

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

M.P., Appellant	)	
	)	
and	)	<b>Docket No. 18-0302</b>
	)	<b>Issued: August 13, 2018</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
Fort Dearborn, IL, Employer	)	
	)	

*Appearances:*  
David Teegarden, for the appellant<sup>1</sup>  
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 November 27, 2017 appellant, through her representative, filed a timely appeal from a June 2, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated July 1, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

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<sup>1</sup> 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.

<sup>2</sup> 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).

## FACTUAL HISTORY

On October 28, 2011 appellant, then a 60-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that repetitive activity at work resulted in injury to her hands. She first realized her claimed condition and its relation to her federal employment on February 1, 2006.<sup>3</sup> OWCP accepted the claim for disorder of bursae and tendons in left shoulder and aggravation of bilateral primary osteoarthritis of the hands. Appellant stopped work on December 17, 2011 and has not returned.

Appellant underwent OWCP-authorized trapeziectomy and carpometacarpal arthroplasty with flexor carpi radialis tendon interposition left thumb on December 21, 2011, and trapeziectomy and flexor carpi radialis tendon arthroplasty of basilar joint of right thumb on February 29, 2012. She did not return to work following her February 29, 2012 right thumb surgery. Effective September 10, 2013, appellant elected to receive FECA benefits.

OWCP assigned appellant to its vocational rehabilitation program from May 22 through December 3, 2013 and, again, beginning September 10, 2014. The September 10, 2014 referral to vocational rehabilitation services noted that the weight of the medical opinion rested with the January 7, 2014 opinion of Dr. Kenneth Sander, a Board-certified orthopedic surgeon and impartial medical specialist, that appellant was able to work within the limitations outlined in a February 6, 2013 functional capacity evaluation (FCE).<sup>4</sup> The referral also noted that the employing establishment was unable to accommodate appellant's restrictions. As the February 6, 2013 FCE was considered outdated, the claims examiner instructed the rehabilitation counselor to obtain an updated FCE.

On October 3, 2014 appellant underwent an FCE conducted by a licensed/registered occupational therapist. The overall results of the evaluation were inconsistent due to submaximal effort by appellant during the performance of a variety of functional tasks. Appellant was found to have demonstrated 39.1 percent inconsistent effort. A true demand level could not be determined due to inconsistent effort.

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<sup>3</sup> The present claim was assigned OWCP File No. xxxxxx231. Under OWCP File No. xxxxxx888, date of injury February 1, 2006, appellant has an accepted occupational disease claim for bilateral carpal tunnel syndrome. Appellant underwent a right carpal release on September 26, 2007 and a left carpal tunnel release on December 12, 2007. OWCP determined that she had reached maximum medical improvement on March 4, 2008. It granted appellant a schedule award for eight percent permanent impairment of her bilateral upper extremities.

<sup>4</sup> OWCP selected Dr. Sanders to resolve a conflict in the medical opinion evidence between appellant's attending physician, Dr. Florian Miranzadeh, an osteopath Board-certified in family practice, and a second opinion physician, Dr. Theodore J. Suchy, an osteopath Board-certified in orthopedic surgery, as to the extent and degree of any continuing employment-related disability or residuals.

In an October 8, 2014 letter, OWCP noted appellant's inconsistent effort on the October 3, 2014 FCE and advised that she had impeded the vocational rehabilitation process precluding an accurate determination of her ability to return to work. It advised her of the provisions of section 8113 (b) of FECA and 20 C.F.R. § 10.519 and warned of the consequences if she did not cooperate with vocational rehabilitation effort required to assist OWCP in locating suitable work. OWCP afforded appellant 30 days to either cooperate with vocational rehabilitation and undergo a new FCE, or provide a valid reason for any nonparticipation with vocational rehabilitation.

On November 5, 2014 appellant underwent another FCE conducted by a physical therapist. The FCE noted that she had demonstrated the ability to perform minimally at the light physical demand category; however, her performance was described as "questionable secondary to varied effort." The physical therapist concluded that appellant was capable of greater function than that demonstrated during the FCE.

By decision dated November 17, 2014, OWCP reduced appellant's compensation to zero as of November 16, 2014 due to failure to cooperate during the early stages of vocational rehabilitation. It advised that the reduction in benefits would continue until a third FCE was conducted which showed a true effort given during the examination or that she showed good cause for not complying with the vocational rehabilitation effort.

On November 22, 2014 appellant elected to receive retirement benefits through the Office of Personnel Management (OPM), effective November 17, 2014.

