

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

A.M., Appellant

and

**U.S. POSTAL SERVICE, BOYDTON POST
OFFICE, Boydton, VA, Employer**

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**Docket No. 17-0893
Issued: October 18, 2017**

Appearances:
*Richard Haefner, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 16, 2017 appellant, through her representative, filed a timely appeal from a November 18, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated July 7, 2016, 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 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 5 U.S.C. § 8101 *et seq.*

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).

On appeal appellant's representative contends that the evidence submitted on reconsideration was that which was specifically requested in the July 8, 2016 merit decision.

FACTUAL HISTORY

On December 29, 2010 appellant, then a 46-year-old sales service and distribution associate, filed an occupational disease claim (Form CA-2) alleging that on December 16, 2010 she first became aware that her right shoulder tendinitis was due to sorting all of the letters on December 12, 14, and 15, 2010. By decision dated February 14, 2012, OWCP accepted appellant's occupational disease claim for thoracic region sprain/strain and right scapulothoracic sprain/strain.

Appellant accepted a new modified assignment as a part-time flexible clerk on February 27, 2012 working up to 40 hours a week. She accepted a series of modified part-time flexible clerk positions beginning April 4 through October 17, 2012.

In a report dated January 17, 2013, Dr. John J. Faulkner, a family practitioner, noted that appellant was sent home from work on December 26, 2012 and was paid administrative leave. Appellant indicated that she filed a grievance.

The employing establishment provided appellant with a form entitled Notice of Removal or Separation for Disability (not OWCP) which was effective January 25, 2013. Appellant filed claims for wage-loss compensation, which OWCP authorized.

On November 7, 2013 the employing establishment offered appellant a modified position of sales service/distribution associate. Appellant refused this position on November 12, 2013. OWCP continued to pay appellant wage-loss compensation.

On April 9, 2014 the employing establishment directed appellant to return to work in accordance with an arbitration decision. Appellant returned to work on April 17, 2014 in a position as a modified sales service and distribution associate. She continued to claim compensation for intermittent periods of leave without pay through May 30, 2014, which OWCP paid.

In a letter dated June 2, 2014, OWCP referred appellant for a second opinion examination with Dr. Richard Holm, a Board-certified orthopedic surgeon, to determine her continuing residuals and disability from work. In a report dated June 19, 2014, Dr. Holm determined that appellant could work at a medium physical level for eight hours a day with a lifting restriction of 20 pounds. He found that no further medical treatment was required.

On November 25, 2014 the employing establishment again offered appellant a modified sales services and distribution associate position. Appellant refused this position on

November 25, 2014. She continued to file claims for wage-loss compensation which OWCP paid.

The employing establishment offered appellant a new modified sales service distribution associate position on March 10, 2015. In a letter dated April 3, 2015, OWCP informed appellant that the offered position on March 10, 2015 was suitable work in accordance with Dr. Holm's work restrictions. It noted that the position remained available and afforded her 30 days to accept the position and report to duty or provide her reasons for refusal. OWCP explained the penalty provision of 5 U.S.C. § 8106(c)(2).

Appellant responded on April 24, 2015 and refused the offered position alleging that it exceeded Dr. Holm's work restrictions by requiring her to lift up to 30 pounds. She asserted that the functional capacity evaluation did not address the actual duties of her position and refused the offered position because it required boxing and distribution of mail. Appellant also asserted that she could not work 30 hours a week.

In a letter dated May 8, 2015, OWCP informed appellant that her reasons for refusing the offered position were not valid. It afforded her an additional 15 days to accept the offered position and report to work.

On May 27, 2015 the employing establishment informed OWCP that appellant had not reported for duty. On June 2, 2015 OWCP received a copy of the suitable work position accepted and signed by appellant on May 10, 2015. In a letter dated May 29, 2015 and received by OWCP on June 2, 2015, appellant asserted that she accepted the offered position on May 10, 2015 and mailed her acceptance to the employing establishment on May 11, 2015. She alleged that she had not received a schedule and official letter to return to work. Appellant also provided a copy of a letter addressed to the employing establishment dated May 10, 2015 indicating that she accepted the job offer and requesting her schedule and return to work date.

By decision dated June 17, 2015, OWCP terminated appellant's entitlement to compensation effective May 2, 2015³ due to her refusal of suitable work.

On July 2, 2015 appellant requested reconsideration. In a letter dated July 21, 2015, she repeated her allegations that she mailed a signed and accepted copy of the job offer to the employing establishment on May 11, 2015. Appellant asserted that she reported to work on May 28, 2015, that the postmaster was not present on that date, and that she left a handwritten note indicating that she accepted the job offer. She provided a copy of this letter. Appellant returned to work again on July 8, 2015 and again signed the job offer. On July 11, 2015 the May 11, 2015 letter arrived at the employing establishment. Appellant reviewed the letter which had been delivered elsewhere and was opened and damaged. She submitted a copy of the job offer signed on May 10, 2015 and date stamped by the employing establishment on March 12, 2015.

³ There is no explanation for the selection of this date in the record. As the merits of the suitable work termination are not before the Board, it will not address this issue on appeal. 20 C.F.R. §§ 501.2(c) and 501.3.

