

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

S.M., Appellant)	
)	
and)	Docket No. 17-1899
)	Issued: August 3, 2018
U.S. POSTAL SERVICE, CUSTOMER CARE)	
CENTER, Los Angeles, CA, Employer)	
)	

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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 8, 2017 appellant, through counsel, filed a timely appeal from a July 17, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision dated February 7, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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.

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 January 19, 2016 appellant, then a 47-year-old customer care agent, filed an occupational disease claim (Form CA-2) alleging that she sustained pain in her neck, right shoulder, right hand, and right wrist causally related to factors of her federal employment. She did not stop work. OWCP accepted the claim for right shoulder bursitis, impingement syndrome of the right shoulder, a sprain of the ligaments of the cervical spine, and carpal tunnel syndrome of the right and left upper limbs.²

In a progress report dated May 13, 2016, Dr. Christopher P. DeCarlo, a physiatrist, diagnosed bilateral carpal tunnel syndrome, right shoulder bursitis, and cervical discogenic disc disease. He found that appellant could perform modified employment.

Dr. Charles Herring, a Board-certified orthopedic surgeon, in a report dated June 2, 2016, discussed appellant's history of injury and diagnosed right shoulder subacromial bursitis and impingement syndrome and a right trapezius strain. He deferred any disability determinations to her attending physician.

On June 3, 2016 Dr. DeCarlo diagnosed bilateral carpal tunnel syndrome, right shoulder bursitis, and cervical discogenic disease. He again found that appellant could perform modified work.

Appellant, on June 15, 2016, filed a claim for compensation (Form CA-7) requesting wage-loss compensation for disability from May 25 through June 3, 2016. She continued to submit claims for wage-loss compensation for time lost from work.³

In a July 8, 2016 duty status report (Form CA-17), Dr. DeCarlo found that appellant could perform her usual employment with an ergonomic workstation. In a July 21, 2016 CA-17 form and July 21 and September 1, 2016 progress reports, he advised that she was totally disabled. Dr. DeCarlo continued to submit progress reports finding that appellant was totally disabled. On September 1, 2016 he noted that appellant had an allergic reaction to a steroid injection received August 25, 2016. Dr. DeCarlo found that she was totally disabled due to cervical spine and right shoulder discomfort, noting that she had a positive impingement sign on the right and mild positive Tinel's signs at the wrists.

² OWCP previously accepted that appellant sustained lumbosacral and left groin sprains on April 29, 2008 under File No. xxxxxx014 and right ankle sprain on February 27, 2012 under File No. xxxxxx703.

³ Appellant requested wage-loss compensation from May 25 through June 3, 2016, June 22 through 28, 2016, July 20 through October 5, 2016, and November 7 through February 15, 2017.

On August 4, 2016 the employing establishment offered appellant a position as a modified customer care agent effective August 20, 2016. The duties required lifting, carrying, pushing, and pulling up to five pounds, occasional fine manipulation, and occasional use of a computer mouse.

OWCP, on October 4, 2016, referred appellant to Dr. Frederic G. Nicola, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that Dr. Nicola discuss the nature and extent of her current condition, its relationship to her employment, and any periods of total disability.

In a report dated November 3, 2016, Dr. Nicola reviewed appellant's history of shoulder and neck pain from repetitive typing in the course of her employment. He diagnosed a sprain/strain of the cervical spine superimposed upon mild cervical degenerative changes, subacromial bursitis of the right shoulder, and bilateral carpal tunnel syndrome. With regard to periods of total disability, Dr. Nicola advised that appellant was totally disabled "concurrent with the time that she had a cortisone injection in her right shoulder." He found that she could perform sedentary employment with restrictions against reaching with flexion and horizontal abduction of the right shoulder and keyboarding.

Dr. DeCarlo, in a January 16, 2017 progress report, diagnosed bilateral carpal tunnel syndrome, right shoulder bursitis, cervical discogenic disease, and migraine headaches. He noted that neck and bilateral wrist and hand pain made activities of daily living difficult. Dr. DeCarlo opined that appellant was temporarily totally disabled "due to the fact she is taking tramadol on a regular basis."⁴ On examination, he found a mild positive Tinel's sign, tenderness to palpation of the paraspinal musculature of the cervical spine, and tenderness at the acromioclavicular joint and subdeltoid bursa area of the right shoulder.

By decision dated February 7, 2017, OWCP found that appellant was entitled to wage-loss compensation for total disability from August 25 through November 3, 2016 when she had a reaction to a cortisone shot. It denied her claim for wage-loss compensation from May 25 to August 25, 2016 and from November 3, 2016 onward. OWCP determined that the medical evidence of record did not explain why her condition worsened such that she was not able to perform modified duty during these periods.

Dr. DeCarlo, in a February 15, 2017 progress report, determined that appellant could perform modified work with the same restrictions.⁵ In a March 15, 2017 CA-17 form, he advised that she was disabled from employment.

On March 21, 2017 Dr. DeCarlo reviewed OWCP's February 7, 2017 decision. He indicated that appellant was temporarily totally disabled beginning July 21, 2016 as increased neck, right shoulder, and bilateral hand, wrist, and finger pain rendered her unable to perform her

⁴ In January 2017 CA-17 forms, Dr. DeCarlo indicated that appellant was totally disabled.

