

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

V.D., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Decatur, GA, Employer)

Docket No. 16-1484
Issued: January 6, 2017

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
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 July 12, 2016 appellant, through counsel, filed a timely appeal from a May 6, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated May 15, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

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 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

On September 18, 2012 appellant filed a traumatic injury claim (Form CA-1) alleging that on September 4, 2012, she was repositioning a patient when she hurt her chest and upper back. She did not indicate on the claim form that she had stopped work. On April 16, 2014 OWCP accepted appellant's claim for thoracic sprain, lumbar sprain, right shoulder sprain, and cervical sprain.

Appellant initially submitted hospital reports indicating that she was treated on September 11, 2012 in the emergency department. She also submitted multiple progress reports from Dr. Rohit Manushai Desai, a Board-certified internist dated from September 20, 2012 through September 18, 2013. Dr. Desai diagnosed thoracic sprain/strain, lumbar sprain/strain, muscle pain, and shoulder sprain/strain. In notes dating from September 20 to October 31, 2012 he related that appellant had been advised to stay off work.

On June 16, 2014 appellant filed a claim for leave without pay (Form CA-7) for the period October 20, 2012 through January 14, 2013.

By letter dated July 18, 2014, OWCP afforded appellant 30 days to submit medical information necessary to support her claim. Appellant did not respond.

By decision dated August 26, 2014, OWCP denied appellant's claim as the medical evidence of record failed to support that she was totally disabled for the claimed period.

On September 2, 2014 OWCP received appellant's request for a telephonic hearing before an OWCP hearing representative.

At the hearing held on February 26, 2015 appellant testified that she was unable to work from October 20, 2012 to January 14, 2013. She noted that she was hurt on September 9, 2012, and was under medical care. Appellant indicated that she returned to work on January 14, 2013.

By decision dated May 15, 2015, OWCP's hearing representative affirmed the denial of compensation benefits for the period October 20, 2012 through January 14, 2013, finding that there was no rationalized medical evidence supporting disability during the claimed period due to her employment injury.

On November 16, 2015 counsel requested reconsideration. He resubmitted a September 4, 2013 form report by Dr. Desai. In this report Dr. Desai noted appellant's history of injury and related diagnoses of shoulder, arm, thoracic and lumbar spine sprain. He concluded that a cause of her diagnosed conditions was the accepted employment incident.

By decision dated May 6, 2016, OWCP denied reconsideration without conducting a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's 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.⁴ 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.⁵ 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.⁶

When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared. There is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired in the 90-day period following OWCP's receipt of the claimant's reconsideration request.⁷

ANALYSIS

OWCP accepted that on September 4, 2012 appellant sustained sprain of the thoracic and lumbar regions of her back, a sprain of her right shoulder and upper arm, and sprain of her neck causally related to an accepted employment incident. However, in a decision dated August 26, 2014, it denied appellant's claim for wage-loss compensation for the period October 20, 2012 through January 14, 2013. This decision was affirmed by the hearing representative in a decision dated May 15, 2015. By letter received by OWCP on November 16, 2015, appellant, through counsel, requested reconsideration. It denied appellant's request in a decision dated May 6, 2016 without reviewing the merits of the case.

As noted above, the Board does not have jurisdiction over the merits of the May 15, 2015 decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of her claim. The Board finds that in her November 16, 2015 request for reconsideration appellant

³ 5 U.S.C. §§ 8128 (a). Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(a) (October 2011); *M.D.*, Docket No. 13-1344 (issued November 7, 2013).

did not show that OWCP erroneously applied or interpreted a specific point of law, and she did not advance a relevant legal argument not previously considered by OWCP. Thus, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue in this case is whether appellant has established that she was disabled during the period October 20, 2012 through January 14, 2013. A claimant may be entitled to a merit review by submitting new, relevant and pertinent evidence, but appellant has not submitted new relevant and pertinent evidence not previously considered by OWCP.

Counsel submitted no new relevant and pertinent evidence with his reconsideration request. The September 4, 2013 report from Dr. Desai that counsel submitted had previously been submitted on October 10, 2013, and it offered no opinion regarding appellant's disability status. Although reference is made by OWCP in the May 6, 2016 decision to other progress reports by Dr. Desai, the record does not reflect that these reports were submitted with the November 16, 2015 reconsideration request. Nevertheless, the reports listed by OWCP are duplicates of evidence already in the record. Evidence or arguments that are duplicative, cumulative, or repetitive in nature are insufficient to warrant reopening a claim for merit review.⁸ Appellant has not met any of the other criteria warranting reopening of her claim for further merit review. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Counsel further argues on appeal that OWCP failed to issue a timely decision regarding the request for reconsideration, and that this prejudiced appellant's appeal rights. The Board notes that OWCP has a timeliness goal for issuing reconsideration decisions of within 90 days from receipt of the request.⁹ OWCP procedures provide that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review the merits of the case by the Board, OWCP should conduct a merit review. However, the procedure manual notes that there is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request. The last merit decision in this case was the May 15, 2015 decision of the hearing representative. Appellant had 180 days after this decision, or until November 11, 2015, to appeal that decision to the Board. OWCP received the reconsideration request on November 16, 2015. Accordingly, it received appellant's reconsideration request after the 180-day period for appeal expired, and therefore OWCP's delay in issuing the decision on the request for reconsideration did not impact appellant's appeal rights.¹⁰ Therefore, counsel's argument on appeal is without merit.

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).

⁸ *Denis M. Dupor*, 51 ECAB 482 (2000).

⁹ *M.D.*, Docket No. 13-1344 (issued November 7, 2013).

¹⁰ *B.D.*, Docket No. 15-0400 (issued May 12, 2016).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6, 2016 is affirmed.

Issued: January 6, 2017
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