

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

A.L., Appellant)	
)	
and)	Docket No. 14-1840
)	Issued: January 20, 2015
U.S. POSTAL SERVICE, POST OFFICE, Anchorage, AK, 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
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 20, 2014 appellant, through counsel, filed a timely appeal from a May 15, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for further merit review. As more than 180 days elapsed from the last merit decision of March 19, 2013 to 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 over the merits of this claim and only has jurisdiction over the nonmerit decision.

ISSUE

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

FACTUAL HISTORY

On January 23, 2010 appellant, then a 49-year-old window clerk, filed a traumatic injury claim alleging that on January 16, 2010 she experienced lower back pain radiating down both legs in the performance of her duties. On January 21, 2011 OWCP accepted the claim for

¹ 5 U.S.C. § 8101 *et seq.*

temporary aggravation of intervertebral disc protrusion (disc bulge) at L4-L5. Appellant returned to full-time light-duty work.

On January 11, 2013 appellant filed a Form CA-7 claim for wage loss for total disability for the period December 6, 2012 to January 11, 2013.

By letter dated February 1, 2013, OWCP requested contemporaneous medical evidence explaining why appellant's back condition prevented her from performing her employment activities during the claimed period. It noted that medical reports from Dr. Stinson and Dr. Rice requesting that leave be granted pending surgery and for recovery from surgery were received, but there was no medical evidence giving objective findings showing that her back condition prevents her from working during the claimed period.

By decision dated February 20, 2013, OWCP denied appellant's request for lumbar spine surgery (L4-L5 discectomy), she underwent on December 4, 2012.

Appellant submitted a February 19, 2013 statement along with medical reports dated March 7, July 31, August 8, and October 8, 2012.

By decision dated March 19, 2013, OWCP denied the claim for wage loss for the period December 6, 2012 through January 11, 2013. It found that while the March 7, July 31, August 8, and October 8, 2012 reports described appellant's work-related medical condition and treatment given, her treating physician failed to provide any medical explanation as to why and how she was placed off work during the claimed period.

On March 4, 2014 appellant requested reconsideration. In a February 15, 2014 statement, she acknowledged that she had no medical documentation to support that she was totally disabled for the period December 6, 2012 to January 11, 2013. Appellant alleged that during the time she was waiting for OWCP to approve her surgery, it used nearly eight weeks of her time, capriciously toying with her. She claimed that OWCP had no intentions for her to have surgery, but provided no basis for this claim. Appellant indicated that OWCP caused the delay for her surgery; therefore, she was asking for compensation for the period December 6, 2012 to January 11, 2013.

Medical reports from Dr. James E. Rice, a Board-certified orthopedic surgeon, were received. These included progress reports dated December 3 and 19, 2012. In a January 11, 2013 report, Dr. Rice indicated that appellant was under his care since December 5, 2012 and would remain under his care until the end of her recovery period from the microdiscectomy surgery. He indicated at appellant's first medical appointment on December 5, 2012, he determined, based on a review of her medical record, diagnostic testing, and examination findings, that appellant was in need of a lumbar microdiscectomy surgery of the L4-L5 disc. Dr. Rice noted that the surgery was scheduled for December 13, 2012, but OWCP denied the surgical request stating further medical information was needed. He performed additional testing on appellant and came to the same conclusion that surgery was needed. Dr. Rice excused her from performing any work duties from December 5, 2012 until his release after she recovers from surgery.

By decision dated May 15, 2014, OWCP denied reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² 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.³ 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.⁴ 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.⁵

ANALYSIS

The underlying issue on reconsideration is whether appellant has submitted new evidence relevant and pertinent to the issue of whether she was totally disabled during the period December 6, 2012 through January 11, 2013. It is noted that appellant underwent an unauthorized lumbar spine surgery on February 7, 2013. Her request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Rather, appellant asserted that Dr. Rice was ready to perform the lumbar surgery on December 6, 2012, but OWCP did not want her to have the lumbar surgery and caused the delay in the surgery. Because OWCP caused the delay, appellant requested that she be compensated. However, the issue of whether she is disabled during the claimed period is a medical issue, which can only be addressed by contemporaneous medical evidence from her physician explaining how and why she was disabled from her work duties due to her accepted condition during the claimed period. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(2).

The Board also finds that appellant did not provide any relevant or pertinent new evidence warranting the reopening of the case on the merits. Submission of evidence which repeats or duplicates evidence already in the record does not constitute a basis for reopening a case.⁶ The evidence submitted was repetitive and duplicative of evidence previously of record.

The progress notes from Dr. Rice dated December 3 and December 19, 2012 did not contain any explanation of why appellant was unable to perform her light-duty work and was placed off work during the claimed period. In his January 11, 2013 report, Dr. Rice excused appellant from performing any work duties from December 5, 2012 until his release after she recovers from surgery. However, he failed to provide any new explanation as she was disabled from performing her work duties during this period. As noted, OWCP denied appellant's request

² 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).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *See D.K.*, 59 ECAB 141 (2007).

for lumbar spine surgery by decision dated February 20, 2013. Thus, this information is insufficient to reopen her claim for further merit review.

The Board finds that appellant did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP. Appellant did not meet any of the regulatory requirements and OWCP properly declined to reopen her claim for further merit review.⁷

On appeal, counsel argues the decision is contrary to law and fact. However, for the reasons discussed above, appellant has failed to establish entitlement to wage-loss compensation for the claimed period of December 6, 2012 to January 11, 2013.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 20, 2015
Washington, DC

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

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

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

⁷ *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration 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).