

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

C.B., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
St. Louis, MO, Employer)

**Docket No. 13-1734
Issued: November 4, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 16, 2013 appellant filed a timely appeal from a January 24, 2013 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration. Because more than 180 days elapsed between the most recent merit decision dated October 29, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² See 20 C.F.R. § 501.3(e).

On appeal, appellant contends that OWCP's decision was not fair as it did not accept her attending physician's impairment rating. She further contends that Dr. Charles I. Mannis, a Board-certified orthopedic surgeon and OWCP referral physician, incorrectly stated that he examined her hand. Lastly, appellant contends that she never had a right hand sprain or left radial styloid tenosynovitis.

FACTUAL HISTORY

On March 2, 2011 appellant, then a 55-year-old automation clerk, filed an occupational disease claim alleging that on February 17, 2009 she first realized that she sustained an injury caused or aggravated by her federal employment. She further alleged that on February 25, 2011 she first became aware of her trigger finger of the left thumb after being diagnosed with the condition by an orthopedist recommended by the employing establishment. OWCP accepted the claim for acquired trigger finger of the bilateral thumbs and left radial styloid tenosynovitis.

In an October 29, 2012 decision, OWCP granted appellant a schedule award for one percent impairment of the left wrist. Appellant had no impairment of the right trigger finger and bilateral trigger thumbs.

By letter dated November 27, 2012, appellant requested reconsideration. She contended that she had been treated unfairly in the instant case and in her cases assigned File Nos. xxxxxx911, xxxxxx143 and xxxxxx174 regarding her claim for a schedule award. Appellant contended that OWCP improperly relied on Dr. Mannis's opinion as the basis for determining the extent of her impairment as he did not conduct a thorough medical examination. Dr. Mannis only asked her a question, pushed back her right hand and looked at her surgery incisions. He did not examine the knots on her wrists. Appellant stated that it was inconceivable for Dr. Mannis to compare deQuervain's tendinitis to a wrist sprain. She contended that she was entitled to a schedule award for her right hand based on results of a functional capacity evaluation, a 24-page letter from her physical therapist and her ongoing treatment as of November 14, 2012 from Dr. Crystel D. Knierim, an attending Board-certified orthopedic surgeon.

Appellant resubmitted Dr. Knierim's February 23, 2012 order requisition which referred her for physical therapy to treat her tendinitis and deQuervain's disease. In a November 8, 2012 medical report, Dr. Knierim listed findings on physical examination and diagnosed recurrent de Quervain's tendinitis with a trigger thumb of the right hand. In an order requisition also dated November 8, 2012, she referred appellant for physical therapy to treat these diagnosed conditions. In a November 29, 2012 report, Dr. Knierim provided a history of her treatment of her right hand and findings on physical examination. She diagnosed persistent tendinitis over the radial styloid. Dr. Knierim set forth appellant's physical restrictions and addressed surgical treatment.

In a November 29, 2011 progress note signed and certified by Dr. Knierim, a physical therapist obtained a history that appellant had persistent pain in her hands since February 2009. The physical therapist listed examination findings and recommended continued treatment under the current plan for her bilateral hand joint pain and trigger finger.

In reports dated November 14, 19 and 27, 2012, a second physical therapist obtained a history that in 2009 appellant sustained trauma to her left hand while at work. Appellant was sitting and passing mail to her neighbor on the left when her hand hit a metal bin. Since this incident, she had problems with her thumb and both hands. The physical therapist listed findings on examination and recommended a follow-up evaluation by Dr. Knierim and rehabilitative therapy to treat her bilateral hand, wrist and forearm pain.

