

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

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**Q.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Santa Clarita, CA, Employer**

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**Docket No. 14-147  
Issued: May 19, 2014**

*Appearances:*

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 28, 2013 appellant, through her attorney, filed a timely appeal from a September 24, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's November 23, 2012 decision. Because more than 180 days elapsed between the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.<sup>2</sup>

**ISSUE**

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

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

On October 10, 1991 appellant, then a 31-year-old carrier, filed an occupational disease claim (Form CA-2) alleging that she developed back pain as a result of lifting and carrying her satchel from her federal employment duties. OWCP accepted the claim for right shoulder and upper arm sprain and lumbosacral sprain. Appellant began working limited duty as a window clerk on January 22, 1993.

Beginning July 25, 2012, appellant filed a recurrence claim.

In medical reports dated June 4 to September 20, 2012, Dr. David Heskiaoff, appellant's treating physician and Board-certified orthopedic surgeon, reported that appellant's new position as a window clerk aggravated her neck and shoulder pain through her repetitive work duties. He diagnosed cervical radiculopathy and myofascial sprain of the cervical spine. Dr. Heskiaoff further opined that appellant's new window clerk position was causing her current problems as her radiculopathy was confirmed by diagnostic testing. He advised that she was unable to work beginning July 6 through October 2, 2012. Appellant was provided with new work restrictions.

In an August 3, 2012 electromyography (EMG) and nerve conduction study of the upper right extremity, Dr. Barak Mevorak, Board-certified in physical medicine and rehabilitation, reported that the tests revealed right acute C5 radiculopathy. A September 14, 2012 diagnostic report was also provided from Dr. B. Shayestehfar, a Board-certified diagnostic radiologist, which provided magnetic resonance imaging scan findings of the cervical spine.

By decision dated November 23, 2012, OWCP denied appellant's recurrence claim on the grounds that the medical evidence failed to establish that her disability was due to a material change/worsening of her accepted work-related conditions.<sup>3</sup> It noted that the medical evidence of record failed to establish her inability to work, which provided rationale explaining why she could not perform the modified duties that she was performing prior to July 6, 2012.

In a December 3, 2012 medical report, Dr. Heskiaoff diagnosed cervical radiculopathy and recommended acupuncture.

In a December 10, 2012 offer of modified assignment, appellant accepted a limited-duty position as a lobby director, which provided her with new work restrictions.

In a February 1, 2013 medical report, Dr. Mark Greenspan, a Board-certified surgeon, provided a detailed work history of the various positions held by appellant while working for the postal service beginning in 1991. He reported that, in December 2011, she was transferred to work at a window, which entailed prolonged standing, repetitive twisting, turning, reaching, arm and hand movements, grasping, torqueing motions, fine finger manipulations and lifting and carrying 10 to 15 pounds for eight hours per day, five days per week. Dr. Greenspan provided a summary of appellant's prior medical reports and history, noting that Dr. Heskiaoff diagnosed myofascial sprain of the cervical spine and cervical radiculopathy and placed her off work from

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<sup>3</sup> OWCP referenced appellants Form CA-7's dated July 6 through October 1, 2012 claiming wage loss from work due to a change or worsening of her accepted work-related conditions.

July to October 2012 because of right shoulder, neck, elbow and hip pain. Upon physical examination and review of diagnostic testing, Dr. Greenspan diagnosed cervical disc bulge C4 through C7, acute C5 radiculopathy, right shoulder sprain and musculoligamentous sprain of the lumbar spine. He opined that appellant's conditions were caused by the September 17, 1991 occupational injury and noted that the described repetitive activities caused the mechanism of injury to the cervical spine, right shoulder and lumbar spine, as evidenced through clinical findings and diagnostic testing. Dr. Greenspan further noted that her injury was a new and separate injury and not an aggravation of her prior injury. He recommended physical therapy and noted that appellant could continue to work her new modified assignment as a lobby director. In a February 25, 2013 progress report, Dr. Greenspan reported that she could return to modified work beginning February 25, 2013.

By decision dated February 28, 2013, OWCP expanded the claim to include herniated cervical disc and cervical radiculopathy, along with the previously accepted lumbar and right shoulder sprain based on Dr. Greenspan's February 1, 2013 report.

On July 31, 2013 appellant requested reconsideration of the November 23, 2012 OWCP decision.

In support of her claim, appellant submitted medical reports previously of record. She also submitted progress notes and medical reports from Dr. Greenspan dated February 1 through July 20, 2013. Dr. Greenspan provided details regarding appellant's current condition and progress following his initial February 1, 2013 evaluation. He recommended physical therapy and cortisone injections and provided her with new work restrictions pertaining to her current position as lobby director.

By decision dated September 24, 2013, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence.<sup>4</sup>

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP 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.<sup>5</sup> Section 10.608(b) of OWCP regulations provides that, when an application for reconsideration does not meet at least one of the three

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<sup>4</sup> The Board notes that appellant submitted additional evidence after OWCP rendered its September 24, 2013 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *D.K.*, 59 ECAB 141 (2007).

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.<sup>6</sup>

### ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

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 July 31, 2013 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant's argument was that her injury was employment related. The underlying issue in this case was not whether her injury was causally related to the accepted factors of federal employment, but rather whether her injury caused her disability from July 6 to October 1, 2012 such that she was unable to perform her light-duty work. That is a medical issue which must be addressed by relevant medical evidence.<sup>7</sup> A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence addressing her disability from work for the claimed period July 6 to October 1, 2012.

Appellant resubmitted medical reports, which were previously addressed and evaluated by OWCP in its November 23, 2012 merit decision. As the reports repeat evidence already in the case record, they are duplicative and do not constitute relevant and pertinent new evidence.

Appellant also submitted new medical reports from Dr. Greenspan dated February 1 through July 20, 2013. While these reports are new, they are not relevant to establishing her disability from work for the claimed period. The Board notes that Dr. Greenspan's February 1, 2013 report provided an additional diagnosis of herniated cervical disc and cervical radiculopathy, which OWCP accepted as employment related on February 28, 2013. Despite providing new diagnoses which were later accepted by OWCP, Dr. Greenspan failed to provide any opinion finding appellant disabled for work for the period July 6 to October 1, 2012 due to her accepted injuries. His reports provided opinions on her work limitations and disability from the date of his initial February 1, 2013 evaluation onward. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>8</sup> While appellant submitted new evidence, it was not relevant in addressing whether she is entitled to wage-loss compensation due to her claimed disability. She may obtain a merit review of an OWCP decision by submitting new and relevant evidence. As none of the reports address whether she was disabled for the period in question, she failed to submit any new and relevant evidence addressing causal relationship.

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<sup>6</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>7</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>8</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

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 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 September 24, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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