

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

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**P.L., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chicago, IL, Employer**

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**Docket No. 14-1875  
Issued: March 20, 2015**

*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  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 26, 2014 appellant, through counsel, filed a timely appeal from a July 30, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. The last merit decision of record was OWCP's August 6, 2013 decision. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, and 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> 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 December 2, 2006 appellant, then a 37-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging multiple injuries on December 1, 2006 when she fell down stairs. She returned to full-time work without restrictions on January 2, 2007. On June 11, 2007 OWCP accepted the claim for displacement of lumbar intervertebral disc without myelopathy.

On June 21, 2007 appellant filed a claim for a schedule award (Form CA-7).

On July 6, 2007 appellant filed a recurrence (Form CA-2a) stating that she sustained a recurrence of disability beginning June 28, 2007. She returned to work full time on November 19, 2007.

Appellant continued to treat with Dr. Charles Mercier, a Board-certified orthopedic surgeon, and Dr. Jay F. Kiokemeister, an osteopathic physician Board-certified in anesthesiology, throughout 2007 and 2008. At the recommendation of Dr. Kiokemeister appellant continued to receive physical therapy treatment. In a report dated May 20, 2008, Dr. Mercier noted her diagnosis as herniated disc at L4-5 and stated that physical therapy had reduced her pain, but that she had requested an epidural steroid injection, which would be scheduled.

The employing establishment offered appellant a modified limited-duty position on August 16, 2008, which she did not accept.

In a report dated November 10, 2008, Dr. Mercier noted that appellant's current diagnosis was small disc herniation at L4-5 with electrodiagnostic evidence of nerve root irritation at that level. He had received correspondence from the employing establishment asking her to return to work as a letter carrier, but that she claimed she could not do this job. Appellant wanted a specific position at the employing establishment and that if any other job was offered to her which required physical activity she was not going to accept the position. Dr. Mercier noted her limitations as no lifting over 10 to 15 pounds, and no repetitive bending at the waist. He suggested that appellant meet with her employing establishment and discuss her limitations, and compromise over what positions she could return to do.

On December 4, 2008 the employing establishment again offered appellant a limited-duty position, which she did not accept.

By decision dated February 13, 2009, OWCP accepted appellant's claim for a recurrence of disability beginning June 28, 2007.

On April 30, 2009 appellant filed claim for compensation forms (CA-7) for leave without pay for the period August 13 to November 18, 2007; July 30, 2008 to April 10, 2009; and April 11 to May 15, 2009.

By letter dated May 8, 2009, OWCP informed appellant that the evidence of record was insufficient to support her claims for disability compensation. It provided her 30 days to submit the requested medical evidence.

In a March 25, 2010 medical report, Dr. Michael Haak, a Board-certified orthopedic surgeon, reviewed appellant's medical history and provided findings on examination. He diagnosed cervical radiculopathy, cervical stenosis, lumbago, lumbar degenerative disc disease, and lumbar radiculopathy. Dr. Haak noted that appellant appeared to be symptomatic with regard to exacerbation of underlying degenerative changes in the cervical spine and lumbar spine, which were exacerbated by an on-the-job injury in December 2006. Based upon lack of lumbar and cervical spine symptoms prior to the work-related incident, Dr. Haak opined that she sustained an exacerbation of her underlying asymptomatic degenerative problems in the neck and the low back at the time of the on-the-job injury, and that her symptoms and limitations were due to that on-the-job injury.

By decision dated August 3, 2011, OWCP denied appellant's disability compensation for the claimed periods August 13 to November 18, 2007; July 30, 2008 to April 10, 2009; and April 11 to May 15, 2009.

On September 1, 2011 OWCP referred the case file to a district medical adviser (DMA) for an opinion regarding whether appellant's claim should be expanded to include cervical conditions.

In a September 4, 2011 report, the DMA opined that the claim should be expanded to include cervical radiculopathy, cervical degenerative disc disease, and cervicgia.

By decision dated September 28, 2011, OWCP expanded the acceptance of the claim to include cervical radiculopathy, cervicgia, and temporary aggravation of cervical degenerative disc disease.

In another decision dated September 28, 2011, OWCP denied appellant's claim for a schedule award.

On January 25, 2012 appellant underwent C4-5 and C5-6 anterior cervical discectomy, C4-5 and C5-6 anterior cervical interbody fusion, and C4 to C6 anterior cervical plating. The surgery was authorized by OWCP.

By letter dated August 1, 2012, counsel for appellant argued that she was entitled to disability compensation dating back to 2009 because OWCP approved her surgery earlier that year. He requested that OWCP inform him of the periods of compensation which had previously been approved and those that were disapproved. Appellant submitted various medical reports and statements in support of her claim.<sup>3</sup>

By decision dated November 5, 2012, OWCP denied appellant's disability compensation for the period August 13 to November 18, 2007 and July 30, 2008 to May 15, 2009. It found that she had failed to submit medical evidence which establishing disability during the claimed periods.