In a January 24, 2013 decision, OWCP denied appellant's request for reconsideration on the grounds that she did not submit new and relevant evidence warranting further merit review of its prior decision.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,³ 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.⁴ 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.⁵ Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

On November 27, 2012 appellant disagreed with OWCP's October 29, 2012 decision, finding that she had no more than one percent impairment of the left wrist and no impairment of the right trigger finger and bilateral trigger thumbs. She requested reconsideration.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, she did not advance a relevant legal argument not previously considered. In her November 27, 2012 request for reconsideration, appellant contended that she had been treated unfairly in the instant case and in her other claims for a schedule award. However, her contention is unsubstantiated. Moreover, appellant's contention is not relevant to the underlying issue in this case, namely, whether she had greater impairment than one percent impairment of the left wrist granted by OWCP and any impairment of the right hand denied by OWCP. That is a medical issue which must be addressed by relevant medical evidence.⁷

³ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁷ *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

Appellant contended that OWCP improperly relied on Dr. Mannis's opinion as the basis for determining the extent of her impairment. She contended that Dr. Mannis failed to conduct a thorough medical examination, but did not explain how OWCP's findings regarding his opinion constituted error. The Board notes that OWCP explained in its October 29, 2012 decision why the opinion of Dr. Mannis and an OWCP medical adviser were sufficient to establish appellant's entitlement to a schedule award. OWCP also noted that appellant's treating physician did not provide an impairment rating. Consequently, the Board finds that appellant is not entitled to further review of the merits based on the first and second requirements under section 10.606(b)(2).

Appellant contended that she was entitled to a schedule award for impairment to her right hand based on results of a functional capacity evaluation, a 24-page letter from her physical therapist and her ongoing treatment as of November 14, 2012 from Dr. Knierim. Lay individuals such as physical therapists are not competent to render a medical opinion.⁸ The Board finds, therefore, that appellant's opinion that the medical evidence establishes her entitlement to a schedule award is irrelevant. Thus, the Board finds that it does not establish a legal error by OWCP or a new and relevant legal argument not previously considered by OWCP. For the reasons discussed below, the Board further finds that Dr. Knierim's reports and the physical therapy reports submitted by appellant on reconsideration are not sufficient to warrant further merit review of her claim.

While the November 29, 2011 progress note certified by Dr. Knierim and her November 8 and 29, 2012 reports and November 8, 2012 order requisition are new, the Board finds that this evidence is not pertinent and relevant to the underlying issue of entitlement to schedule award benefits. Dr. Knierim did not provide any opinion addressing whether appellant had impairment greater than the one percent already awarded for her left wrist and any impairment to her right trigger finger and bilateral trigger thumbs causally related to the accepted work factors. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹ Appellant resubmitted Dr. Knierim's February 23, 2012 order requisition. 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 for a merit review.¹⁰ For the stated reasons, the Board finds that Dr. Knierim's progress note, report and order requisitions were insufficient to warrant further merit review of appellant's claim.

The November 14, 19 and 27, 2012 physical therapy reports, while new, were also insufficient to warrant further merit review as a physical therapist is not a physician as defined

⁸*Gloria J. McPherson*, 51 ECAB 441 (2000).

⁹*R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

¹⁰*See A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Betty A. Butler*, 56 ECAB 545 (2005).

under FECA.¹¹ The Board finds, therefore, that this evidence is not relevant to the underlying medical issue on appeal and is insufficient to warrant further merit review of appellant's claim.

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to the requirements under section 10.606(b)(3). OWCP properly denied appellant's November 27, 2012 request for reconsideration.¹²

On appeal, appellant raised arguments that implicated the merits of her case. The Board only has jurisdiction to consider whether OWCP properly denied her request for reconsideration based on the evidence and argument of record at the time the January 24, 2013 nonmerit decision was issued. As discussed above, appellant did not provide evidence or argument satisfying any of the three regulatory criteria for reopening a claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C § 8128(a).

¹¹Section 8102(2) of FECA provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. As nurses, physician's assistants, physical and occupational therapists are not physicians as defined by FECA, their medical opinions regarding diagnosis and causal relationship are of no probative medical value. 5 U.S.C. § 8101(2); *E.H.*, Docket No. 08-1862 (issued July 8, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *see also Roy L. Humphrey*, 57 ECAB 238 (2005).

¹²*Robert E. Cullison*, 55 ECAB 570 (2004); *M.E.*, *supra* note 10 (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 4, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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