

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

L.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer

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Docket No. 16-0584
Issued: September 26, 2016

Appearances:

Jason S. Lomax, Esq., for the appellant¹
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 January 26, 2016 appellant, through counsel, filed a timely appeal of an August 4, 2015² nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated November 4, 2014, and the filing of

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*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. *See* 20 C.F.R. § 501.3(f)(2). As OWCP's decision was issued on August 4, 2015, the 180-day computation begins August 5, 2015. One hundred eighty days from August 4, 2015 was February 1, 2016. Since using February 8, 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 January 26, 2016, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

ISSUE

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

On appeal counsel argues that he had provided a new legal argument which entitled appellant to a review of the merits of her claim. He contends that she submitted her willingness to cooperate with vocational rehabilitation services *via* a letter dated January 31, 2014 in accordance with section 2.813.17(f) of the Federal (FECA) Procedure Manual. Counsel alleges that OWCP's hearing representative had inappropriately selected the date of the oral hearing to reinstate benefits, rather than the date of appellant's January 31, 2014 letter and that this allegation was a new argument requiring review of the merits of her claim.

FACTUAL HISTORY

On August 4, 2011 appellant, then a 45-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a knee condition due to her employment duties of walking, climbing, and bending. On August 3, 2011 she underwent right knee arthroscopy for medial meniscal tear and chondromalacia. OWCP denied appellant's claim on October 12, 2011 finding that she had not submitted sufficient factual evidence to establish that her knee condition was due to her employment duties. On November 2, 2011 appellant requested an oral hearing from OWCP's Branch of Hearings and Review. By decision dated December 21, 2011, an OWCP hearing representative accepted her claim for right medial meniscal tear. OWCP accepted a tear of the medial meniscus of the left knee on April 26, 2012. Appellant underwent left knee arthroscopic surgery with partial meniscectomy and chondroplasties on May 2, 2012.

By decision dated December 20, 2012, OWCP declined to expand appellant's condition to include lumbar conditions including lumbosacral strain, multilevel broad-based disc bulges and herniations, lumbosacral spondylosis, lumbar facet arthropathy, and lumbar radiculopathy. Appellant, through counsel, requested an oral hearing from OWCP's Branch of Hearings and Review on December 28, 2012.

OWCP proposed to terminate appellant's medical benefits and compensation for wage loss in a notice dated February 7, 2013.

Appellant filed a second occupational disease claim (Form CA-2) on June 12, 2013 alleging that her bilateral knee conditions resulted in a lumbar spine injury.

By decision dated July 8, 2013, OWCP's hearing representative affirmed OWCP's December 20, 2012 denial of a back condition causally related to appellant's August 4, 2011 occupational disease claim.

³ 5 U.S.C. § 8101 *et seq.*

On November 7, 2013 OWCP referred appellant for vocational rehabilitation services. In a rehabilitation action report dated November 14, 2013, the vocational rehabilitation counselor indicated that she left a message for appellant on November 12, 2013. Appellant returned her call on November 12, 2013 and indicated that she needed to consult her calendar prior to scheduling an appointment. She relayed that she would call back in 10 minutes with a date. The vocational rehabilitation counselor next received a call from appellant on November 14, 2013. Appellant explained that she forgot to contact the vocational rehabilitation counselor on November 12, 2013. The vocational rehabilitation counselor explained that appellant was required to return calls within 24 hours or she would be considered noncooperative with the vocational rehabilitation process. She scheduled a meeting with appellant on November 18, 2013. Appellant attended this initial meeting. The vocational rehabilitation counselor noted that appellant was sent a letter directing her to attend an interview on November 26, 2013 at the employing establishment. The employing establishment informed the vocational rehabilitation counselor that appellant would be undergoing surgery and would not attend this interview. Appellant did not provide this information in the November 18, 2013 meeting with the vocational rehabilitation counselor. She did not attend the November 26, 2013 interview at the employing establishment.

In a letter dated November 26, 2013, OWCP explained that appellant had impeded the efforts of the vocational rehabilitation counselor by failing to appear for the November 26, 2013 interview without personally notifying the vocational rehabilitation counselor. It advised appellant of the penalty provisions of 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519. OWCP allowed her 30 days to contact OWCP and the vocational rehabilitation counselor and to make a good faith effort to participate in vocational rehabilitation counseling efforts.

