

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

Q.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer**

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**Docket No. 14-1142
Issued: September 3, 2014**

Appearances:
James D. Muirhead, 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 April 18, 2014 appellant, through counsel, filed a timely appeal from an October 28, 2013 Office of Workers' Compensation Programs' (OWCP) nonmerit decision which denied her request for reconsideration under 5 U.S.C. § 8128(a) and a March 19, 2014 nonmerit decision denying her reconsideration request on the grounds that it was untimely filed and failed to present clear evidence of error. Because more than 180 days elapsed since the most recent merit decision dated December 31, 2012 and the filing of this appeal on April 18, 2014, the Board lacks jurisdiction to review the merits of appellant's case but has jurisdiction over the nonmerits pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a); and (2) whether OWCP

¹ 5 U.S.C. § 8101 *et seq.*

improperly refused to reopen appellant's case for further review of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

On appeal, counsel contends that appellant submitted a magnetic resonance imaging (MRI) scan dated October 15, 2013 as relevant and pertinent new evidence in support of her request for reconsideration. He further contends that appellant submitted sufficient medical evidence in support of her claim.

FACTUAL HISTORY

On July 21, 2012 appellant, then a 28-year-old mail carrier, filed a recurrence claim (Form CA-2a), under OWCP File No. xxxxxx214, alleging that "on July 12, 2012 after finishing my work for the day the pain was unbearable and I could no longer try and manage."² The employing establishment indicated that she was pregnant upon returning to work and was limited to three hours of walking by her doctor.

Appellant also submitted claims for wage-loss compensation (Form CA-7s) for periods commencing July 16, 2012.

In a July 30, 2012 letter, OWCP notified appellant that her recurrence claim was accepted as a claim for a new injury and advised that her claims for compensation (Form CA-7s) would be transferred to the new claim for adjudication.

In a May 14, 2012 report, Dr. Michael T. Dresdner, a Board-certified obstetrician and gynecologist, indicated that appellant was under his care for prenatal care and delivery and was last seen in his office on April 19, 2012. Appellant was 14 weeks and 4 days gestational age with a due date of November 2, 2012 and had been limited to the following restrictions: no more than 25 pounds at a time of lifting; no more than three hours per day of walking; no exposure to more than 85 degrees Fahrenheit.

On July 16, 2012 Dr. David S. Wolkstein, a Board-certified orthopedic surgeon, indicated that appellant was under his care for injuries sustained on December 12, 2011 to her back and right shoulder. He noted that she was also pregnant which exacerbated the lower back. Dr. Wolkstein opined that appellant was disabled and unable to work. On July 30, 2012 he stated that she was injured in a motor vehicle accident on December 12, 2011 and was evaluated in his office on January 12, 2012 with complaints of continued pain in her right shoulder and lower back with radiation from her lower back into her right lower extremity. Dr. Wolkstein diagnosed right shoulder sprain and lumbosacral sprain with left lumbar radiculitis. He examined appellant on February 9, March 1 and July 16, 2012 for complaints of low back pain, right shoulder pain and numbness and tingling in both lower extremities. Dr. Wolkstein noted that she was pregnant and advised that she was unable to carry out the duties of mail carrier as she was unable to sit, stand, bend, stoop, walk, climb, twist, push, pull or reach above the shoulders.

² The original claim was accepted due to a December 12, 2011 motor vehicle accident that occurred during duty hours.

In an August 14, 2012 letter, OWCP stated that, according to the information sent with her recurrence claim under File No. xxxxxx214, appellant did not experience a spontaneous worsening of an employment-related condition without new injury or exposure to employment factors. It reiterated that it had converted her recurrence claim into a new traumatic injury claim under File No. xxxxxx380. OWCP notified appellant of the deficiencies of her claim and afforded her 30 days to submit additional evidence and to respond to its inquiries.

In an August 30, 2012 narrative statement, appellant indicated that on July 12, 2012 she arrived at work at 7:30 a.m. and pitched mail into her case for two hours, pulled the mail from the case and then proceeded to the street for delivery. She had three hours of house-to-house mail delivery and two hours of building deliveries. As appellant was pitching mail into the government mailbox of the last building, she reached to place mail into a box that was higher than her shoulder and felt a pop in her shoulder and a sharp pain in her lower back. Immediately after the injury she returned to the office. The pain was continuous and did not subside with Tylenol so appellant decided to make an appointment with Dr. Wolkstein who was unavailable until July 16, 2012. She notified her supervisor, Veronica Walker, that she had an appointment with Dr. Wolkstein on July 16, 2012 because of her back and shoulder and Ms. Walker instructed her on how to call out with an on-the-job injury.

In an August 29, 2012 report, Dr. Wolkstein stated that appellant was injured at work on July 12, 2012 as a result of reaching over her head with her right arm to place mail in government boxes and felt an exacerbation of her preexisting right shoulder and lower back pain. He diagnosed acute exacerbation of preexisting right shoulder sprain and lumbosacral sprain with left lumbar radiculitis. Dr. Wolkstein indicated that appellant was eight months pregnant which could have contributed to her lower back pain and prevented her from undergoing imaging studies and physical therapy. He opined that the July 12, 2012 employment incident was causally related to the injuries sustained to her right shoulder and lower back.

By decision dated September 20, 2012, OWCP denied the claim on the basis that the evidence submitted was not sufficient to establish a causal relationship between appellant's conditions and the July 12, 2012 employment incident.

