

ISSUE

The issue is whether OWCP properly denied appellant's February 20, 2013 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

OWCP accepted that on March 9, 1991 appellant, then a 35-year-old mail carrier, sustained an open wound dog bite in the performance of duty. She did not stop work. On April 10, 1992 appellant underwent surgery to her right thigh and stopped work. OWCP paid wage-loss compensation benefits for total disability.

In an August 20, 1992 duty status report, Dr. Thomas W. Jackson, a Board-certified orthopedic surgeon, authorized appellant to return to work on September 8, 1992 with restrictions of three hours of lifting, carrying, standing and walking, one hour of sitting, climbing, bending and stooping and two hours of reaching above the shoulder and driving a vehicle. Appellant returned to her regular work duties but did not perform such duties as walking routes.

In 2009 appellant moved to North Carolina and began to work there. The case remained inactive until May 2011.

On May 30, 2011 appellant filed a recurrence of disability claim alleging that her injury continued since the March 9, 1991 employment injury. The employing establishment controverted her claim noting that she never requested limited duty at the station.

In a June 2, 2011 statement, D. Sherman Jourdian, an employee of the employing establishment, explained that, although appellant had verbally claimed limitations in conjunction with a March 1991 employment injury, she never provided documentation to substantiate her work restrictions. He noted that she never requested light duty or accommodations regarding an employment injury. In the last six months, appellant had received three letters of warning and a seven-day suspension. Mr. Jourdian opined that her claim was in response to management's corrective actions.

In a June 3, 2011 letter, Cynthia Tuccitto, a management specialist at the employing establishment, stated that appellant had repeated arguments with her supervisor about her workload because her route involved walking. Appellant filed a claim on February 14, 2011 that was subsequently denied. After the denial she reported that she was unable to work because of a dog bite injury. Ms. Tuccitto contended that appellant's claim was filed in response to corrective action and thus, was an administrative issue to be resolved.

In a March 1, 2011 duty status report, Dr. Myra Deese Hall, a Board-certified family practitioner, stated that appellant was a city carrier who sustained a dog bite injury to her right quadriceps in March 1991. She stated that appellant had loss of muscle due to the injury and diagnosed paralysis of the right quadriceps. Dr. Hall advised appellant to return to work with restrictions. She stated that appellant was to avoid inclines and walking upstairs when possible.

On August 19, 2011 OWCP requested additional medical evidence to establish that appellant sustained a recurrence of the March 9, 1991 employment injury. It requested a detailed description of her job duties after her return to work and all medical care she received since her accepted employment injury.

In an August 31, 2011 statement, appellant reported that when she initially moved from California to North Carolina her postmaster and supervisor honored her work restrictions. The Postmaster retired and her new supervisor claimed to have no knowledge of her March 9, 1991 employment injury or permanent restrictions. Appellant stated that she was limited in her ability to perform park and loop deliveries or an excess amount of dismount deliveries. Since transferring to North Carolina, she had been unable to perform her duties within her restrictions.

In a decision dated November 1, 2011, OWCP denied appellant's recurrence claim finding insufficient evidence to establish that her disability beginning May 30, 2011 was a result of her accepted March 9, 1991 employment injury.

On November 16, 2011 appellant requested a telephone hearing, which was held on March 13, 2012. She described her right leg injury and her limitations as a result of her right leg condition. When appellant moved to North Carolina, her supervisors were aware of her restrictions and did not assign her routes she could not do. She explained that when new management came in she tried to inform them of her restrictions. Appellant was advised that formal restrictions were not on file. Her representative stated that appellant did not have a formal, limited-duty assignment; but had a working relationship with her superiors in accordance with the work restrictions provided in her duty status reports. Appellant alleged that she sustained a recurrence because she was no longer allowed to continue in her restricted work duties.

In a December 16, 2011 report, Dr. Hall stated that she treated appellant for a March 9, 1991 work-related injury. She completed a duty status report on March 1, 2011 and listed work restrictions that were permanent due to the severity of appellant's injury. Appellant suffered a loss of muscle and paralysis of her right quadriceps and had been able to work with the support of a leg brace and within her medically-defined limitations.

In a February 8, 2012 letter, Ms. Tuccitto stated that appellant requested work accommodations as a result of a 1991 dog bite she sustained while working in the Postal Service in California. She requested the entire file with all information pertinent to the initial traumatic injury claim.

By decision dated June 11, 2012, an OWCP hearing representative affirmed the November 1, 2011 decision finding insufficient medical evidence to establish that appellant's March 9, 1991 employment injury caused her present disability. He determined that the medical evidence did not establish that she was unable to perform her full duties as a result of her March 9, 1991 work-related injury.

On September 12, 2012 appellant's representative submitted a request for reconsideration. She stated that a June 6, 1997 work restrictions form demonstrated that appellant worked limited duty and that management in North Carolina had not

honored the restrictions. Appellant's representative reported that she was enclosing various medical reports to support that appellant's March 9, 1991 employment injury was causally related to her present inability to work.

Appellant submitted medical reports dated from September 18, 1995 to January 16, 2002 regarding treatment for her right leg. She also submitted a June 16, 1997 work restrictions report, which demonstrated that she had limitations of sitting up to eight hours, walking, standing and bending up to one hour, lifting up to two hours and no squatting, climbing, kneeling or twisting.³

In a decision dated November 1, 2012, OWCP denied modification of the November 1, 2011 denial decision finding insufficient medical evidence to establish that appellant was unable to work as a result of her March 9, 1991 employment injury or that she was working in a limited-duty capacity.

