

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

L.S., Appellant

and

**DEPARTMENT OF LABOR, EMPLOYMENT
STANDARDS ADMINISTRATION,
New York, NY, Employer**

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**Docket No. 14-1445
Issued: January 15, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 9, 2014 appellant filed a timely appeal from the April 21, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last OWCP merit decision in this matter was issued on March 22, 2013. Since more than 180 days elapsed since March 22, 2013 and the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² Although appellant initially requested an oral argument before the Board, by letter dated October 29, 2014, she withdrew this request.

On appeal, appellant contends that her claim was not updated to note that she continued to work after the September 23, 2010 incident, that the statements of accepted facts and questions to the referral physicians did not include this fact, that her injury occurred over many work shifts as she continued to work after the employment incident, and that OWCP is supposed to act as a disinterested arbiter and see that justice is done.

FACTUAL HISTORY

This case has previously been before the Board. On September 24, 2010 appellant, then a 47-year-old claims examiner, filed a traumatic injury claim alleging that she injured her right shoulder on September 23, 2010 while sitting at her desk indexing mail. OWCP denied her claim, finding that she had not established that her claimed medical condition was related to the established employment-related events. However, in a November 27, 2012 decision, the Board found that there was a conflict between appellant's treating physician and the second opinion physician with regard to whether she sustained an injury causally related to the accepted employment factor, and remanded the case. The facts as set forth in the Board's prior decision are hereby incorporated by reference.³

On remand, OWCP referred appellant to Dr. Harvey L. Seigel, a Board-certified orthopedic surgeon, for an impartial medical examination. In a January 18, 2013 report, Dr. Seigel found that the diagnosed condition of a herniated disc at C5-C6 and C6-C7 levels were not the result of the accepted employment incident.

In a March 22, 2013 decision, OWCP found that the weight of the evidence was represented by Dr. Seigel's report and affirmed the denial of the claim.

On January 21, 2014 appellant requested reconsideration. She contended that the factual basis of the case was incorrect. Appellant alleged that after her initial injury on September 23, 2010 she continued to work the next day, and therefore she sustained an occupational injury, not a traumatic injury. She claimed this was evidence of an incident that occurred over two shifts. Appellant alleged that she did not stop working until September 27, 2010. She attached copies of her time sheets in support of her statements. Appellant alleged that these facts required a new statement of accepted facts and referred for a new second opinion. She also submitted copies of her performance summaries for September 23 and 24, 2010 in support of her reconsideration request.

By decision dated April 21, 2014, OWCP found that appellant's arguments and evidence were not sufficient to warrant a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ its regulations provide that the evidence or argument submitted by a claimant must: (1) show that

³ Docket No. 12-987 (issued November 27, 2012).

⁴ 5 U.S.C. §§ 8101-8193. 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).

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.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 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.⁸

ANALYSIS

OWCP denied appellant's traumatic injury claim as it found that she had failed to establish a cervical condition causally related to the September 23, 2010 employment incident. Accordingly, the underlying issue was whether she submitted rationalized medical evidence of a causal relationship between her cervical condition and the accepted employment incident. Appellant did not submit any medical evidence in support of her reconsideration request. Rather, she alleged that the employing establishment incorrectly filed a traumatic injury claim on her behalf because she continued to work after the September 23, 2010 employment incident for at least two days. In support of her argument, appellant submitted time sheets and performance summaries for September 23 and 24, 2010. As the time sheets and performance summaries do not address causal relationship, they are not relevant on reconsideration.⁹

Appellant argues a new point of law on reconsideration, *i.e.*, that her claim should have been considered as an occupational disease claim. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required unless the legal contention has some connection with the facts of the case.¹⁰ Appellant signed her traumatic injury claim form. The claim form clearly indicated that an incident occurred on September 23, 2010 when she was indexing mail and she felt a sudden pain in her right shoulder. Appellant alleged a specific injury resulting from a specific incident on a specific date.¹¹ The fact that she continued to work after the incident is irrelevant to the issue of causal relationship.

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

⁹ *Id.*

¹⁰ *J.D.*, Docket No. 14-758 (issued June 26, 2014).

¹¹ 20 C.F.R. § 10.5(15), (16) defines a traumatic injury as a wound or other injury caused by a specific event or incident within a single workday or shift, whereas an occupational injury is defined as a condition produced in the work environment over a period longer than a single workday or shift.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 constitute 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 on 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 April 21, 2014 is affirmed.

Issued: January 15, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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