⁵ On February 9, 2017 Dr. Herring requested authorization for a right subacromial decompression with debridement and repair. On March 15, 2017 an OWCP medical adviser recommended authorization for an anterior acromioplasty to treat acromial impingement syndrome and, if necessary, a rotator cuff repair.

daily activities. Dr. DeCarlo also noted that she could not operate a motor vehicle due to her narcotic use. He related:

“At the time I originally placed [appellant] on TTD [temporary total disability] due to the above-mentioned factors, there were objective findings of tenderness to palpation along the paraspinal musculature of the cervical spine and upper trapezius muscles with spasming noted. There was also tenderness to palpation at the suboccipital muscles around the skull. [Appellant] had a negative compression test, negative Suprling; however, there was increased pain with neck extension.”

Dr. DeCarlo related that appellant had a positive right Tinel’s test and mild positive left Tinel’s test, positive impingement signs for the right shoulder, and difficulty with range of motion. He concluded that she was totally disabled due to her need for increased pain medication such that she could not drive or operate machines.

Dr. DeCarlo, in an April 17, 2017 progress report, noted that appellant was scheduled for surgery on her right shoulder. In an April 17, 2017 CA-17 form, he advised that she was totally disabled.

Appellant, on April 19, 2017, requested reconsideration.

On May 4, 2017 Dr. Herring diagnosed impingement syndrome and subacromial bursitis of the right shoulder and a right trapezius strain. On examination he found a positive Tinel’s sign and Phalen’s test. Dr. Herring advised that appellant would be totally disabled after the surgery. In a May 17, 2017 CA-20 form, he found that she was totally disabled beginning May 15, 2017.

Dr. Herring performed a right shoulder subacromial decompression with distal clavicle excision and extensive debridement on May 15, 2017. OWCP paid appellant compensation for temporary total disability beginning that date. In a June 1, 2017 progress report, Dr. Herring discussed appellant’s condition subsequent to surgery.

In a June 7, 2017 progress report, Dr. DeCarlo noted that appellant had right shoulder surgery on May 15, 2017 and was currently undergoing physical therapy. He found that she was totally disabled. In a July 3, 2017 CA-17 form, Dr. Herring indicated that appellant remained disabled.

By decision dated July 17, 2017, OWCP denied appellant’s request for reconsideration pursuant to section 8128(a). It found that she had not raised a relevant legal argument or submitted new and relevant evidence sufficient to warrant reopening her case for further merit review. OWCP determined that the reports from Dr. DeCarlo were cumulative in nature or irrelevant.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.⁸ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

ANALYSIS

In the last merit decision dated February 7, 2017, OWCP found that appellant had not established entitlement to wage-loss compensation for disability from May 25 to August 25, 2016 and beginning November 3, 2016. It received her request for reconsideration on April 19, 2017. Appellant's request for reconsideration was timely filed because it was received within one year of the last merit decision issued February 7, 2017.

The issue presented on appeal is whether appellant's April 19, 2017 request for reconsideration 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 the claim.

On reconsideration appellant did not contend that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. As appellant did not allege that OWCP erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered by OWCP, she is not entitled to a review of the merits of her claim based on the first and second requirements under section 10.606(b)(3).

Appellant also failed to submit any pertinent new and relevant evidence with her request for reconsideration. She submitted a medical evidence from Dr. Herring, including a February 9,

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

2017 report and request for surgical authorization, a May 4, 2017 progress report finding that she would be disabled after the surgery, a copy of a May 15, 2017 operative report, and a June 1, 2017 progress report regarding her condition subsequent to surgery. Dr. Herring also found that appellant was totally disabled in a July 3, 2017 CA-17 form. This new evidence, however, does not address the relevant issue of whether she was disabled prior to her May 15, 2017 surgery. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.¹¹

Dr. DeCarlo, in a February 15, 2017 progress report, found that appellant could perform modified work. In CA-17 forms dated March 15 and April 17, 2017, he indicated that she was totally disabled. Dr. DeCarlo's progress report and form reports are substantially similar to previously submitted evidence. The Board has held that evidence which is cumulative of material already in the case record is insufficient to warrant reopening a claim for merit review.¹²

In a March 21, 2017 report, Dr. DeCarlo advised that appellant was totally disabled beginning July 21, 2016 due to increased pain in her neck, right shoulder, and bilateral hands, wrists, and fingers causing difficulty performing activities of daily living. He related that she required narcotic medication due to her pain which rendered her unable to operate machinery or a motor vehicle, resulting in total disability. Dr. DeCarlo provided objective findings of tenderness to palpation of the muscles of the cervical spine and upper trapezius, positive right shoulder impingement, and a positive Tinel's sign bilaterally. He provided similar findings and conclusions, however, in his January 16, 2017 report, which was previously considered by OWCP in its prior merit decision. As noted, evidence which is cumulative or duplicative of evidence already of record does not constitute relevant and pertinent new evidence not previously considered by OWCP.¹³

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 reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹¹ See *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

¹² See *L.W.*, Docket No. 17-1171 (issued May 18, 2018).

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2018
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