On October 1, 2012 appellant, through counsel, requested reconsideration and submitted a September 27, 2012 report from Dr. Wolkstein who stated that on July 12, 2012 appellant was carrying approximately five pounds of weight in her hands and injured her right shoulder while attempting to place mail over her head. Dr. Wolkstein indicated that because "she had a previous injury to her right shoulder on December 12, 2011 and continued to feel right shoulder pain since that injury, simply reaching over her head [could] indeed cause an acute exacerbation of her right shoulder pain." Appellant related to Dr. Wolkstein on September 27, 2012 "that she did not feel an exacerbation of her lower back pain on July 12, 2012 but just continued to feel the same lower back pain that she felt since the injury on July 12, 2012." She had returned to work on March 19, 2012 while still being symptomatic with lower back pain because she did not want to lose her wages. Also, appellant had three previous pregnancies without any lower back symptoms and had no complications with her current pregnancy, therefore, Dr. Wolkstein opined that there was no reason to contribute her lower back pain to her current pregnancy. Dr. Wolkstein concluded that her right shoulder pain was causally related to the incident that

occurred on July 12, 2012 and her lower back pain was causally related to the injury that occurred on December 12, 2011.

By decision dated December 31, 2012, OWCP denied modification of its September 20, 2012 decision.

On September 25, 2013 appellant, through counsel, requested reconsideration for a second time and submitted a narrative statement dated September 19, 2013.

By decision dated October 28, 2013, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence and did not show that it erroneously applied or interpreted a point of law not previously considered by OWCP.

On November 11, 2013 appellant, through counsel, requested reconsideration "of the decision dated October 28, 2013 and the prior decision dated December 31, 2012" and submitted an October 15, 2013 MRI scan of the right shoulder which showed a mild productive change at the acromioclavicular (AC) joint and supraspinatus tendinosis.

In a November 19, 2013 letter, OWCP notified appellant that it had received her request for reconsideration on November 11, 2013. It further indicated that she was not entitled to request reconsideration of the October 28, 2013 decision as it was not made within the one-year limit.

On March 14, 2014 appellant's counsel indicated that appellant had requested reconsideration of the December 31, 2012 decision on November 11, 2013 and submitted new medical evidence in support of her claim.

By decision dated March 19, 2014, OWCP denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to present clear evidence of error, indicating that her request was received on March 14, 2014.

LEGAL PRECEDENT -- ISSUE 1

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, 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

³ 5 U.S.C. § 8101 *et seq.* 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 See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

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 -- ISSUE 1

In support of her September 25, 2013 reconsideration request, appellant submitted a narrative statement dated September 19, 2013. The Board finds that submission of this document did not require reopening appellant's case for merit review as it was focused on the history of her claim and did not provide medical rationale from a physician establishing a causal relationship between appellant's conditions and the July 12, 2012 employment incident, which was the issue before OWCP. Therefore, it does not constitute relevant and pertinent new evidence and is not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP, nor did she submit any pertinent new and relevant evidence not previously considered. The Board finds that appellant did not meet any of the necessary requirements and, thus, she is not entitled to further merit review.⁸

LEGAL PRECEDENT -- ISSUE 2

To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.⁹ The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.¹⁰ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board and any merit decision following action by the Board.¹¹

⁵ 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ See *L.H.*, 59 ECAB 253 (2007).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ See *D.G.*, 59 ECAB 455 (2008); *Veletta C. Coleman*, 48 ECAB 367 (1997); *Leon D. Faidley, Jr.*, *id.* at 111.

ANALYSIS -- ISSUE 2

In its March 19, 2014 decision, OWCP denied appellant's November 11, 2013 request for reconsideration finding that it was untimely filed and failed to present clear evidence of error. The Board finds that OWCP improperly determined that her request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.607.

On December 31, 2012 OWCP issued a decision denying modification of its September 20, 2012 decision which denied appellant's claim for a traumatic injury. Accordingly, appellant had one year from December 31, 2012 to make a timely request for reconsideration.¹² In its March 19, 2014 decision, OWCP indicated that appellant's request for reconsideration was received on March 14, 2014 and determined that the request was not within the one-year time limitation. However, the record establishes that the request for reconsideration of OWCP's December 31, 2012 and October 28, 2013 decisions was filed on November 11, 2013 as confirmed by a November 19, 2013 letter from OWCP. The Board finds that the November 11, 2013 request for reconsideration is within one year of the last merit decision dated December 31, 2012 and thus appellant's request for reconsideration is therefore timely.

As appellant timely filed a request for reconsideration in this case, the Board finds that OWCP improperly denied her reconsideration request by applying the legal standard for cases where reconsideration is requested after more than one year has elapsed.¹³ OWCP should have applied the standard reserved for timely reconsideration requests as set forth in 20 C.F.R. § 10.606(b)(3).¹⁴ Since it erroneously reviewed the evidence submitted in support of appellant's reconsideration request under the more stringent clear evidence of error standard, the Board will remand the case for review of the evidence under the proper standard of review for a timely reconsideration request.¹⁵

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a). The Board further finds that OWCP improperly refused to reopen appellant's case for further review of her claim on the grounds that her request was untimely filed and failed to demonstrate clear evidence of error.

¹² See *id.* A right to reconsideration within one year accompanies any subsequent merit decision on the issues.

¹³ See *C.J.*, Docket No. 12-1570 (issued January 16, 2013).

¹⁴ 20 C.F.R. § 10.606(b)(3) of OWCP regulations provide that an application for reconsideration must be in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.

¹⁵ In light of the disposition of this case, the Board will not address counsel's arguments on appeal.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2013 decision of the Office of Workers' Compensation Programs is affirmed and the decision dated March 19, 2014 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 3, 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