

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

D.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
McAllen, TX, Employer**

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**Docket No. 15-1811
Issued: January 6, 2016**

Appearances:
Frankie Sanders, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 1, 2015 appellant, through her representative, filed a timely appeal from a July 17, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from November 17, 2014, the date of the most recent OWCP merit decision, to 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 to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration without a merit review pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 12, 2014 appellant, then a 60-year-old parcel post distribution machinist, filed a traumatic injury claim (Form CA-1) alleging that she strained both shoulders on February 7, 2014, due to lifting a “large heavy parcel.” She stopped work that day and later returned to a modified-duty position.

By letter dated February 27, 2014, OWCP notified appellant that evidence of record was insufficient to establish her claim. It advised her of the type of evidence needed and instructed her to return a questionnaire within 30 days.

In a February 12, 2014 report, Dr. Jetta Brown, a general practitioner, advised that appellant was injured at work while lifting parcels of mail weighing in excess of 25 pounds and pulling large baskets weighing up to 1,000 pounds. She detailed appellant’s past medical history, including bilateral knee problems and carpal tunnel syndrome, and made findings on examination. Dr. Brown assessed cervical sprain, thoracic sprain, lumbar sprain, lumbar disc disease with radiculopathy, bilateral internal derangement of knees and hips, antalgic gait, bilateral rotator cuff syndrome, loss of and function in both hands, and tendinitis of the right elbow. She opined that appellant clearly suffered a traumatic injury on February 7, 2014 based on the explanation of the type of work that she was performing. Dr. Brown further opined that appellant’s condition was causally related to the work that she performing as a clerk for the employing establishment.

In a March 26, 2014 report, Dr. Marco Gutierrez, a Board-certified family practitioner, advised that appellant complained of bilateral shoulder pain. He assessed shoulder pain and ordered a magnetic resonance imaging (MRI) scan.

By letter dated March 24, 2014, the employing establishment controverted appellant’s claim. It noted that prior to the alleged incident she had been absent from work for 10 consecutive days, from January 28 through February 6, 2014, and that she was absent without leave for 3 days before reporting the February 7, 2014 injury. The employing establishment also noted that she did not seek medical treatment until February 12, 2014. Appellant’s supervisor, Albert Castillo, advised that appellant was handling packages weighing 5 to 15 pounds and that, if she had encountered heavier packages, she was required to seek help. The employing establishment also claimed that the 1,000-pound baskets that she claimed she pulled on the date of injury were only 321 pounds and moved effortlessly as they were on wheels. It also noted that her medical reports failed to mention appellant’s preexisting conditions and failed to explain how the alleged incident caused the diagnosed conditions.

In a March 28, 2014 duty status report (Form CA-17), Dr. James Key, a Board-certified orthopedic surgeon, advised that appellant was disabled from work.

On August 4, 2014 appellant accepted a modified-duty position.

By decision dated April 29, 2014, OWCP denied appellant’s claim because the evidence of record was insufficient to establish fact of injury.

On May 5, 2014 appellant requested reconsideration. She provided a February 12, 2014 report from Dr. Eric Bennos, a Board-certified diagnostic radiologist, who advised that an MRI scan of the left shoulder revealed type 2 acromion with hypertrophy of the acromioclavicular joint possibly supporting a shoulder impingement diagnosis, tendinosis/tendinopathy and tendinous strain, punctiform tear of the distal supraspinatus tendon, bicep tenosynovitis, and deltoid muscular strain. A right shoulder MRI scan revealed tendinosis/tendinopathy and tendinous strain, type 2 acromion, and minimal fluid in the subacromial and subdeltoid bursal spaces.

By decision dated August 14, 2014, OWCP denied modification of its previous decision. It indicated that appellant had not submitted sufficient factual evidence to show that the claimed incident occurred, as alleged.

On August 15, 2014 appellant again requested reconsideration. She provided an August 15, 2014 statement responding to OWCP questions about her claimed injury. Appellant advised that on February 7, 2014 from about 4:00 a.m. to 4:15 a.m., she felt pressure and pain from her shoulders down to her lower back, hips, legs, and ankles when she picked up a heavy parcel of mail. She noted that following the incident she went on break for 15 minutes, keyed for 45 minutes, and then began to sweep.

Accompanying the request was an August 1, 2014 report from Dr. Key who advised that appellant felt pressure in her shoulders, neck, and lower back when she picked up a heavy parcel of mail on February 7, 2014. He assessed sprain of the lumbar region, sprain of the left wrist and hand, muscle spasm, sprain of bilateral shoulders, and cervical sprain. Dr. Key opined that the mechanism of injury was consistent with appellant's duties and his findings on examination. He further opined that the injuries she sustained on February 7, 2014 were directly related to the work she had performed that day.

