

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

S.E., Appellant

and

**U.S. POSTAL SERVICE, VILLAGE STATION
POST OFFICE, Los Angeles, CA, Employer**

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**Docket No. 16-1077
Issued: October 26, 2016**

Appearances:
*Minnette D. Miles, for the appellant*¹
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 18, 2016 appellant, through her representative, filed a timely appeal from an October 21, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from October 16, 2014, the date of the most recent OWCP merit decision, to the filing of this appeal, the Board lacks jurisdiction to review

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from October 21, 2015, the date of OWCP's last decision, was April 18, 2016. Since using April 26, 2016, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is April 18, 2016, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

the merits of this case pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

FACTUAL HISTORY

On October 10, 2000 appellant, then a 31-year-old modified mail carrier, filed a recurrence of disability claim (Form CA-2a) alleging that on September 28, 2000 she sustained a recurrence of disability causally related to a January 23, 1999 employment injury. OWCP converted the notice of recurrence of disability to new occupational disease claim (Form CA-2) as she attributed her condition to new work factors. It accepted the claim for low back strain and a single episode of major depressive disorder. OWCP paid appellant compensation for intermittent disability beginning October 4, 2000. Appellant returned to full-time modified employment on July 26, 2004.⁴

On October 25, 2005 Dr. Michael D. Smith, an attending Board-certified orthopedic surgeon, diagnosed thoracic and lumbar strains and found that appellant could return to her usual employment. He noted that a magnetic resonance imaging (MRI) scan study of the lumbar spine was basically normal.

On November 29, 2005 appellant filed a notice of recurrence of disability (Form CA-2a) beginning November 15, 2005 causally related to her January 23, 1999 and September 28, 2000 employment injuries. In a decision dated March 31, 2006, OWCP found that she had not established a recurrence of disability beginning November 15, 2005 due to her accepted work injury. It noted that appellant returned to work after her physician released her to resume her usual employment duties. OWCP determined that the medical evidence was insufficient to show that she was totally disabled from her employment. On September 7, 2006 appellant requested reconsideration. By decision dated November 17, 2006, OWCP denied modification of its March 31, 2006 decision.

The employing establishment, on July 23, 2007, advised that appellant had returned to her usual work on July 16, 2007, but when she arrived at work she indicated that she "could not perform her duties." She filed a claim for compensation (Form CA-7) for the period from

³ 5 U.S.C. § 8101 *et seq.*

⁴ In decisions dated November 13 and December 24, 2003, OWCP terminated appellant's compensation as she refused an offer of suitable work under 5 U.S.C. § 8106(c). On April 8, 2005 OWCP vacated its November 13 and December 24, 2003 decisions as the offered position was temporary in nature. In a decision dated September 16, 2005, the Board affirmed an August 21, 2004 OWCP decision approving representative's fees before OWCP and a February 2, 2005 decision denying her request for a review of the written record under 5 U.S.C. § 8124. Docket No. 05-1188 (issued September 16, 2005).

July 23 to 28, 2007 as there was no work available within her restrictions. The employing establishment asserted that she had no work restrictions and refused to perform her assignment⁵

By decision dated November 15, 2007, OWCP found that appellant had not established a recurrence of disability beginning July 23, 2007. It discussed its prior finding that she had not established a recurrence of disability as of November 15, 2005, when she left her employment. OWCP determined that the employing establishment's failure to accommodate appellant's request for light duty after she resumed work after a voluntary work stoppage was insufficient to show a recurrence of disability.

Appellant requested reconsideration on March 3, 2008. In a July 9, 2008 decision OWCP denied modification of its November 15, 2007 decision. It noted its prior decision denying a recurrence of disability beginning November 15, 2005 and indicated that it was currently considering only whether she sustained a recurrence of disability on July 23, 2007. OWCP also noted that appellant had returned to work for a partial day on September 21, 2007 and filed a claim for a traumatic injury occurring on that date, assigned another file number.

Appellant again requested reconsideration on July 14, 2009. By decision dated December 23, 2009, OWCP denied modification of its July 9, 2008 decision. It found that she had not established a withdrawal of limited duty or that she was totally disabled.

Appellant requested reconsideration on December 27, 2010 and December 23, 2013. In a decision dated February 25, 2014, OWCP denied modification of its December 23, 2009 decision. On July 21, 2014 appellant again requested reconsideration. By decision dated October 16, 2014, OWCP denied modification of its February 25, 2014 decision.

On August 24, 2015 appellant requested reconsideration. In a statement dated October 13, 2015, she related that she was totally disabled from March 27, 2006 until July 16, 2007, when she was released to modified employment. The employing establishment did not accommodate her work restrictions. Appellant referred to reports from Dr. Roland S. Jefferson, a Board-certified psychiatrist, dated January 2, 2007 and March 8 and 31, 2008. She maintained that her October 17, 2005 MRI scan study was not normal as had been found by Dr. Smith.