In a November 24, 2014 letter, appellant requested that OWCP schedule her for another FCE. She also expressed her intent to fully comply with the examination to the best of her abilities.

On December 4, 2014 vocational rehabilitation services were closed. OWCP reduced her compensation benefits to zero effective November 17, 2014, explaining that because she failed to undergo the preparatory vocational testing, it assumed that she either would have returned to her date-of-injury position or that she would have earned higher wages. It advised that the reduction would continue until appellant, in "good faith," either undergoes the vocational testing or shows good cause for not complying.<sup>5</sup>

In a November 25, 2014 appeal request form, postmarked November 25, 2014, appellant requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on April 6, 2015, during which appellant testified and her authorized representative presented arguments. At the conclusion of the hearing, the hearing representative held the record open for 30 days to allow for the submission of additional evidence. No evidence relevant to the sanction decision was received.

By decision dated July 1, 2015, OWCP's hearing representative affirmed OWCP's November 17, 2014 decision. The hearing representative determined that OWCP properly determined there was a sufficient basis to reduce appellant's compensation benefits as appellant

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<sup>5</sup> In a December 3, 2014 report, the vocational rehabilitation counselor noted that a new claims examiner was assigned on November 26, 2014.

had failed to cooperate with vocational rehabilitation by putting forth an inconsistent, suboptimal effort in both the October and November 2014 FCE's.

On June 20, 2016 appellant, through her representative, requested reconsideration. He argued that it was a medical question as to whether or not appellant had impeded vocational rehabilitation services by failing to put forth optimum efforts during an FCE. Specifically, the representative contended that the FCEs relied upon by OWCP in issuing the suspension sanction were signed by nonmedical personnel and not countersigned by a physician; accordingly, the determination of appellant's "efforts" was not probative medical evidence. In support of his argument, he referenced specific chapters from the Federal (FECA) Procedure Manual pertaining to the development and evaluation of medical evidence. The representative also cited to the Board's case in *R.C.*, Docket No. 09-2095 (issued August 4, 2010).<sup>6</sup> He noted that Dr. Sanders, an impartial medical specialist, had determined appellant's work restrictions based upon appellant's February 6, 2013 FCE (which OWCP had determined to be outdated.)

By decision dated June 2, 2017, OWCP denied appellant's June 20, 2016 request for reconsideration of the merits of her claim. It found that the representative's argument regarding putting forth maximum effort during an FCE did not apply to the rules of evaluating medical evidence and thus was not relevant and was therefore insufficient to warrant a merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>7</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>8</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>9</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>10</sup> When a timely application for reconsideration does not meet at least one

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<sup>6</sup> In *R.C.*, the Board held that in the absence of probative medical evidence, OWCP's determination that appellant did not put forth maximum effort on functional capacity testing was not established. Accordingly, the Board reversed OWCP's decision that appellant failed to cooperate with vocational rehabilitation under section 8113(b) to support its reduction of his monetary compensation to zero.

<sup>7</sup> This section provides in pertinent part: "[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." 5 U.S.C. § 8128(a).

<sup>8</sup> 20 C.F.R. § 10.607.

<sup>9</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>10</sup> 20 C.F.R. § 10.606(b)(3).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>11</sup>

### **ANALYSIS**

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

The underlying issue in this case is whether or not appellant had failed to cooperate with vocational rehabilitation under section 8113(b) to support its reduction of her monetary compensation to zero. With the June 20, 2016 reconsideration request, appellant's representative asserted that it was a medical question as to whether appellant put forth optimum efforts during an FCE. In support of his argument, in both his reconsideration request as well as on appeal, appellant's representative cited to *R.C.*, Docket No. 09-2095 (issued August 4, 2010) for the proposition that probative medical opinion evidence was need to establish OWCP's determination that appellant did not put forth maximum effort on functional capacity testing.

The Board finds that appellant's representative has advanced a relevant legal argument not previously considered by OWCP, namely that the opinion of the licensed/registered occupational therapist and physical therapist lacked probative value and was thus an insufficient basis to terminate compensation benefits. Accordingly, appellant has advanced a new and relevant legal argument not previously considered. OWCP did not specifically address the *R.C.* case in denying appellant's reconsideration request.

On remand OWCP shall review the merits of the claim. It shall also address appellant's November 24, 2014 request that another FCE be scheduled. After such further development of the evidence as necessary, it shall issue an appropriate decision.

### **CONCLUSION**

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

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<sup>11</sup> *Id.* at § 10.608(a), (b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 2, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 13, 2018  
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