Appellant subsequently submitted a March 28, 2014 report from Dr. Key. Dr. Key reiterated that she was lifting a parcel when she began to feel neck and low back pain. He advised that appellant was restricted from lifting more than 10 pounds and that overhead activity, bending, stooping, twisting, pulling, and pushing was limited to an hour.

By decision dated November 17, 2014, OWCP denied modification of its April 29, 2014 decision. It noted that the factual component of fact of injury was not established, as there were discrepancies between appellant's account of the incident and her supervisor's account.

On April 23, 2015 appellant requested reconsideration from the November 17, 2014 decision.

In a statement dated February 12, 2015, appellant requested reconsideration and disputed her supervisor's challenge to her claim. She contended that he was not on duty during her injury and that he was either mistaken regarding the weight of parcels for which she was responsible or he was misrepresenting the truth. Appellant reiterated that she felt pressure and pain in her shoulders down to her lower back when she lifted a heavy parcel of mail. She argued that the statement provided by her supervisor should not be sufficient to deny her claim.

In a December 8, 2014 statement, a coworker contended that the clerk post required prolonged standing, walking, bending, reaching, and lifting up to 70 pounds. She noted that clerks could ask for help if needed.

In a March 27, 2015 report, Dr. Key advised that appellant was a clerk for the employing establishment. He noted that on February 7, 2014 she was lifting parcels, some weighing approximately 25 pounds and placing them on a piece of equipment. Dr. Key noted that the history as provided by appellant had been consistent since her initial February 12, 2014 visit. He opined that the mechanism of the injury was consistent with the report of the injury and the objective findings on examination. Dr. Key further opined that appellant sustained an injury as a result of the work she performed and that her case was being improperly denied. Appellant also resubmitted February 12, 2014 diagnostic reports.

By decision dated June 23, 2015, OWCP denied appellant's request for reconsideration without conducting a merit review.

On appeal appellant argued that OWCP should have considered the newly submitted witness statement, as it addressed the type of work that she performed at the employing establishment.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² its 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 its decision denying or terminating a benefit, a claimant's application for review must be received 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

In a November 17, 2014 merit decision, OWCP denied appellant's claim because the evidence of record failed to establish that the work incident occurred as alleged. Appellant submitted a timely request for reconsideration received by OWCP, which was denied without conducting a merit review.

² *Id.* 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)(3).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

The underlying issue on appeal involves the factual component of fact of injury, specifically, whether the incident occurred at the time, place, and in the manner alleged within the performance of duty. In support of her request for reconsideration, appellant submitted a statement from her coworker. The coworker advised that clerks engage in prolonged standing, walking, bending, reaching, and lifting up to 70 pounds. Although she noted that clerks are generally required to lift up to 70 pounds, she does not indicate that she witnessed or had immediate knowledge of appellant's claimed lifting injury on February 7, 2014. As the coworker's statement does not specifically address whether the claimed incident occurred on February 7, 2014 it is not relevant evidence.

In a February 12, 2015 statement, appellant disputed her supervisor's challenge to her claim. She contended that her supervisor was not on duty when she was injured and that he was either mistaken regarding the weight of parcels she was responsible for or he was misrepresenting the truth. Appellant reiterated that she felt pressure and pain in her shoulders down to her lower back when she lifted a heavy parcel of mail. This statement merely repeats the account previously provided in her earlier statement. The Board has held that the submission of evidence which repeats or duplicates evidence already of record does not constitute a basis for reopening a case for a merit review.⁶ Appellant also argued that her supervisor's statement should not be used to deny her claim as he was not in her unit on the date of injury day. However, it is well established that where the legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.⁷

Appellant also submitted a March 27, 2015 report from Dr. Key and resubmitted diagnostic reports previously reviewed by OWCP. While these documents have some connection to her claim, they are irrelevant to the issue for which OWCP denied her claim because they fail to establish that the incident occurred in the performance of duty at the time, place, and in the manner alleged. As a result, these medical documents do not constitute a basis for reopening appellant's claim.

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by OWCP, and did not submit new relevant evidence. As she did not meet any of the necessary requirements, she is not entitled to further merit review.⁸

On appeal appellant argues that OWCP should have considered the newly submitted witness statement, as it addressed the type of work that she performed at the employing establishment. As explained, the witness statement only generally discussed the job duties of clerks and did not warrant reopening of his claim for a merit review under 20 C.F.R. § 10.606(b)(3).

⁶ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

⁷ *Norman W. Hanson*, 45 ECAB 430 (1994).

⁸ *L.H.*, 59 ECAB 253 (2007).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board