By decision dated January 8, 2014, OWCP reduced appellant's compensation to zero effective that date based on her refusal to participate in vocational rehabilitation counseling. It noted that she had not contacted it for the purpose of participating in the rehabilitation effort since the November 26, 2013 letter and had not provided good cause for refusing to participate in vocational rehabilitation counseling.

The employing establishment submitted a letter dated January 21, 2014 informing OWCP that appellant had telephoned and notified the employing establishment that she would not be able to attend the November 26, 2013 interview prior to that interview date.

Counsel requested an oral hearing from OWCP's Branch of Hearings and Review in a letter dated January 24, 2014 and received on January 31, 2014.

The vocational rehabilitation counselor submitted a closure report from January 7 through 13, 2014 that indicated that appellant had not contacted her following the obstruction letter on November 26, 2013.

In a letter dated January 31, 2014 and received by OWCP on February 12, 2014, appellant denied refusing to cooperate with vocational rehabilitation counseling. Appellant indicated that she had contacted the employing establishment and informed it that she would not be attending the November 26, 2013 appointment. She asserted that she had multiple surgeries and medical procedures from December 12, 2013 through January 30, 2014 and was currently

totally disabled. Appellant indicated that she was willing to cooperate with vocational rehabilitation counseling in the future, but was currently medically unable to do so. She requested an oral hearing and reinstatement of her medical benefits.

Counsel submitted a letter dated February 18, 2014 received by OWCP on that date and notified OWCP that appellant was ready and willing to participate in vocational rehabilitation efforts. He resubmitted her January 31, 2014 letter.

Appellant testified at the oral hearing on August 14, 2014. Counsel argued that she had nonemployment-related conditions, which rendered her temporarily totally disabled and unable to participate in vocational rehabilitation counseling. Appellant alleged at the time of the initial meeting with the vocational rehabilitation counselor she had 120 staples in her stomach and 500 internal stitches requiring a cane to help her walk due to removal of a benign mass. She alleged that she described her condition to the employing establishment and was directed not to report for the interview on November 26, 2013. Counsel argued that OWCP had violated its procedures as appellant had shown a willingness to participate in vocational rehabilitation counseling through the January and February 2014 letters. Appellant indicated that she was willing to participate in vocational rehabilitation counseling at the oral hearing. She noted that her surgery that disabled her for the November 26, 2013 meeting was performed on June 19, 2013 and that her internal stitches were not healed by November 2013 as this required a year.

By decision dated November 4, 2014, OWCP's hearing representative found that OWCP properly reduced appellant's compensation under 5 U.S.C. § 8113(b) on January 8, 2014 as she failed to comply with vocational rehabilitation. She found that appellant did not attend the November 26, 2013 interview, that appellant did not respond to the November 26, 2013 letter from OWCP, and that she had submitted no medical evidence supporting her physical inability to participate in vocational rehabilitation. The hearing representative further found that appellant had confirmed that she would participate in vocational rehabilitation services and was entitled to reinstatement of compensation benefits. She concluded that the effective date of reinstatement of the previous rate of compensation would be the hearing date of August 14, 2014 the date appellant presented with her intent to comply.

OWCP reinstated appellant's compensation benefits effective August 14, 2014. Appellant returned to vocational rehabilitation counseling on December 9, 2014 and returned to work on February 9, 2015. She completed 60 days of employment on April 14, 2015.

On May 6, 2015 counsel requested reconsideration of the November 4, 2014 OWCP hearing representative's decision. He argued that appellant had set forth in writing her willingness to cooperate with the vocational rehabilitation process by the letter dated January 31, 2014 and received by OWCP on February 12, 2014. Counsel further argued that he had presented appellant's willingness to cooperate with vocational rehabilitation counseling in his letter dated February 18, 2014, which included appellant's January 31, 2014 letter. He asserted that OWCP should have restarted the vocational rehabilitation counseling process in February 2014. Counsel alleged that OWCP was required to reinstate appellant's compensation benefits on the date that she indicated in writing her intent to comply which he contended was February 12, 2014. Counsel alleged that OWCP incorrectly directed appellant to exercise her appeal rights rather than restarting her vocational rehabilitation counseling.

