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**Docket No. 12-1696
Issued: January 8, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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 August 6, 2012 appellant, through her attorney, filed a timely appeal of a July 24, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), denying her application for reconsideration without merit review of the claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the July 24, 2012 nonmerit decision. Since more than 180 days has elapsed between the last merit decision on October 31, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(e).

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 30, 2010 appellant, then a 55-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 2010 she injured her back in the performance of duty when she pushed a box. On October 6, 2010 OWCP accepted the claim for a lumbar sprain. The record indicates that appellant worked part time and then stopped working on October 23, 2010.

In a report dated February 15, 2011, Dr. Reginald Fayssoux, an orthopedic surgeon, diagnosed lumbago and stated that appellant's examination was unchanged, with no pain on provocative maneuvers except for seated axial rotation and lumbar extension. OWCP referred appellant for a second opinion examination by Dr. Aubrey Swartz, a Board-certified orthopedic surgeon. In a report dated May 26, 2011, Dr. Swartz provided a history and results on examination. He diagnosed status post lumbar sprain with mild degenerative changes from L4-S1. Dr. Swartz opined that there were no objective residuals of the employment injury and appellant could return to work with lifting modifications. He stated that at appellant's age she would have difficulty lifting 70 pounds. Dr. Swartz completed a work capacity evaluation (Form OWCP 5c) dated June 17, 2011 with a 35-pound lifting restriction.

By letter dated June 30, 2011, OWCP forwarded a copy of Dr. Swartz's report to Dr. Fayssoux for his comment. In a letter dated August 12, 2011, to appellant, it proposed to terminate her compensation. OWCP found that Dr. Swartz represented the weight of the evidence and established no continuing employment-related residuals.

In a letter dated August 30, 2011, appellant stated that she still had back problems and had tried to see her attending physician but was "denied authorization." On September 12, 2011 she submitted an August 23, 2011 report from Dr. Fayssoux who reported that appellant stated that her condition had not been upgraded to include an annular tear at L5-S1. Dr. Fayssoux stated that appellant had a typical history for someone with an annular tear/degenerative disc, and these patients typically did not have many physical findings. On September 26, 2011 appellant also submitted a July 18, 2011 report from Dr. Fayssoux opining that she had a permanent impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

By decision dated October 13, 2011, OWCP terminated compensation for wage-loss and medical benefits. It found that the medical evidence did not establish an annular tear or degenerative changes as employment related. According to OWCP, appellant had not been previously denied authorization for medical treatment.

Appellant requested reconsideration and submitted a May 29, 2012 letter. Accordingly, she had assumed that the findings on an magnetic resonance imaging (MRI) scan would be accepted as employment related and was unaware that her physician needed to "upgrade" her condition to include the MRI scan findings. Appellant stated that she continued to have back pain and the employment injury caused bulging discs. She asserted that OWCP's claims examiner did not return telephone calls and she did not know until it was too late that her physician had not filled out the proper paperwork.

By decision dated July 24, 2012, OWCP declined to review the merits of the claim for compensation. It found the application for reconsideration was insufficient to warrant merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."³ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁴

ANALYSIS

In the present case, OWCP terminated compensation for wage-loss and medical benefits, effective October 13, 2011, based on the medical evidence of record. Appellant must meet one of the requirements noted above to require OWCP to review the merits of that decision. The May 29, 2012 letter does not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not discuss a specific point of law or show error in its application or interpretation.

In addition, appellant's reconsideration request did not advance a relevant legal argument not previously considered by OWCP. She indicated that she felt her physician did not complete the proper paperwork with respect to additional employment-related conditions and OWCP was not responsive in handling her claim. The Board notes that, with respect to establishing an additional condition as employment related, appellant has the burden to submit probative evidence.⁵ As to an argument that OWCP was not responsive, the Board notes that OWCP provided a June 30, 2011 letter to Dr. Fayssoux requesting an opinion on the relevant medical issues, and OWCP issued a notice of proposed termination and provided appellant an opportunity to respond and submit evidence. It is well established that where the legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.⁶ Appellant did not advance a new and relevant legal argument with respect to her claim.

² 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.")

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁶ *Norman W. Hanson*, *supra* note 4.

As to the submission of “relevant and pertinent evidence not previously considered by OWCP,” appellant did not submit any new evidence. She stated that her back remained painful. The issue as to a continuing employment-related condition or disability is a medical issue and must be addressed by a physician under FECA to be of probative value.⁷ The Board finds that appellant did not submit new and relevant evidence.

Accordingly, the Board finds that the application for reconsideration 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 by OWCP. OWCP therefore properly denied the application for reconsideration without merit review of the claim.

CONCLUSION

The Board finds that OWCP properly denied appellant’s application for reconsideration without merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated July 24, 2012 is affirmed.

Issued: January 8, 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

⁷ See *Barbara J. Williams*, 40 ECAB 649, 657 (1989); 5 U.S.C. § 8101(2).