

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

C.F., Appellant)	
)	
and)	Docket No. 18-0360
)	Issued: July 19, 2018
)	
U.S. POSTAL SERVICE, POST OFFICE,)	
Lakewood, NJ, Employer)	
)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant¹
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 December 6, 2017² appellant, through counsel, filed a timely appeal from a June 9, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated April 29, 2016, to the filing of this appeal,

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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. One hundred and eighty days from June 9, 2017, the date of OWCP's decision, was December 6, 2017. Since using December 11, 2017, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 6, 2017, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

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 April 7, 2015 appellant, then a 41-year-old letter carrier, filed a traumatic injury claim (Form CA-1), alleging that, on March 30, 2015, she worked for 12 hours delivering Route 62 by truck, which required "twisting and turning [her] neck and body," resulting in neck and low back pain with bilateral radiculopathy. She asserted that she was forced to deliver mail in violation of previous medical restrictions for a May 19, 2014 lumbar injury under OWCP File No. xxxxxx446, sustained when a package fell on her and she bent into an awkward position. Appellant alleged that she contacted the employing establishment during her shift to ask for help, but received no assistance. She accepted a modified-duty position on April 13, 2015.

In support of her claim, appellant submitted reports dated April 7, 2015 from Melanie Vernacchia, a nurse practitioner.

By development letter dated April 17, 2015, OWCP explained the deficiencies in appellant's claim and the type of factual and medical evidence necessary to meet her burden of proof. It noted that appellant had not yet established the factual component of fact of injury, and that nurse practitioners were not considered physicians under FECA. OWCP afforded appellant 30 days to submit additional evidence.

In response, appellant submitted a supplemental March 30, 2015 statement in which she alleged that employing establishment managers were aware that she was unable to deliver her route within the allotted time. She had been instructed to request assistance in delivering the route rather than "bring the mail back."

In a report dated October 7, 2014, Dr. Sripad Dhawlikar, an attending Board-certified orthopedic surgeon, opined that the claimed May 19, 2014 employment incident caused C3-4 and C5-6 herniations, a thoracic facet cyst at T10-11, a thoracic strain, and lumbar facet syndrome at L4-5 and L5-S1. He noted work restrictions and prescribed physical therapy and a series of cervical spine injections. Dr. Dhawlikar provided additional work restrictions on April 2, 2015, limiting lifting to five pounds, driving to 4 hours a day, and working for no more than 8 hours continuously or 40 hours a week.

In reports dated April 13, 2015, Dr. Tanisha Taylor, an attending physician Board-certified in internal and occupational medicine, provided a history of injury. She diagnosed a sprain/strain of the cervical, thoracic, and lumbar spine with radiculopathy. On an attending physician's form report (Form CA-20), Dr. Taylor checked a box marked "yes" in response to a question asking if

³ 5 U.S.C. § 8101 *et seq.*

the diagnosed conditions were related to factors of appellant's federal employment. She noted work restrictions.⁴

The employing establishment submitted an April 11, 2015 statement alleging that, although appellant claimed to have an eight-hour work limitation, she performed voluntary overtime without difficulty on 10 dates from March 11 to 27, 2015, including six days delivering Route 62. On March 30, 2015 the date of the alleged injury, appellant worked for 3.74 hours of voluntary overtime delivering Route 62.

By decision dated May 20, 2015, OWCP denied the claim, finding that appellant failed to meet her burden of proof to establish causal relationship. It accepted that the March 30, 2015 employment incident occurred at the time, place, and in the manner alleged. OWCP denied the claim, however, as the medical evidence of record did not contain sufficient medical rationale to support a pathophysiologic causal relationship between the accepted March 30, 2015 employment incident and the claimed cervical and lumbar injuries.

In a letter postmarked June 15, 2015 and received by OWCP on June 17, 2015, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, held February 19, 2016. During the hearing, appellant reiterated that she was forced to work outside of medical restrictions imposed under OWCP File No. xxxxxx446 related to the May 19, 2014 lumbar injury. She submitted additional evidence.