In a February 20, 2013 letter, appellant's representative submitted a request for reconsideration. She stated that Dr. Jackson's October 29, 1992 report established that appellant was not performing every work duty and supported her need for limited duty. Appellant's representative requested that the November 1, 2012 decision be reversed and appellant's entitlement to benefits be granted. She resubmitted several medical reports regarding appellant's work limitations.

In an undated statement, Scott Lanni, appellant's former postmaster, reported that he had previously supervised her. During his time as postmaster he was aware of her limited right leg mobility due to an employment injury sustained in California. Mr. Lanni stated that appellant was provided accommodations to lessen her walking on various assignments and that, if she was unable to work due to her limitations, she was charged with a missed opportunity.

Appellant also submitted a November 13, 2012 decision from the employing establishment's Reasonable Accommodation Committee, which determined that she was able to perform the essential functions of her city carrier position with minimal accommodation and found that the employing establishment failed to provide her with appropriate light-duty work.

By decision dated March 13, 2013, OWCP denied appellant's request for reconsideration finding that the evidence was not relevant to the issue of whether she sustained a work-related recurrence of disability.

³On September 7, 2012 appellant filed a claim for a schedule award. In a May 30, 2012 report, Dr. James E. Rice, a Board-certified orthopedic surgeon, conducted an examination of her and diagnosed disorders of the peripheral nerves, neuromuscular junction and muscles. He opined that appellant continued to suffer long-term problems of her leg and concluded that she had a combined permanent impairment of 10 percent of the right lower extremity. In a September 19, 2012 report, a district medical adviser reviewed appellant's records and concluded that she had a 10 percent permanent impairment of the right lower extremity. By decision dated December 14, 2012, OWCP granted a schedule award for 10 percent permanent impairment of the right lower extremity.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁴ OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his or her right through a request to the district Office.⁵

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.⁶

A request for reconsideration must also be submitted within one year of the date of OWCP decision for which review is sought.⁷ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁹

ANALYSIS

The Board finds that OWCP improperly refused to reopen appellant's case for further merit review pursuant to 5 U.S.C. § 8128(a).

On May 30, 2011 appellant filed a recurrence claim alleging that her right leg condition remained permanent after the March 9, 1991 employment injury. She stated that, when she was initially transferred to North Carolina her supervisors honored her work restrictions but when her former postmaster retired, her new supervisor claimed to have no knowledge of her work limitations. Appellant alleged that she was not allowed to perform her work duties within her restrictions. In June 2011 statements, Mr. Jourdian and Ms. Tuccitto of the employing establishment reported that appellant did not work light duty and never provided documentation to substantiate her need for accommodations. OWCP denied appellant's recurrence claim finding insufficient medical evidence to establish that she was unable to return work as a result

⁴5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁶*Id.* at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷*Id.* at § 10.607(a).

⁸*Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹*Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

of her March 9, 1991 employment injury and she appealed on several occasions. In a November 1, 2012 decision, it denied modification of its denial decision determining that the medical evidence failed to establish that she was currently disabled from work as a result of her March 9, 1991 employment injury. OWCP also found that the evidence was insufficient to demonstrate that appellant was in need of or had been working limited duty.

The Board finds that appellant has submitted argument and evidence requiring further merit review.

OWCP denied appellant's claim that she sustained a recurrence of the March 9, 1991 employment injury finding that the medical evidence failed to establish that she was currently disabled as a result of her accepted conditions and that the evidence failed to demonstrate that she worked limited duty. Prior to the most recent November 1, 2012 merit decision denying her claim, appellant merely stated that her supervisors accommodated her work limitations and did not require her to perform each of her regular routes. The employing establishment stated that there were no documents to establish that she was authorized to work limited duty. In her February 20, 2012 reconsideration request, however, appellant's representative provided a statement from Mr. Lanni, appellant's former postmaster, who reported that he was aware of her limited right leg mobility due to a previous employment injury and had provided accommodations to lessen her duties on various assignments. She also provided a November 13, 2012 report from the employing establishment's Reasonable Accommodation Committee, which found that the employing establishment failed to provide appellant with appropriate light-duty work. The Board finds that this new evidence is relevant to appellant's recurrence claim. It is relevant to the issue of whether her employer North Carolina was aware of her light-duty restrictions.¹⁰

OWCP's regulations provide that a recurrence of disability occurs when an employee is no longer able to work a light-duty assignment made specifically to accommodate an employee's physical limitations due to a work-related injury or illness or when the physical requirements of such an assignment are altered so that they exceed his or her physical limitations.¹¹ Mr. Lanni's statement confirming that appellant was provided accommodations at work and the November 13, 2012 report, which determined that the employing establishment failed to provide light-duty work is relevant to the issue of whether appellant sustained a recurrence of disability and should have been considered new and relevant evidence.¹²

Because appellant submitted new and relevant argument and evidence in support of her February 20, 2013 reconsideration request, the Board finds that OWCP improperly denied further merit review of her case. The November 1, 2012 decision will be set aside and the case remanded for OWCP to review her claim and issue a merit decision.

¹⁰See *Harrison Dorsey, II*, Docket No. 06-246 (issued March 8, 2006).

¹¹20 C.F.R. § 10.5(x).

¹²*Supra* note 6; see also in the manner of *Annette Y. Potter*, Docket No. 95-1121 (issued March 13, 1997).

CONCLUSION

The Board finds that OWCP improperly refused further merit review of appellant's case pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2013 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: November 18, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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