

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

D.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Peekskill, NY, Employer**

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**Docket No. 12-1890
Issued: January 24, 2013**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 10, 2012 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) July 3, 2012 nonmerit decision denying her request for reconsideration. The last merit decision in this case was the Board's September 22, 2011 decision affirming OWCP's denial of appellant's traumatic injury claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

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).

On appeal, counsel contends that appellant submitted relevant and pertinent evidence not previously considered by OWCP such that a merit review was required.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board. In a decision dated September 22, 2011, the Board denied appellant's February 12, 2010 traumatic injury claim, in which she alleged that she sustained an injury to her right knee in the performance of duty when the folding table at which she was working collapsed. The Board found that appellant's presentation of the facts was not supported by the evidence of record and did not establish her allegation that a specific event occurred which caused an injury on the date in question. The Board also found there to be inconsistencies in the evidence which cast serious doubt on the validity of her claim.² The facts and the law contained in the Board's prior decision are incorporated herein by reference.

On May 22, 2012 appellant, through her representative, requested reconsideration. Noting that the original table had been discarded by the employing establishment, the representative submitted two photographs of tables described as "duplicates of the defective table to demonstrate the magnitude of weight [appellant] supported on her knee and with her hands." Appellant also submitted medical reports for the period August 15, 2010 through March 27, 2012; a personal statement; and two witness statements from her husband.

Appellant reiterated her description of the January 23, 2010 incident in which she injured her right knee. She alleged that when her work table collapsed, she was unable to move her legs from under the table because she was pinned in by adjacent boxes and a utility cart. Appellant stated that she was submitting a statement from her husband, who works at the employing establishment and witnessed the table immediately after the incident and observed her pain following the injury.

In a January 13, 2012 statement, appellant's husband indicated that on the date in question appellant was performing her normal clerical duties when the long, heavy table at which she was working began to collapse down on her. She injured her right knee while attempting to hold the table up.

In a statement dated January 21, 2012, appellant's husband reported that he did not directly witness the events of January 23, 2012; he stated, however, that he discovered what happened later that same morning, as he is an employee and union steward at the same facility. When he inspected the table where appellant had been working, he observed that the safety bracket was "flared" in a manner that rendered it useless. During the following week, his wife experienced a great deal of right knee pain. On January 30, 2012, he was summoned by appellant's supervisor because his wife was experiencing severe knee pain and swelling. He observed his wife surrounded by numerous coworkers, who were watching her cry.

In his capacity as a shop steward, appellant's husband performed an investigation of the circumstances surrounding the claimed injury. He interviewed Linda Aldi, a coworker, and SCS Kaiser. Appellant's husband noted that the employees' statements were somewhat inconsistent; however, both confirmed that the table collapsed on appellant's right knee on the date in question.

² Docket No. 11-557 (issued September 22, 2011).

By decision dated July 3, 2012, OWCP denied appellant's request for reconsideration. It did not review the merits of the claim because the evidence submitted was irrelevant, immaterial or duplicative. OWCP explained that appellant's husband's statement was immaterial because he did not witness the events first hand.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by 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; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.³ 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.⁴ 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.⁵ The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁶

ANALYSIS

In denying appellant's request for reconsideration, OWCP found that the evidence submitted was either irrelevant, immaterial or duplicative. In its September 22, 2011 decision, the Board found that appellant had failed to meet the factual component of her claim. Therefore, the medical evidence submitted in support of appellant's reconsideration request was not relevant to the issue at hand. Additionally, appellant's statement essentially repeated information previously presented and was, therefore, insufficient to warrant merit review.⁷ The Board finds, however, that OWCP erred in its treatment of statements from appellant's husband and the photographs of work tables, which represented relevant and pertinent new evidence not previously considered.⁸ The Board finds that OWCP improperly denied appellant's request for merit review.

There is no indication that appellant's husband's statements were previously submitted or considered by OWCP, and the substance of his statements is clearly relevant to the issue at hand. OWCP found that the statements were immaterial because appellant's husband had not witnessed the events firsthand. Appellant's husband's lack of firsthand knowledge of the alleged injury, however, goes to the weight or probative value of the evidence, not whether the statement is

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ 20 C.F.R. § 10.608(b).

⁶ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

⁷ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

⁸ 20 C.F.R. § 10.606(b)(2)(iii) (2009).

sufficient to warrant reopening appellant's claim for further merit review.⁹ Moreover, the hearsay nature of the statement does not negate the fact that appellant's husband was present at the employing establishment on the day the incident occurred and performed an investigation of the circumstances surrounding the incident. Because appellant's husband's statement is relevant and pertinent new evidence, appellant is entitled to a review of the merits of her claim. The Board also finds that the photographs of tables that were ostensibly duplicates of the damaged work table are also new and relevant evidence to be considered by OWCP in its merit review.

Accordingly, the July 3, 2012 decision shall be set aside and the case remanded for further merit review in accordance with 20 C.F.R. §§ 10.608(a) and 10.609.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: January 24, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

⁹ See *S.B.*, Docket No. 09-1654 (issued July 14, 2010).