

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

E.D., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Fenton, MO, Employer

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**Docket No. 14-1102
Issued: August 15, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 16, 2014 appellant filed a timely appeal from November 15, 2013 and March 21, 2014 decisions of the Office of Workers' Compensation Programs (OWCP) denying her requests for merit review. As more than 180 days elapsed from issuance of the last merit decision dated March 13, 2013 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review on the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant contends that she submitted new x-rays and work capacity forms but OWCP stated that the evidence was irrelevant and not sufficient to conduct a merit review.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In an April 26, 2011 decision, the Board affirmed a December 16, 2009 OWCP decision finding that appellant did not establish entitlement to wage-loss compensation benefits for the period December 20, 1995 through August 31, 2004.² The facts as set forth in the Board's prior decision are hereby incorporated by reference.

On July 9, 2009 OWCP proposed termination of appellant's compensation benefits. It based this recommendation on the second opinion report of Dr. Donald Brancato, a Board-certified orthopedic surgeon, who found that the accepted injury no longer prevented appellant from performing her date-of-injury job. Dr. Brancato also reported that appellant had paraspinal muscle irritation and low back pain, which was nonobjective and unrelated to her ankle injury. OWCP noted that, although Dr. David E. Chalk, appellant's treating Board-certified orthopedic surgeon, indicated that she still experienced residuals from her January 7, 1994 injury, his opinion was of diminished value and not supported by objective findings or adequate rationale.

On August 26, 2009 OWCP terminated appellant's wage-loss benefits effective August 30, 2009 as her injury-related disability had ceased.

Appellant filed numerous reconsideration requests. By decisions dated December 16, 2009, June 13, 2011, April 10, 2012 and March 13, 2013, OWCP denied modification of the termination decision. It declined appellant's requests for merit review in decisions dated November 6, 2009, January 14 and February 23, 2010, July 21, September 15 and November 9, 2011; September 4, 2012, July 15 and September 16, 2013.

On October 22, 2013 appellant requested reconsideration. She did not submit any new medical evidence in support of her request for reconsideration.

By decision dated November 15, 2013, OWCP denied appellant's reconsideration request without conducting a merit review.

On December 23, 2013 appellant again requested reconsideration. She submitted a May 28, 2013 report by Dr. Robert Seelig, a Board-certified diagnostic radiologist, who interpreted an x-ray of appellant's lumbar spine as evincing four true nonrib bearing nonsacralized lumbar vertebrae with a designated T12 level having a small right-sided rib. Dr. Seelig also noted a small amount of end plate spurring. He indicated that the x-ray of appellant's left knee was normal. With regard to appellant's left foot, Dr. Seelig noted posterior calcaneal spur and early arthritic change of the first metatarsal head. In a September 18, 2013 radiological examination of her left foot, Dr. Jesse Poblete, a Board-certified diagnostic radiologist, noted degenerative changes. X-rays taken on that date of appellant's left ankle were interpreted by Dr. Poblete as evincing soft tissue swelling and degenerative changes. Appellant

² Docket No. 10-1245 (issued April 26, 2011). On January 7, 1994 appellant, then a 28-year-old rural carrier associate, slipped on snow while exiting her vehicle to deliver mail and fractured her left ankle. OWCP accepted appellant's claim for trimalleolar fracture of the left ankle and open reduction internal fixation left medial and lateral malleoli. Appellant returned to work on January 13, 1994 with limitations and was released to full duty on July 8, 1994. Her employment with the employing establishment was terminated on August 2, 1994. Following the end of a schedule award on December 19, 1995, appellant claimed compensation for lost wages for the period December 20, 1995 through August 31, 2004.

also resubmitted the October 5, 2006 report by Dr. Chalk wherein he indicated that the shoes appellant purchased to fit her with her Arizona brace were of utmost necessity.³

By decision dated March 21, 2014, OWCP denied appellant's request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ its 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 by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ 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.⁶ 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.⁷

ANALYSIS

By decision dated August 26, 2009, OWCP terminated appellant's compensation benefits effective August 30, 2009 as it found that the injury-related disability had ceased. Appellant requested reconsideration of that decision on multiple occasions. The Board's jurisdiction is limited to reviewing OWCP decisions issued within 180 days of appellant's April 16, 2014 date of filing of this appeal. The Board is precluded from reviewing the decisions denying reconsideration issued prior to November 15, 2013 and March 21, 2014. The Board does not have jurisdiction over the merits of the claim and may only address whether appellant's request for reconsideration was properly denied without merit review.⁸

Appellant did not submit any evidence in support of her October 22, 2013 request for reconsideration. She did submit new x-ray evidence in support of her December 23, 2013 request for reconsideration. The x-ray reports of Dr. Seelig and Dr. Poblete do not address the underlying issue of disability or causal relation. Therefore, the x-rays are irrelevant to the issue of whether appellant's injury-related disability had ceased by August 30, 2009. Dr. Chalk's October 5, 2006 report is duplicative of a report that was previously submitted to OWCP and considered. The Board has held that evidence which is duplicative or repetitive of evidence

³ Dr. Chalk's October 5, 2006 report was first received by OWCP on February 12, 2007.

⁴ 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he 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).

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *Id.* at § 501.3(e).

existing in the record is not sufficient to warrant further merit review.⁹ As Dr. Chalk's October 5, 2006 report was already in the record, it is duplicative and does not constitute relevant and pertinent new medical evidence. Contrary to appellant's assertions, the record does not reflect that any new work capacity forms were submitted in support of her two most recent requests for reconsideration. Therefore the medical evidence submitted with appellant's request for reconsideration is insufficient to reopen her case for further merit review of the merits.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, has not advanced a relevant legal argument not previously considered by OWCP, and has not submitted relevant and pertinent new evidence not previously considered by OWCP. Accordingly, the Board finds that she did not meet any of the necessary requirements and is not entitled to further merit review.¹⁰

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 21, 2014 and November 15, 2013 are affirmed.

Issued: August 15, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁹ *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *L.H.*, 59 ECAB 253 (2007); *Jennifer A. Guillary*, 57 ECAB 485 (2005).

¹⁰ *See L.H.*, 59 ECAB 253 (2007).