

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

G.J., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
SCOTT AIR FORCE BASE, IL, Employer**

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**Docket No. 14-32
Issued: May 21, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 15, 2013 appellant filed a timely appeal from an April 19, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying reconsideration. The most recent merit decision of record is dated November 23, 2011. There is no merit decision within 180 days of October 4, 2013, the date appellant filed her appeal with the Board. 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 denied appellant's request for reconsideration, under 5 U.S.C. § 8128(a).

On appeal, appellant contends that the medical record establishes that the offered light-duty position exceeded her medical restrictions and functional limitations. She contends that

¹ 5 U.S.C. § 8101 *et seq.*

Dr. Nashed's September 10, 2010 report returning her to light duty terminated on October 5, 2010.

FACTUAL HISTORY

OWCP accepted that on or before April 1, 2009 appellant, then a 49-year-old office automation secretary, sustained an ulnar nerve lesion and reflex sympathetic dystrophy of the right upper extremity due to keyboarding and other repetitive motion at work. She stopped work on January 12, 2010. Other than a brief trial of work in September 2010, appellant did not return to work. She received compensation on the daily rolls through April 28, 2010 and on the periodic rolls commencing April 29, 2010.

Dr. Rafat S. Nashed, an attending Board-certified orthopedic surgeon, performed an anterior transposition of the ulnar nerve at the right elbow on January 12, 2010. He held appellant off work through June 4, 2010 and described physical therapy.²

In a June 25, 2010 duty status report (Form CA-17), Dr. Nashed found appellant able to perform light-duty work, with no fine manipulation, reaching above the shoulder, driving a vehicle, operating machinery, pulling/pushing, kneeling, walking or climbing.³ On July 1, 2010 the employing establishment offered appellant a full-time light-duty job within these restrictions. Dr. Nashed then submitted a July 9, 2010 report holding appellant off work.

On August 17, 2010 OWCP obtained a second opinion from Dr. Robert Sciortino, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. On examination, Dr. Sciortino found weakness and stiffness throughout the right arm. He advised that appellant could perform limited duty without any use of the right upper extremity.

In a September 10 and 14, 2010 reports, Dr. Nashed released appellant to light duty as of September 20, 2010, with no use of the right arm and no use of a headset. He prescribed use of "speaker [tele]phone only to answer [tele]phones." In an October 1, 2010 report, Dr. Nashed related appellant's account of reporting to work at the employing establishment the previous week, but that there was no work available within her restrictions.⁴

As the medical evidence demonstrated that appellant could perform light-duty work, OWCP referred her for vocational rehabilitation services on December 9, 2010, with the goal of reemployment at the employing establishment.

² In a June 23, 2010 report, Dr. S. Vic Glogovac, an attending Board-certified orthopedic surgeon, noted that stellate ganglion blocks reduced the hypersensitivity in appellant's right hand. He noted a positive flexed elbow test on the left, with decreased sensation in the ulnar dorsum.

³ On June 25, 2010 appellant filed a notice of recurrence of disability, asserting that she was still disabled for work. OWCP interpreted the form as a statement of continuing disability rather than a new claim for compensation

⁴ A December 8, 2010 functional capacity evaluation demonstrated that appellant could perform sedentary work.

On January 25, 2011 the employing establishment offered appellant a full-time, permanent modified job offer as an office automation secretary. The duties included: answering telephone calls, greeting visitors, maintaining a meeting calendar, scheduling meetings and delivering mail within a medical clinic. The employing establishment would provide assistive technology such as speech recognition software and ergonomic accommodations to conform to her restrictions. The position was available beginning March 7, 2011.

In a February 2, 2011 letter, appellant rejected the offered position as it was “demeaning” and exceeded her limitations. She enclosed portions of an application for disability benefits under the Social Security Act.

By letter dated February 16, 2011, OWCP advised appellant that the offered position was found suitable work within the limitations provided by Dr. Nashed. It notified her of the penalty provision under section 8106(c) of FECA for refusing suitable work. OWCP afforded appellant 30 days to either accept the offered position or provide valid reasons for her refusal.

In a March 9, 2011 letter, OWCP advised appellant that it had received notice of her refusal of the job offer. It considered her reasons for refusal and found them unacceptable. OWCP afforded her 15 days in which to accept the position or appellant’s wage-loss compensation benefits would be terminated. It noted that no further reasons for refusal would be considered. In a March 16, 2011 letter, appellant requested an extension to respond. On March 31, 2011 the employing establishment confirmed that the position remained open and available.

By decision dated March 31, 2011, OWCP terminated appellant’s monetary compensation benefits effective that day under 5 U.S.C. § 8106(c) on the grounds that she refused an offer of suitable work. It found that the modified position offered to her on January 25, 2011 conformed to Dr. Nashed’s restrictions.

