

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

_____)	
R.F., Appellant)	
)	
and)	Docket No. 18-0284
)	Issued: July 9, 2018
U.S. POSTAL SERVICE, CANARSIE STATION,)	
Brooklyn, NE, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 27, 2017 appellant, through counsel, filed a timely appeal from a September 22, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated September 7, 2017, 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 has jurisdiction to review this nonmerit decision.³

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.*

³ The Board notes that the case record also contains a September 7, 2017 merit decision of OWCP. In his November 27, 2017 application for review (Form AB-1), counsel indicated that the appeal was from the September 22, 2017 decision. He did not appeal from or otherwise mention the September 7, 2017 merit decision.

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 March 27, 1997 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she was delivering mail when a dog pushed open a door which struck her and caused her to fall on her right ankle. OWCP accepted the claim for right ankle sprain/strain.

The case remained dormant until 2016. In a note dated September 20, 2016, Dr. Noor Khan, a Board-certified internist, found that appellant had reached maximum medical improvement (MMI). On November 3, 2016 appellant filed a schedule award claim (Form CA-7).

In a development letter dated November 10, 2016, OWCP informed appellant that she should submit a report from her treating physician which provided a permanent impairment rating in support of her schedule award claim. It afforded her 30 days to submit the necessary evidence. OWCP did not receive any additional evidence.

By decision dated December 30, 2016, OWCP denied appellant's schedule award claim, finding that she had not provided medical evidence of permanent impairment due to her accepted right ankle sprain. In a letter dated January 5, 2017, counsel requested an oral hearing before an OWCP hearing representative.

In a report dated February 8, 2017, Dr. Kumar S. Reddy, a Board-certified orthopedic surgeon, provided a description of appellant's injury on March 27, 1997 which occurred while she was delivering mail, when a dog inside a house charged the storm door which hit her and caused her to fall backwards down two steps landing on her right ankle and on the pavement. Appellant reported continuing right ankle pain and swelling. She noted that she was receiving disability retirement benefits. Dr. Reddy reviewed medical records including an August 18, 1997 orthopedic examination, an April 4, 2001 magnetic resonance imaging (MRI) scan of the right ankle and December 18, 2012 right ankle x-rays. He provided appellant's right ankle range of motion figures. Dr. Reddy found that she had 30 degrees of plantarflexion, 10 degrees of dorsiflexion, and 15 degrees of both inversion and eversion. He diagnosed right ankle sprain resolved with residuals. Dr. Reddy concluded that appellant had reached MMI. He applied the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*)⁴ and found that she had seven percent permanent impairment of the right ankle based on her loss of range of motion.⁵

On July 12, 2017 appellant testified during the oral hearing and noted that she had continuing right ankle pain and swelling. She testified that she had not returned to full-duty work

⁴ A.M.A., *Guides* (6th ed. 2009).

⁵ *Id.* at 549, Table 16-20 and Table 16-22.

after the March 27, 1997 employment injury and that she retired on June 3, 2010 due to another medical condition.

Dr. Reddy provided a supplemental report on July 26, 2017 noting that appellant's right ankle sprain had reached MMI on February 8, 2017. He found that, based on her history, she had no preexisting right ankle conditions and that she had seven percent permanent impairment of her right ankle due to loss of range of motion.

By decision dated September 7, 2017, OWCP's hearing representative found that Dr. Reddy's reports were insufficient to establish that appellant sustained any permanent impairment causally related to her March 27, 1997 employment injury. She found that his reports included a diagnosis of a resolved ankle sprain with residuals which was contradictory as it was unclear how he could conclude that appellant had residuals of a condition that was found to be resolved. The hearing representative further noted that Dr. Reddy made largely unremarkable physical findings, noting no swelling, tenderness, redness, or crepitation. She concluded that he did not explain why appellant's range of motion deficits were related to her accepted ankle sprain rather than to her concurrent conditions of lupus, arthritis, osteoarthritis of both legs, and diabetes.

On September 18, 2017 counsel requested reconsideration of the September 7, 2017 decision. He resubmitted the July 26, 2017 report from Dr. Reddy.

By decision dated September 22, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It noted that she resubmitted the July 26, 2017 report from Dr. Reddy, which had been previously reviewed by OWCP's hearing representative in the September 7, 2017 merit decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ One such limitation is that 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 within one year of the date of that decision.⁸ To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁹ 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.¹⁰

⁶ This section provides in pertinent part: the 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).

⁷ 20 C.F.R. § 10.607.

⁸ *Id.* at § 10.607(a).

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

¹⁰ 20 C.F.R. § 10.606(b)(3).

When a claimant failed to meet one of the above standards, OWCP will deny the application for review without reopening the case for a review on the merits.¹¹

The submission of evidence which repeats or duplicates evidence already in the case record,¹² and the submission of evidence which does not address the particular issue involved, does not constitute a basis for reopening a case.¹³

ANALYSIS

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

In her September 18, 2017 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant 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 above-noted requirements under section 10.606(b)(3).

In support of her September 18, 2017 reconsideration request, appellant resubmitted the July 26, 2017 report from Dr. Reddy. OWCP's hearing representative's September 7, 2017 decision reviewed this report. The Board has held that evidence which is repetitive or duplicative of evidence already of record is insufficient to warrant further merit review.¹⁴

The Board accordingly finds that appellant was not entitled to a merit review of the claim. 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 by OWCP. Pursuant to 20 C.F.R. § 10.606(b)(3), 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 *Id.* at § 10.608(b).

¹² *T.H.*, Docket Nos. 17-1578 & 17-1651 (issued April 26, 2018); *M.D.*, Docket No. 17-1250 (issued April 24, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹³ *T.H.*, *M.D.*, *id.*; *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹⁴ *T.H.*, *M.D.*, *id.*; *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 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