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<sup>3</sup> On February 15, 2012 appellant filed CA-7 claim for compensation forms for the period beginning December 10, 2009. The Board notes that OWCP approved certain periods of disability compensation for subsequent CA-7 forms filed. The Board further notes that any CA-7 forms filed for the period after May 15, 2009 do not pertain to this claim on appeal as the decision on appeal only pertains to the denial of benefits during the period July 30, 2008 to May 15, 2009.

On November 19, 2012 appellant, through counsel, appealed the November 5, 2012 OWCP decision and requested a telephone hearing before the Branch of Hearings and Review. In support of her claim, she submitted various medical reports and statements. A hearing was held on March 11, 2013.

Appellant's request for a schedule award was denied by decision dated February 27, 2013. By decision dated August 6, 2013, OWCP's Branch of Hearings and Review affirmed the February 27, 2013 decision.

By decision dated May 30, 2013, the Branch of Hearings and Review reversed in part the November 5, 2012 decision, finding that appellant was entitled to wage-loss compensation for the period August 13 to November 18, 2007. It affirmed in part the November 5, 2012 decision, finding that she had failed to submit evidence establishing disability for the period July 30, 2008 to May 15, 2009. An OWCP's hearing representative noted that appellant had not established that her work stoppage after returning to work in November 2007 was due to a recurrence of her accepted conditions. He further stated that appellant did not establish a change in her modified-duty position which prevented her from returning to work during this period, noting that she was offered multiple suitable modified-duty positions after she stopped work.

On May 1, 2014 appellant, through counsel, requested reconsideration of the May 30, 2013 hearing representative's decision. Counsel stated that he was submitting a March 24, 2014 medical report not previously considered from Dr. Haak in support of appellant's claim.

In a March 24, 2014 report, Dr. Haak reported that appellant had undergone cervical fusion in January 2012 and lumbar fusion in December 2012 due to complaints of neck, and low back pain. He noted that her original injury was due to her employment with the employing establishment. Dr. Haak diagnosed cervicgia, cervical degenerative disc disease, lumbago, and lumbar degenerative disc disease. He reported that appellant's condition had improved and recommended a functional capacity evaluation to determine her capabilities. Dr. Haak further stated that she should not resume employment until after she had the functional capacity evaluation. The remaining medical evidence submitted was previously considered by OWCP.

By decision dated July 30, 2014, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence.

### **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>4</sup> Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements

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<sup>4</sup> D.K., 59 ECAB 141 (2007).

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>5</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 May 1, 2014 application for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant argued that Dr. Haak's March 24, 2014 report established her entitlement to disability compensation for the period July 30, 2008 to May 15, 2009. The underlying issue in this case however is whether her accepted injuries caused her disability from July 30, 2008 to May 15, 2009 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>6</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 30, 2008 to May 15, 2009.<sup>7</sup>

While appellant submitted a new March 14, 2014 medical report from Dr. Haak, this report is not relevant in establishing her claim. Dr. Haak's report provided diagnoses of cervicalgia, cervical degenerative disc disease, lumbago, and lumbar degenerative disc disease. He restricted appellant from returning to work until after she underwent a functional capacity evaluation. Dr. Haak's report provided a limited and vague opinion on her work limitations and disability from the date of his March 24, 2014 evaluation onward. He did not address the relevant issue in this claim and made no mention of the specific period of disability in question. Dr. Haak's report failed to establish that appellant was disabled from July 30, 2008 to May 15, 2009 as a result of her accepted employment injuries. Appellant failed to provide detailed medical rationale from a physician to explain and support the medical opinion that her diagnosed conditions caused her disability from July 30, 2008 to May 15, 2009 such that she was unable to perform her federal employment duties.<sup>8</sup> 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

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<sup>5</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>6</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>7</sup> The Board notes that the record indicates that appellant has filed multiple claims for other periods of disability. The decision on appeal only pertains to the denial of benefits during the period July 30, 2008 to May 15, 2009, as affirmed by the decision of the Branch of Hearings and Review on May 30, 2013, and for which merit review was denied on July 30, 2014.

<sup>8</sup> See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

case.<sup>9</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.<sup>10</sup>

The remaining medical evidence of record had previously been submitted and reviewed by OWCP. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.<sup>11</sup>

The Board accordingly finds that appellant failed to 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).

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<sup>9</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>10</sup> *M.C.*, Docket No. 14-21 (issued March 11, 2014).

<sup>11</sup> *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 30, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 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