In an April 26, 2011 letter, appellant requested a telephonic oral hearing, held September 29, 2011. At the hearing, she asserted that, during a trial of work in September 2010, she merely sat and did not complete work tasks because no accommodations were provided. Appellant contended that the January 25, 2011 job offer was for a full-duty position that exceeded her medical restrictions.

Appellant submitted Dr. Nashed’s April 23, 2010 note holding her off work due to reflex sympathetic dystrophy of the right arm, a December 21, 2010 request for a functional capacity evaluation and his March 24, 2011 report noting that she was not putting forth full effort in physical therapy. She also provided February and March 2011 physical therapy notes, correspondence with her elected representative, letters from her attorney, medical literature about reflex sympathetic dystrophy syndrome and 2010 timekeeping and financial records.

By decision dated and finalized November 23, 2011, an OWCP hearing representative affirmed the March 31, 2011 termination. He found that the evidence did not establish that the January 25, 2011 job offer was not suitable work. The hearing representative further found that appellant’s arguments regarding the September 2010 trial of work were irrelevant to the job offer made on January 25, 2011.

In a November 17, 2012 letter, appellant requested reconsideration. She asserted that the lack of accommodations during a September 2010 trial of work created confusion and angered senior managers. Appellant contended that the lack of accommodations also demonstrated that the January 25, 2011 light-duty job offer was actually for a full-duty position exceeding her restrictions. She submitted Social Security and Office of Personnel Management (OPM) forms and February and March 2011 physical therapy notes. In a March 7, 2011 report, Dr. Elbert H. Cason, a Board-certified surgeon, noted weakness and swelling in the right hand. Appellant also resubmitted copies of documents previously of record.⁵

By decision dated April 19, 2013, OWCP denied reconsideration on the grounds that the evidence submitted was either irrelevant to the suitable work issue or duplicative of evidence previously of record.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ section 10.606(b)(2) of Title 20 of the Code of Federal 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) submit relevant and pertinent new evidence not previously considered by OWCP.⁷ Section 10.608(b) provides that when an application for review of the merits of a claim 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.⁸

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁹ The claimant need only submit relevant, pertinent evidence not previously considered by OWCP.¹⁰ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹¹

⁵ Appellant also submitted correspondence and OWCP letters from April 2012 to January 2013 regarding medical billing and coding matters. These documents are unrelated to appellant's request for reconsideration.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹¹ *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS

OWCP terminated appellant's wage-loss compensation benefits effective March 31, 2011 on the grounds that she refused a January 25, 2011 offer of suitable work conforming to restrictions provided by Dr. Nashed, an attending Board-certified orthopedic surgeon. Appellant requested a hearing, at which she contended that the job offer was not made in good faith as she was not accommodated during a September 2010 trial of work. OWCP affirmed the termination by decision issued November 23, 2011, finding that the additional evidence and argument did not establish that the January 25, 2011 job offer was not suitable work.

Appellant requested reconsideration on November 17, 2012. OWCP denied reconsideration by decision issued April 19, 2013 on the grounds that the evidence submitted was cumulative or irrelevant. The Board finds that OWCP properly denied her request for reconsideration.

In support of her request for reconsideration, appellant submitted a November 17, 2012 statement reiterating her argument that the January 25, 2011 was not made in good faith as the employer did not provide accommodations in September 2010. She also submitted copies of medical reports and OWCP decisions previously of record and physical therapy notes repeating prior findings. The Board has held that evidence which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹²

Appellant also submitted Social Security and OPM forms. These documents are not relevant to the underlying issue as decisions of other federal agencies or governmental bodies are not dispositive to issues raised under FECA.¹³ Appellant also provided a March 7, 2011 report from Dr. Cason, a Board-certified surgeon, who noted weakness and swelling in the right hand. Dr. Cason did not address the January 25, 2011 job offer or her ability to perform the job. Therefore, his report is irrelevant to the suitable work issue in the claim.¹⁴

A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant evidence in this case. The Board accordingly finds that she 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.

On appeal, appellant asserts that the medical record establishes that the offered light-duty position exceeded her medical restrictions and functional limitations. She contends that Dr. Nashed's September 10, 2010 report returning her to light duty "terminated on

¹² *Denis M. Dupor*, 51 ECAB 482 (2000).

¹³ *A.C.*, Docket No. 12-1579 (issued December 13, 2012); *Andrew Fullman*, 57 ECAB 574 (2006).

¹⁴ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

October 5, 2010.” These arguments pertain to the merits of the claim, which are not before the Board on the present appeal.

CONCLUSION

The Board finds that OWCP properly denied reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated April 19, 2013 is affirmed.

Issued: May 21, 2014
Washington, DC

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

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

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