

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

K.S., Appellant)	
)	
and)	Docket No. 18-0380
)	Issued: July 17, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Morrow, OH, 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 December 18, 2017 appellant, through counsel, filed a timely appeal from a November 27, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction over the merits of the claim.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 counsel restricted the appeal to the November 27, 2017 nonmerit decision. He did not list on the AB-1 form the October 4, 2017 merit decision as a decision being appealed. The merits of the case are therefore not presently before the Board. *See* 20 C.F.R. § 501.3(c)(4).

ISSUE

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

FACTUAL HISTORY

On August 19, 2005 appellant, then a 44-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she was injured in a work-related motor vehicle accident on August 4, 2005. She explained that another car struck her vehicle from behind, pushing her car 50 to 70 feet. Appellant was trapped in her car and sustained injuries to her hips, back, neck, head, jaw, throat, shoulders, arms, hands, and right foot. On October 14, 2005 OWCP accepted her claim for lumbar strain. On December 5, 2005 it expanded acceptance of appellant's claim to include the additional condition of right temporomandibular joint (TMJ) dislocation. On March 30, 2006 OWCP again expanded acceptance of the claim to include the additional conditions of recurrent episode of major depressive disorder, panic disorder without agoraphobia, displaced lumbar disc at L1-2, and post-concussion syndrome. By separate decision dated March 30, 2006, it authorized wage-loss compensation beginning August 4 through December 23, 2005.

On January 13, 2016 OWCP referred appellant to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding any disability or medical residuals causally related to her accepted condition of lumbar sprain. In his report dated March 7, 2016, Dr. Fisher found that appellant had no residuals of her accepted lumbar sprain noting that this condition would have healed within a matter of weeks following the employment injury. He concluded that appellant could return to her date-of-injury position based on her lumbar condition and further found that she did not require further medical treatment for this condition.

On September 12, 2016 Dr. Carl M. Shapiro, an osteopath and appellant's attending physician, reviewed Dr. Fisher's report and offered his reasons for disagreement. In a note dated September 15, 2016, he opined that appellant had an ongoing lumbar strain. Dr. Shapiro further noted that he had chronic low back pain as well as aggravation of lumbar and cervical spondylosis.

On October 26, 2016 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for an impartial medical examination with Dr. Theodore Toan Le, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Dr. Shapiro and second opinion physician Dr. Fisher regarding whether appellant continued to have work-related residuals of her lumbar spine condition. In his December 22, 2016 report, Dr. Le opined that appellant had no continuing residuals of her lumbar sprain as that condition would have resolved in three to six months. He completed additional reports on January 24, April 13, and June 8, 2017 and opined that appellant had no residuals of her lumbar strain and should not have any work restrictions.

In a letter dated August 31, 2017, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits with regard to her lumbar strain based on the reports of impartial medical examiner Dr. Le.⁴

In a report dated September 22, 2017, Dr. Shapiro attributed appellant's disability to her accepted condition of post-concussion syndrome. He indicated that the acceptance of appellant's claim should be expanded to include aggravation of degenerative disc disease and spondylosis of the lumbar spine as a result of her August 4, 2005 employment-related motor vehicle accident. Dr. Shapiro also disagreed with Dr. Le's findings and conclusions. He opined that appellant was totally disabled from work.

By decision dated October 4, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date for the accepted condition of lumbar sprain.

On November 22, 2017 appellant, through counsel, requested reconsideration of the October 4, 2017 termination decision. In support of this request, counsel resubmitted Dr. Shapiro's September 22, 2017 report.

By decision dated November 27, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). It found that her request for reconsideration did not include substantive legal questions, nor did it include new and relevant evidence. OWCP noted that it had received Dr. Shapiro's September 22, 2017 report on September 25, 2017 and considered this report in the October 4, 2017 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ Its 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

⁴ The Board notes OWCP previously terminated appellant's medical benefits for her other accepted conditions. Following a December 15, 2014 notice of proposed termination, by decision dated February 9, 2015, it terminated appellant's medical benefits for her accepted conditions of herniated disc at L1-2, and post-concussion syndrome/disorder. On February 16, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on August 25, 2015. By decision dated November 2, 2015, OWCP's hearing representative affirmed the February 9, 2015 termination decision. Similarly, following a September 16, 2016 notice of proposed termination, by decision dated October 19, 2016, OWCP terminated appellant's medical benefits for her accepted right TMJ dislocation, major depressive disorder, and panic disorder without agoraphobia. On October 25, 2016 appellant, through counsel, requested an oral hearing, which was held on May 17, 2016. By decision dated July 31, 2017, OWCP's hearing representative affirmed the October 19, 2016 termination decision.

⁵ 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).

⁶ 20 C.F.R. § 10.607.

(3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁷ When a claimant fails to meet one of the above standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

The submission of evidence which repeats or duplicates evidence already of record⁹ and the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

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).

OWCP issued an October 4, 2017 decision terminating appellant's wage-loss compensation and medical benefits, effective that date, for the accepted condition of lumbar sprain.

In her November 22, 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. Thus, 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).¹¹

In support of the November 22, 2017 reconsideration request, counsel resubmitted the September 22, 2017 report from Dr. Shapiro. The Board has held that evidence which is repetitive or duplicative of evidence existing in the record is insufficient to warrant further merit review.¹² Therefore, this report does not constitute a basis for reopen appellant's case for review of the merits. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence and thus, she failed to satisfy the third requirement under section 10.606(b)(3).

The Board accordingly finds that properly denied appellant's request for reconsideration of the merits of the claim. Appellant's evidence and argument submitted on reconsideration 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 constitute relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

⁷ *Id.* at § 10.606(b)(3).

⁸ *Id.* at § 10.608(b).

⁹ *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).

¹⁰ *T.H.*, *M.D.*, *supra* note 9; *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹¹ *Supra* note 7.

¹² *T.H.*, *M.D.*, *supra* note 9; *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

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).

ORDER

IT IS HEREBY ORDERED THAT the November 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 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