In a report dated December 8, 2015, Dr. Dhawlikar diagnosed herniated cervical discs with lumbar facet syndrome. He opined that the twisting and turning motions appellant performed while delivering mail on March 30, 2015 aggravated her lumbar facet syndrome and cervical pain, and likely aggravated "discogenic as well as facet-related pain due to the constant loading and unloading and shifting of the joints," which Dr. Dhawlikar suspected had occurred in appellant's case. Dr. Dhawlikar noted that as appellant's symptoms remained active for six months after the March 30, 2015 incident, the aggravation appeared to be permanent.

By decision dated April 29, 2016, OWCP's hearing representative affirmed OWCP's prior decision, finding that the additional evidence and argument submitted was insufficient to establish causal relationship. He found that Dr. Dhawlikar's December 8, 2015 report was speculative and presented an incomplete history of appellant's injury.

On May 1, 2017 appellant, through counsel, requested reconsideration. Counsel contended that OWCP should have administratively combined the present claim with OWCP File No. xxxxxx446 as both claims pertained to the cervical and lumbar spine. He did not submit additional medical evidence.

By decision dated June 9, 2017, OWCP denied reconsideration under 5 U.S.C. § 8128(a), finding that appellant did not submit new and relevant evidence, or legal argument sufficient to

⁴ Appellant also submitted imaging studies. May 19, 2014 lumbar x-rays showed no fracture or significant degenerative changes. An August 21, 2014 magnetic resonance imaging (MRI) scan of the lumbar spine showed a mild disc bulge at L5-S1 with encroachment in the left extraforaminal area. A September 26, 2014 MRI scan of the thoracic spine demonstrated cervical disc herniations and a left synovium cyst at T10-11.

warrant reopening the merits of her claim. It found that counsel's arguments regarding combining appellant's two lumbar injury claims were irrelevant to the critical issue of causal relationship as they were not medical evidence. Therefore, his brief did not warrant reopening the merits of appellant's claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ 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.⁶ 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.⁷ 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.⁸

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁹ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹⁰ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹¹

ANALYSIS

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).

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument. On reconsideration counsel argued that OWCP should have administratively combined the present claim with OWCP File No. xxxxxx446 for a previous occupational lumbar injury. This argument is irrelevant to the critical issue of causal relationship, which is determined by rationalized medical

⁵ 5 U.S.C. § 8128(a). Under section 8128 of FECA, "[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."

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁰ *See Mark H. Dever*, 53 ECAB 710 (2002).

¹¹ *Annette Louise*, 54 ECAB 783 (2003).

evidence.¹² As such, counsel's argument is irrelevant to the claim and does not comprise a basis for reopening the case on its merits.¹³ As appellant did not allege 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 requirements under section 10.606(b)(3).

No new evidence was submitted with appellant's request for reconsideration. Appellant was therefore not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(3).

As appellant's application for review did not meet any of the three requirements enumerated under 10.606(b)(3), the Board finds that OWCP properly denied the request for reconsideration without reopening the case for a review on the merits.¹⁴

On appeal counsel contends that appellant's claim for a lumbar injury under OWCP File No. xxxxxx446 should have been administratively combined with the present claim. He also argues that Dr. Dhawlikar's opinion provided a "substantially correct" history, which met the standard set forth in OWCP's procedures,¹⁵ whereas OWCP improperly imposed a more exacting standard of proof. The Board notes that these arguments pertain to the merits of the claim, which are not before the Board on the present appeal.

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).

¹² *E.D.*, Docket No. 18-0138 (issued May 14, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹³ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁴ *R.C.*, Docket No. 17-0595 (issued September 7, 2017); *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

¹⁵ Counsel cited to the Federal (FECA) Procedure Manual at Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.5.a (September 2010).

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2018
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