By decision dated August 4, 2015, OWCP declined to reopen appellant's claim for consideration of the merits finding that evidence submitted on reconsideration was insufficient to require OWCP to reopen the November 4, 2015 merit decision. It found that the January 31, 2014 letter from appellant did not indicate that she was immediately ready and willing to comply with vocational rehabilitation services. OWCP noted, "While the January 31, 2014 letter from you stated you did not decline to participate with vocational rehab[ilitation] and you 'will do so in the future,' the letter clearly establishes that you did not participate in vocational rehabilitation efforts due to the nonwork-related medical reasons and you would not participate with vocational rehabilitation efforts until those medical concerns were addressed." It found that it had previously considered the argument that appellant's ongoing medical issue did not allow her to participate in vocational rehabilitation counseling and that counsel had not presented a new legal argument.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁴ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁶ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for further review of the merits of her claim.

On January 8, 2014 OWCP reduced appellant's compensation benefits based on her refusal to cooperate with vocational rehabilitation counseling and OWCP's hearing representative affirmed this decision on November 4, 2014 finding that she failed to cooperate, that she did not provide medical evidence establishing good cause for her failure, and that she did not respond to OWCP's November 26, 2013 letter advising her of her obligations and the

⁴ *Id.* at § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608.

⁷ *Id.* at § 10.607(a); *Id.* at § 10.519(b) and (c). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

consequences of failing to cooperate with vocational rehabilitation counseling. OWCP's hearing representative further reinstated appellant's compensation benefits effective August 14, 2014, the date of the oral hearing, based on her statements at that time that she would cooperate with vocational rehabilitation counseling. On May 6, 2015 counsel timely requested reconsideration of the hearing representative's decision dated November 4, 2014.

The Board does not have jurisdiction over the November 4, 2014 OWCP decision. The issue presented is whether appellant, through counsel, met any of the requirements of 20 C.F.R. § 10.606(b)(3) requiring OWCP to reopen the case for review of the merits of her claim. In the May 6, 2015 request for reconsideration, counsel did not attempt to submit pertinent new and relevant evidence or to establish that OWCP erroneously applied or interpreted a specific point of law. Instead, he attempted to offer a relevant legal argument not previously considered by OWCP, namely that OWCP had utilized an incorrect date for reinstatement of benefits. Counsel argued that the appropriate date for reinstatement of appellant's compensation benefits was February 12, 2014, the date that OWCP received her January 31, 2014 letter or at the latest, February 18, 2014, the date that he proclaimed her willingness to cooperate and resubmitted the January 31, 2014 letter.

The Board finds that these are not new legal arguments. Counsel presented this argument at the August 14, 2014 oral hearing. In response to OWCP's hearing representative's query of whether appellant was currently willing to cooperate with vocational rehabilitation counseling, appellant's counsel contended that the oral hearing was not the first time that appellant had expressed her willingness to cooperate and mentioned the January and February 2014 letters. As appellant's counsel made the argument that appellant had agreed to cooperate with vocational rehabilitation counseling at the oral hearing, OWCP's hearing representative had heard this argument prior to reaching her decision on November 4, 2014 and this cannot be considered to be a new legal argument warranting review of the merits on August 4, 2015.⁸

On appeal counsel further developed this argument and cites to OWCP's procedures. OWCP's procedures require that following suspension of benefits, due to failure to cooperate with vocational rehabilitation counseling, the effective date of reinstatement of the previous rate of compensation should be the date the injured worker indicates in writing his or her intent to comply. This is further qualified by the requirement that the intent to cooperate must be confirmed by the vocational rehabilitation counselor.⁹ As noted by OWCP, appellant did not clearly present her intent to cooperate with vocational rehabilitation counseling in the January 2014 letter submitted both independently and through counsel. This letter asserts that she is currently unable to cooperate, but could cooperate at some unnamed date. The Board finds that this citation is insufficient to require OWCP to reopen appellant's claim for consideration of the merits.

⁸ See *Eugene F. Butler*, 36 ECAB 393, 398 (1984) where the Board held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case. See also *V.R.*, Docket No. 16-0969 (issued August 8, 2016).

⁹ *Supra* note 7 *Vocational Rehabilitation Services*, Chapter 2.813.17(f) (February 2011).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 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