

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

D.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, MO, Employer**

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**Docket No. 14-1704
Issued: December 8, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 1, 2014 appellant, through counsel, filed a timely appeal from the May 14, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for merit review. Pursuant the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3. Because more than 180 days has elapsed between the last merit decision of OWCP, dated August 2, 2013, and the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

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

FACTUAL HISTORY

OWCP accepted that on January 7, 2011 appellant, then a 52-year-old rural carrier, sustained a tear of the rotator cuff of her right shoulder. She did not stop work at the time of her

¹ 5 U.S.C. § 8101 *et seq.*

injury. Instead, appellant began working in a limited-duty position for the employing establishment. She stopped work in March 2011 and on May 5, 2011 she underwent right rotator cuff repair surgery which was authorized by OWCP. Appellant received disability compensation on the periodic rolls.

In October 2011, Dr. John T. Ogden, an attending Board-certified orthopedic surgeon, recommended that appellant have permanent work restrictions and she began participating in an OWCP-authorized vocational rehabilitation program designed to help return her to work. In May 2012, appellant participated in informal computer instruction sessions at a local library as a means of improving her work skills. In June and October 2012, she underwent surgeries for nonwork-related conditions which arose after her January 7, 2011 work injury.

Robert Miller, appellant's vocational rehabilitation counselor, determined that appellant was able to earn wages in the constructed position of receptionist. The receptionist position was chosen from the Department of Labor, *Dictionary of Occupational Titles* (DOT) and bore the DOT No. 237.367.038. The position involved receiving visitors to establishments, handling incoming telephone calls, and engaging in some clerical work on a computer.² It was a sedentary job which required exerting up to 10 pounds of force on an occasional basis. A state labor market survey conducted by Mr. Miller showed that the receptionist position was reasonably available in appellant's commuting area at an entry-level wage of \$360.00 a week.³

In a January 25, 2013 letter, OWCP advised appellant that it proposed to reduce her wage-loss compensation based on her capacity to earn wages in the constructed position of receptionist. It indicated that the position, chosen from the DOT, was medically and vocationally suitable for appellant and was reasonably available in her commuting area.

In a March 13, 2013 decision, OWCP reduced appellant's wage-loss compensation effective March 13, 2013 based on her capacity to earn wages in the constructed position of receptionist. It found that she was medically and vocationally capable of performing the position and that it was reasonably available in her commuting area. OWCP calculated appellant's loss of wage-earning capacity through application of the principles set forth in the Board decision, *Albert C. Shadrick*.⁴

In a March 15, 2013 letter, appellant, through counsel at the time, argued that she did not have adequate computer skills to work as a receptionist.

By decision dated August 2, 2013, OWCP affirmed its March 13, 2013 loss of wage-earning capacity determination noting that the reduction of appellant's compensation was proper given her capacity to earn wages in the constructed position of receptionist. It was noted that Mr. Miller had provided an opinion that appellant was vocationally capable of working as a receptionist.

² Mr. Miller indicated that appellant had the requisite computer skills for the receptionist position based on her work for the employing establishment and other prior work experience.

³ Mr. Miller also indicated that appellant could work in the constructed position of customer service, bearing the DOT No. 249.362.026.

⁴ 5 ECAB 376 (1953).

In a March 17, 2014 letter, counsel, on behalf of appellant, requested reconsideration of OWCP's August 2, 2013 decision. He argued that OWCP's loss of wage-earning capacity determination was improper because it was based on a position selected from the DOT, *i.e.*, the constructed position of receptionist. Counsel claimed that the Department of Labor had replaced the DOT with the Occupational Information Network, an internet database, and stated:

“The basis of this motion is that the job position identified as the basis for the [loss of wage-earning capacity] was based on an antiquated and defunct publication. The job identified in the decision [cannot] be shown to actually exist in the present economy. The use of the [DOT] is out of date. The publication is no longer used and it has not been updated for many years. Therefore, the conclusion reached in this case is based upon an outdated reference and is no better than fiction. This injured worker and all injured workers who have [loss of wage-earning capacity] decisions based on the DOT have been denied their basic rights under the law.”⁵

In a May 14, 2014 decision, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a) noting that counsel's argument regarding OWCP's use of the DOT to select the position of receptionist did not have a reasonable color of validity.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ OWCP's 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.⁷ 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.⁸ 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.⁹ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁰ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ While a reopening of a case may be predicated solely on

⁵ Appellant submitted a November 18, 2013 statement in which she argued that she did not have sufficient computer skills to work as a receptionist.

⁶ 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).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

¹⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹¹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

a legal premise not previously considered such reopening is not required where the legal contention does not have a reasonable color of validity.¹²

OWCP procedures provide that in cases where the claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report to the vocational rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or more jobs which are medically and vocationally suitable for the claimant. The report will include the corresponding job numbers from the Department of Labor's DOT or (OWCP-specified equivalent) and pay ranges in the relevant geographical area. The vocational rehabilitation counselor will also include the DOT's description (or OWCP specified equivalent) of the duties and physical requirements of each job.¹³ Vocational rehabilitation counselors are experts in the field of vocational rehabilitation and OWCP may rely on their opinions as to whether a job is reasonably available and vocationally suitable.¹⁴

ANALYSIS

OWCP issued a decision on August 2, 2013 in which it affirmed its reduction of appellant's compensation based on her capacity to earn wages in the constructed position of receptionist. Appellant requested reconsideration of this decision in March 2014.

As noted above, the Board does not have jurisdiction over the August 2, 2013 merit decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. Her main argument, made through counsel, was that OWCP's loss of wage-earning capacity determination was improper because it was based on a position selected from the DOT, *i.e.*, the constructed position of receptionist. The Board notes that OWCP properly found that this argument does not have a reasonable color of validity. OWCP procedures provide that in cases where the claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report summarizing why vocational rehabilitation was unsuccessful and listing two or more jobs which are medically and vocationally suitable for the claimant. Such jobs are selected from the Department of Labor's DOT or an OWCP-specified equivalent.¹⁵ Because appellant's argument that OWCP improperly used the DOT does not have a reasonable color of validity, the presentation of this argument does not require reopening of her claim for review on the merits.¹⁶ She also argued that she did not have sufficient computer skills to work as a receptionist, but OWCP has previously considered and rejected this argument. The Board

¹² *John F. Critz*, 44 ECAB 788, 794 (1993).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4 (June 2013); *see also T.G.*, Docket No. 14-921 (issued September 17, 2014).

¹⁴ *D.J.*, Docket No. 14-863 (issued August 25, 2014).

¹⁵ *See supra* note 12.

¹⁶ *See supra* note 11.

has held that the submission of argument which repeats or duplicates argument already in the case record does not constitute a basis for reopening a case.¹⁷

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

¹⁷ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980). The Board noted that OWCP had relied on the opinion of appellant's vocational rehabilitation counselor who provided a clear opinion that she had sufficient computer skills to work as a receptionist. *See supra* note 13.