

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

J.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Woodville, WI, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 17-0683
Issued: June 1, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 6, 2017 appellant, through counsel, filed a timely appeal from a January 10, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was the September 16, 2016 decision of the Board which became final after 30 days of issuance and is not subject to further review.² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c), 501.3, and 501.6(d), the Board lacks jurisdiction to review the merits of the claim.

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 20 C.F.R. § 501.6(d).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are set forth below.

On August 17, 2012 appellant, then a 53-year-old part-time flexible sales and services distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on October 4, 2011 she injured her left shoulder when handling a bent shelf at work. She did not stop work.

By decision dated September 26, 2012, OWCP denied appellant's claim. It found that the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted October 4, 2011 employment incident.

On September 27, 2012 OWCP received a January 4, 2012 report from Dr. Marvin Klingler, who specializes in family medicine. Dr. Klingler evaluated appellant for left shoulder pain after a fall and diagnosed left shoulder strain.

In a February 1, 2012 report, Dr. Lance Weagant, Board-certified in family medicine, obtained a history of appellant sustaining an injury on October 4, 2011 trying to bring down a cart from a shelf. He noted that she reinjured her shoulder in the middle of December 2011 after a fall at work. On March 8, 2012 Dr. Weagant noted that appellant's injury occurred with lifting and that it was a workers' compensation injury.

Dr. Thomas Comfort, a Board-certified orthopedic surgeon, evaluated appellant on June 11, 2012. He indicated that she sustained an injury when a shelf she was holding gave way. Dr. Comfort noted that x-rays showed an intact rotator cuff and acromioclavicular (AC) joint arthrosis.

In a September 4, 2012 report, Dr. Weagant advised that he was treating appellant for a left shoulder injury sustained at work on October 4, 2011 when she tried to lift a cart off of a shelf. Her physician opined that her work duties, including repeatedly lifting material above shoulder level, caused her injury.

Dr. Jason Dieterle, an orthopedic surgeon, diagnosed left shoulder impingement syndrome with partial thickness tear of the rotator cuff and AC arthrosis in July 13 and September 26, 2012 reports. He noted that appellant injured herself when she pulled a cart at work.

On October 19, 2012 appellant requested an oral hearing, which was held before an OWCP hearing representative on February 12, 2013.

Dr. Dieterle, in a March 12, 2013 addendum report, clarified that appellant's injury occurred when she jammed her shoulder holding on to an upper shelf on a cart that gave way.

By decision dated May 1, 2013, an OWCP hearing representative affirmed the September 26, 2012 decision. He found that the medical evidence of record was insufficient to establish a diagnosed condition causally related to the accepted work incident.

On September 24, 2013 counsel requested reconsideration.

In an August 26, 2013 report, Dr. Michael Lockheart, Board-certified in occupational medicine, diagnosed left shoulder pain.⁴ He provided a history of appellant jamming her left shoulder while attempting to pull a shelf from a cart on October 4, 2011. Dr. Lockheart advised that she related to him that her physician deemed the injury work related.⁵

On August 8, 2013 Dr. Samuel Inkumsah, Board-certified in family medicine, related that appellant injured herself at work while unloading mail from an upright steel cart. He diagnosed a partial thickness tear of the rotator cuff and bone spurring due to the force of the shelf jamming into her shoulder. Dr. Inkumsah noted that a fall two months later on uneven pavement at work contributed to her condition.

Dr. Comfort, on September 9, 2013, indicated that appellant jammed her shoulder while using a mail cart when a shelf she was holding gave way. He opined that her injury was work related.

By decision dated April 17, 2014, OWCP denied modification of its May 1, 2013 decision. It found that the medical evidence was insufficient to show that appellant sustained a left shoulder condition due to the October 4, 2011 employment incident.

Appellant appealed to the Board. By decision dated February 4, 2015, the Board affirmed OWCP's April 17, 2014 decision.⁶ The Board found that the medical evidence of record was insufficient to establish that the October 4, 2011 work incident caused appellant's left shoulder condition.

On August 18, 2015 appellant, through counsel, requested reconsideration. In support of her request, she submitted a July 14, 2015 report from Dr. Dieterle. Dr. Dieterle related that when a jamming motion occurred the muscle of the rotator cuff contracts and that if the arm is not allowed the intended arc of motion, the force directed to the tendon can cause the tendon to pull away from the bone causing a rotator cuff tear. He opined that this is what occurred in

⁴ On January 2, 2013 Dr. Dieterle performed a left shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, acromioplasty, and arthroscopic distal clavicle resection. He treated appellant beginning February 5, 2013 for a shoulder reinjury.

⁵ In a September 10, 2013 report, Dr. Lockheart diagnosed shoulder pain, low back pain, foot pain, fibromyalgia, and neck pain. He noted that appellant had shoulder surgery in January 2013 and indicated that this was being claimed as a workers' compensation injury.

⁶ Docket No. 14-1502 (issued February 4, 2015).

appellant's case when she jammed her shoulder. Dr. Dieterle opined that she likely tore her rotator cuff, or at least exacerbated her condition, when the tendon pulled away from the bone secondary to the jamming event as described.

By decision dated November 2, 2015, OWCP denied modification of its prior decision. It found that the medical evidence was insufficient to show that appellant sustained a left arm condition on October 4, 2011.

Appellant appealed to the Board. By decision dated September 16, 2016, the Board affirmed the November 2, 2015 decision.⁷ The Board determined that the medical evidence of record, including Dr. Dieterle's July 14, 2015 report, was insufficiently rationalized to meet her burden of proof.

On December 6, 2016 appellant, through counsel, requested reconsideration. He resubmitted the July 14, 2015 report from Dr. Dieterle, which he asserted constituted new evidence.

By decision dated January 10, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim as she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further consideration of the merits under section 8128(a).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁸ 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) submit relevant and pertinent new evidence not previously considered by OWCP.⁹ 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 by OWCP within one year of the date of that decision.¹⁰ 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.¹¹

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 the merits of a case.¹² The

⁷ Docket No. 16-0509 (issued September 16, 2016).

⁸ *Supra* note 3. 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 his own motion or on application."

⁹ 20 C.F.R. § 10.606(b)(3).

¹⁰ *Id.* at § 10.607(a).

¹¹ *Id.* at § 10.608(b).

¹² *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening the merits of a case.¹³ While the reopening of the merits 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.¹⁴

ANALYSIS

The last merit decision was issued by the Board on September 16, 2016. In that decision, the Board affirmed a November 2, 2015 OWCP decision, finding that appellant had not submitted sufficient medical evidence to establish that she sustained a left shoulder condition due to an October 4, 2011 work incident. Appellant timely sought reconsideration with OWCP on December 6, 2016. OWCP denied her request for reconsideration in a January 10, 2017 decision, finding that she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further merit review.

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 review of the merits of the claim. In her December 6, 2016 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a new and relevant legal argument not previously considered by OWCP. She further did not submit any pertinent new and relevant evidence. Through counsel, appellant resubmitted the July 14, 2015 report from Dr. Dieterle, which she maintained was new evidence. Dr. Dieterle's July 14, 2015 report, however, was previously considered by both OWCP and the Board. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹⁵

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

¹³ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁴ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹⁵ *See J.P.*, 58 ECAB 289 (2007); *Richard Yadron*, 57 ECAB 207 (2005).

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2017
Washington, DC

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

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

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