

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

P.B., Appellant)
and) Docket No. 15-1211
U.S. POSTAL SERVICE, POST OFFICE,) Issued: August 21, 2015
Peru, NY, Employer)

)

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2015 appellant, through counsel, filed a timely appeal from a January 12, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed between the last merit decision, dated October 16, 2012, and 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 of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal counsel argues that the decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On April 12, 2012 appellant, then a 55-year-old rural carrier associate, filed a traumatic injury claim alleging that on January 9, 2012 she injured her right shoulder and biceps when she slipped while stepping off a porch and her shoe fell off of her left foot.

By decision dated June 21, 2012, OWCP denied appellant's claim on the basis that she failed to establish a causal relationship between her right shoulder and wrist conditions and the January 9, 2012 employment incident. Following appellant's request for reconsideration, on October 16, 2012 OWCP denied modification. Appellant again requested reconsideration, which OWCP denied in a September 12, 2013 decision. On March 11, 2014 she appealed to the Board. By decision dated October 9, 2014 the Board affirmed the September 12, 2013 OWCP decision.² The facts and circumstances of the Board's prior decision are incorporated by reference.

On August 15, 2014 OWCP received a July 31, 2014 report from Dr. Stephane Mulligan, an examining Board-certified orthopedic surgeon, reporting that appellant was seen for an office visit on July 8, 2014, and that prior to this visit she was previously seen on July 26, 2012. Dr. Mulligan reported that appellant sustained a work injury on January 9, 2012. A review of a magnetic resonance imaging (MRI) scan revealed a mildly retracted full thickness supraspinatus tendon tear. Dr. Mulligan also diagnosed a subscapularis tendon tear with some biceps medial tendon displacement into the joint space. Lastly, he reported fairly good right shoulder function.

In a letter dated November 25, 2014, counsel requested reconsideration based on new evidence which was submitted subsequent to the September 12, 2013 OWCP decision. Appellant argued that the newly submitted evidence established that the prior OWCP decision should be vacated.

By decision dated December 9, 2014, OWCP denied reconsideration. It found the evidence submitted was insufficient to warrant a merit review.

Counsel argued in a December 29, 2014 letter that the December 9, 2014 OWCP decision was legally incorrect as appellant filed a request for reconsideration of OWCP's September 12, 2013 decision based on new evidence submitted following that decision.

By decision dated January 12, 2015, OWCP denied reconsideration finding no new and relevant evidence was submitted and no substantive legal question was raised.

² Docket No. 14-908 (issued October 9, 2014).

LEGAL PRECEDENT

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

ANALYSIS

The Board finds that OWCP did not abuse its discretion when it declined to reopen appellant's claim for further consideration of the merits, pursuant to 5 U.S.C. § 8128(a).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her December 29, 2014 request for reconsideration, appellant failed to show that OWCP had erroneously applied or interpreted a specific point of law. She also failed to advance a new and relevant legal argument not previously considered by OWCP.

Counsel argued that Dr. Mulligan's July 8, 2014 report supported vacating the September 12, 2013 OWCP decision. Dr. Mulligan diagnosed a subscapularis tendon tear with some biceps medial tendon displacement into the joint space and she reported that appellant sustained a work injury on January 9, 2012. This report, while new, is not relevant to the issue on reconsideration because it fails to explain how the diagnosed conditions were causally related to the accepted January 9, 2012 employment incident. The Board has held that the submission of evidence which does not address the particular issue involved in a case does not constitute a basis for reopening the claim.⁷

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁵ *Id.* at § 10.607(a). *See S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁶ *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁷ *S.J.*, *supra* note 5; *D'Wayne Avila*, 57 ECAB 642 (2006).

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. §10.606(b)(3) and, thus, OWCP properly declined to reopen her claim for further merit review.⁸

On appeal counsel contends that OWCP's decision was contrary to fact and law. Based on the findings and reasons stated above, the Board finds his arguments are not substantiated.

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 decision of the Office of Workers' Compensation Programs dated January 12, 2015 is affirmed.

Issued: August 21, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

⁸ A.K., Docket No. 09-2032 (issued August 3, 2010); M.E., 58 ECAB 694 (2007); Susan A. Filkins, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).