Appellant resubmitted an October 17, 2005 MRI scan study of the lumbar spine showing a right lumbar rotatory scoliosis compatible with post-traumatic asymmetrical weight bearing or an ongoing spasm associated with small facet synovial cysts at L3-4 and L4-5, and "L2-3 through L5-S1 level posterior deep adipose tissue fluid-correlate historically for post-traumatic soft tissue injury and clinically for persistent symptoms."

Appellant also resubmitted medical reports from Dr. Roberts dated March 27 and August 7, 2006, December 10, 2013, and December 23, 2014, and medical reports from Dr. Jefferson dated January 2, 2007 and January 3, 2012.

⁵ The employing establishment advised that after appellant received a notice of proposed separation she asked to return to employment but after she got to work on July 23, 2007 informed her supervisor that she had restrictions.

In a January 28, 2014 attending physician's report, Dr. Roberts diagnosed a herniated lumbar disc at L4-5 and lumbar radiculopathy. He checked a box marked "yes" that the condition was caused or aggravated by employment and found that appellant was permanently disabled. Dr. Roberts also completed a form report on December 23, 2014. He diagnosed herniated lumbar discs and checked a box marked "yes" that the condition arose from employment.

In a permanent and stationary report dated December 23, 2014, Dr. Roberts related that appellant sustained a new injury on September 21, 2007 delivering mail resulting in a herniated L4-5 lumbar disc with impingement. He diagnosed herniated lumbar discs at L4-5 and L5-S1, lumbosacral strain, and left radiculopathy. Dr. Roberts advised that appellant had 15 percent whole person permanent impairment of her lumbar spine.

By decision dated October 21, 2015, OWCP denied appellant's request for reconsideration as she did not submit evidence or raise an argument sufficient to warrant reopening the case for further merit review under section 8128(a).

On appeal appellant, citing Board case law, notes that OWCP may not deny a request for reconsideration because the evidence lacked probative value if the evidence is new and relevant. She maintains that she submitted reports from Dr. Jefferson regarding her consequential psychiatric condition that OWCP did not discuss in its decision. Appellant argues that she was unable to work due to her psychiatric condition.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ 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.⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁸ 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.⁹

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁰ The Board also has held that the submission of evidence which does not address the particular issue involved does

⁶ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

¹⁰ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

not constitute a basis for reopening a case.¹¹ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹²

ANALYSIS

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a). She did not demonstrate that OWCP erroneously applied or interpreted a point of law. Moreover, appellant did not advance a relevant legal argument not previously considered by OWCP.

In support of her August 24, 2015 reconsideration request, appellant maintained that Dr. Smith erroneously found that an October 17, 2005 MRI scan study was normal. She contended that she was partially disabled beginning July 16, 2007 but the employing establishment failed to accommodate her restrictions. Appellant noted that she had submitted January 2, 2007 and March 8 and 31, 2008 report from Dr. Jefferson. OWCP, however, previously considered the October 17, 2005 MRI scan study and Dr. Smith's 2005 interpretation of the study, the referenced reports from Dr. Jefferson, and her argument that the employing establishment did not provide her with limited duty. Evidence or argument which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹³

Appellant additionally resubmitted medical evidence, including the October 17, 2005 MRI scan study, reports from Dr. Roberts dated March 27 and August 7, 2006, December 10, 2013, and December 23, 2014, and reports from Dr. Jefferson dated January 2, 2007 and January 3, 2012. As these reports repeat evidence already in the case record, they are duplicative and do not constitute relevant and pertinent new evidence.¹⁴

Dr. Roberts, in a report dated January 28, 2014, diagnosed a herniated lumbar disc at L4-5 and radiculopathy and advised that appellant was totally disabled. In a report dated December 23, 2014, he noted that she sustained a new injury on September 21, 2007 and provided an impairment evaluation. Dr. Roberts did not address the pertinent issue of whether appellant was disabled beginning July 2007 due to her accepted employment injury. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.¹⁵

¹¹ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹² *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹³ *See J.P.*, 58 ECAB 289 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

¹⁴ *See J.B.*, Docket No. 16-0320 (issued March 29, 2016).

¹⁵ *Freddie Mosley*, 54 ECAB 255 (2002).

On appeal appellant contends that Board case law provides that OWCP may not deny a request for reconsideration if the evidence is new and relevant. As found, however, she did not submit relevant and pertinent new evidence with her reconsideration request.

Appellant further contends that OWCP did not discuss Dr. Jefferson's reports regarding her consequential injury in its decision. OWCP performed only a limited review of the evidence submitted on reconsideration to determine if it warranted reopening her case for further merit review. Appellant failed to submit relevant and pertinent new reports from Dr. Jefferson with her reconsideration request.

As 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 new evidence not previously considered, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board