The employing establishment responded on July 30, 2015 and provided a timeline of events noting that on June 18, 2015 appellant's representative first provided notification that appellant had accepted the job offer *via* her signature on May 10, 2015. Appellant telephoned the employing establishment on July 7, 2015 and alleged that OWCP indicated that she should receive another job offer and that she was awaiting instructions from her postmaster. The employing establishment questioned why a job signed on May 10, 2015 would be date stamped as received on March 12, 2015. It asserted that appellant removed the refusal indication, the reasons for refusing, the original signature, and the original date.

The employing establishment provided appellant with a notice of separation, effective July 24, 2015.

Appellant's representative submitted a letter dated September 6, 2015 supporting appellant's allegations regarding the acceptance of the offered position. He provided a copy of an envelope addressed to the postmaster, which indicated it was opened at the wrong address. The postmark date is July 7, 2015.

By decision dated September 29, 2015, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decision. It found that the job offer signed by appellant on May 10, 2015, but date stamped received as March 12, 2015 was invalid.

Appellant requested reconsideration on November 17, 2015. She asserted that she made copies of the offered position and decided to accept it on May 10, 2015. Appellant contended that OWCP date stamped the job offer on March 12, 2015. She asserted that the postmaster never responded to her written request for a return to work date. Appellant alleged that administrative actions had to take place before her return to work such that she could not just show up at the employing establishment and begin working. She noted that she was granted disability retirement and asserted that this established that the offered position was not suitable work.

By decision dated February 11, 2016, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decision.

On April 13, 2016 appellant requested reconsideration of the February 11, 2016 merit decision. Appellant's representative submitted statements dated June 8 and 19, 2016 asserting that he was talking to appellant on the telephone on May 10, 2015 and was a witness to the fact that she went to the employing establishment on that date, purchased a stamped envelope and used it to mail her accepted modified job offer. He asserted that appellant did not have an original copy of the offer and signed the March 12, 2015 offer previously accepted by the employing establishment. Appellant's representative also asserted that he witnessed by telephone appellant's presence at the employing establishment on May 28, 2015 when she presented her handwritten acceptance letter. Appellant asked if she was on the schedule to work, and received a negative reply. Appellant's representative submitted a copy of his telephone bill indicating calls on May 10, 11, and 28, 2015 to Boydton, VA, the employing establishment's location.

In a July 7, 2016 decision, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decisions. It found that the circumstances suggested that she made an effort to accept the modified job offer, but that there was no evidence from the employing establishment acknowledging timely receipt of the accepted job offer.

Appellant, through her representative, requested reconsideration on November 15, 2016 and asserted that he made a Freedom of Information Act (FOIA) request to the employing establishment and received a copy of the handwritten note from appellant accepting the job offer on May 10, 2015, and the envelope postmarked July 7, 2015 which noted that it was opened at the wrong address. He again asserted that the letter was mailed on May 11, 2015. Appellant's representative also resubmitted a copy of the handwritten letter from appellant dated May 28, 2015. This letter was addressed to the postmaster and date stamped by the employing establishment on May 28, 2015. Appellant's representative also submitted an operations analysis from the employing establishment dated May 9 through July 18, 2016 which indicated that appellant's name did not appear on the schedule until the week of July 14, 2015.

Appellant's representative argued that appellant took every action she could to accept the job offer in a timely manner, that circumstances beyond her control delayed the May 11, 2015 letter, and that appellant was not scheduled to return to work. He asserted that appellant had submitted evidence that the employing establishment acknowledged receipt of her agreement to return to work.

By decision dated November 18, 2016, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that she failed to submit relevant new and pertinent evidence in support of her request for reconsideration. It explained that the evidence submitted had no bearing on the issue of whether appellant notified her employing establishment that she accepted the limited-duty job offer in May 2015 or that the employing establishment was made aware of her purported acceptance or that she appeared for work to begin performing the modified job as claimed.

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

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608.

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

On November 15, 2016 appellant, through her representative, filed a timely request for reconsideration from the July 7, 2016 merit decision. The underlying issue of the case is whether appellant has established that she accepted a suitable work position.

In support of the request for reconsideration, appellant's representative resubmitted the letters from appellant dated May 10 and 28, 2015 received by the employing establishment and previously considered by OWCP. The Board has 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 under 5 U.S.C. § 8128(a).⁸

Appellant's representative also presented additional documentation not previously reviewed by OWCP consisting of a work schedule from the employing establishment. The Board finds that the work schedule does not address the central issue of whether appellant notified the employing establishment of her acceptance of the suitable work position and is, therefore, not relevant to the central issue of the case. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

The Board finds that appellant's request for reconsideration does not establish that OWCP erroneously applied or interpreted a specific point of law; does not advance a relevant legal argument not previously considered by OWCP; and does not constitute relevant and pertinent new evidence not previously considered by OWCP.

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).

⁷ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

⁸ *See M.H.*, Docket No. 16-1382 (issued December 5, 2016); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁹ *B.T.*, Docket No. 16-0785 (issued September 21, 2016); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy 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