

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

A.C., Appellant)	
)	
and)	Docket No. 17-1616
)	Issued: November 27, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Zephyrhills, FL, Employer)	
)	

Appearances:
Wayne Johnson, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 22, 2017 appellant, through counsel, filed a timely appeal from a January 23, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days elapsed from the last merit decision, dated December 30, 2015, 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 On her application for review (Form AB-1), appellant requested an oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated January 29, 2018, the Board exercised its discretion and denied appellant's request, finding that the appeal could be adequately addressed in a decision based on the review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-1616 (issued January 29, 2018).

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

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 August 20, 2013 appellant, then a 41-year-old rural carrier associate, filed an occupational disease claim (Form CA-2) alleging that she developed lupus. She claimed that she developed a rash on both arms as a result of delivering mail. Appellant first became aware of her condition on April 13, 2011 and realized that it was causally related to her federal employment on April 15, 2011. She stopped work on August 7, 2012 and did not return. OWCP initially denied appellant's claim. However, by decision dated July 30, 2014, it vacated the prior denial and accepted appellant's claim for permanent aggravation of systemic lupus erythematosus. OWCP paid wage-loss compensation for temporary total disability retroactive to August 8, 2013, and placed appellant on the periodic compensation rolls.

In a report dated June 20, 2014, appellant's treating physician, Dr. Amarilis Torres, a Board-certified rheumatologist, summarized appellant's treatment for systemic lupus erythematosus since May 2011, which manifested with skin rashes in sun exposed areas, arthritis, muscle pains, and inflammation in the lining of the heart and lungs. She noted that appellant's disease was active when she was exposed to sunlight and heat as a result of her occupation and required frequent office visits and regular treatment. Dr. Torres noted limited sun exposure dramatically decreased her flare-ups. Other reports dated January 12 and 15, 2015 from Dr. Torres advised that appellant was unable to work in any ultraviolet (UV) light environment even with protective clothing.

In a January 28, 2015 note, Dr. Gary K. Arthur, a Board-certified psychiatrist, advised that appellant was totally disabled from any work due to depression and anxiety. He indicated that she could not work even with protective clothing. Dr. Arthur also advised that depression and anxiety should be added to appellant's accepted condition(s) along with systemic lupus erythematosus.

In a January 28, 2015 narrative report and work capacity evaluation (OWCP-5c), Dr. Samy F. Bishai, a Board-certified orthopedic surgeon, diagnosed systemic lupus erythematosus and multiple arthralgia secondary to lupus erythematosus. He advised that appellant was unable to perform any work, even in a sedentary capacity. Dr. Bishai explained that she could not work in any UV lighting. He also noted that appellant had pain in all her joints, as well as severe depression.

In March 2015, OWCP referred appellant to Dr. Anthony G. Sankoorikal, a Board-certified rheumatologist, for a second opinion to determine if the accepted condition had resolved.

³ 5 U.S.C. § 8101 *et seq.*

In an April 14, 2015 report, Dr. Sankoorikal noted that appellant had a history of systemic lupus erythematosus, but did not have active disease clinically or serologically. He opined that she may have fibromyalgia -- manifested by generalized aches and pains and muscle pains, sleep disturbance, depression, anxiety, and multiple soft tissue tender points on examination. Dr. Sankoorikal also noted that appellant has chronic obstructive pulmonary disease (COPD). In response to the question of whether appellant's lupus was still related to her sun exposure while working, he replied, "No," and explained that lupus might have been precipitated by sun exposure at that time, but that exposure was unlikely to cause lasting effect. Dr. Sankoorikal further explained that sun exposure does not cause lupus, but it might be a triggering factor. He also indicated that appellant could not work in ultraviolet lighting, or outdoors, but LED lighting would not pose a threat. Dr. Sankoorikal noted her restrictions were not related to lupus except the need to stay away from ultraviolet lighting, but were attributed to other comorbidities including fibromyalgia, depression, anxiety, and COPD. He noted that appellant could not return to her usual job due to fatigue, muscle pain, shortness of breath on exertion, and sun sensitivity. Dr. Sankoorikal opined that she could work part time, four hours a day, under LED lights.

On April 29, 2015 OWCP proposed to terminate all FECA benefits, finding that Dr. Sankoorikal's report established that she no longer had residuals or disability causally related to her accepted condition. It allowed her 30 days in which to respond.

In an April 14, 2015 report, Dr. Richard Moore, a Board-certified dermatologist, noted that appellant's systemic lupus erythematosus appeared to be under "great control."

By decision dated June 1, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that same date. It based its determination on Dr. Sankoorikal's April 14, 2015 second opinion evaluation.

Appellant subsequently submitted reports from Dr. Torres dated February 5 and December 27, 2013 who noted appellant's symptoms initially presented with a photosensitive rash on her arms, face, and chest. She reported working as a mail carrier and experiencing skin eruptions which intensified after she delivered mail. Appellant underwent a biopsy of her right forearm and was diagnosed with systemic lupus erythematosus. Dr. Torres diagnosed systemic lupus erythematosus, depression, migraine headaches, vitamin D deficiency, and left lateral humeral epicondylitis/osteoarthritis.

By an appeal request form received December 1, 2015, appellant requested reconsideration. She also submitted reports from Dr. Torres dated May 10 to July 20, 2011, in which she diagnosed discoid lupus, carpal tunnel syndrome, oligoarticular arthralgias, depression, and nausea. On July 20, 2011 Dr. Torres indicated that appellant's medical condition did not permit sun exposure exceeding three and a half hours a day. On March 27, 2014 she diagnosed fatigue and insomnia. Similarly, on February 24, 2015, Dr. Torres diagnosed depression and referred appellant to a psychologist.

By decision dated December 30, 2015, OWCP denied modification of its June 1, 2015 decision.

On December 27, 2016 appellant requested reconsideration. In a statement dated December 26, 2016, she disagreed with the second opinion physician, Dr. Sankoorikal, who diagnosed fibromyalgia, sleep disturbance, depression, anxiety, and COPD. Appellant asserted that she was never diagnosed with COPD or fibromyalgia and had no previous medical history before her diagnoses on April 13, 2011 of subacute cutaneous lupus erythematosus. She believed that working in the sun from 2011 to August 2012 caused her disease to progress to systemic lupus erythematosus, depression, fatigue, tendinitis, anxiety, muscle pain, and sleep disturbance. Appellant referenced reports from her pulmonologist, neurologist, and Dr. Torres. She reported continuing residuals of depression, anxiety, fatigue, muscle and joint pain, sleep disturbance, shortness of breath, photosensitivity, migraines, cognitive impairment, and systemic lupus erythematosus. Appellant also submitted several hand written notes stating that her specialist have confirmed that she did not have COPD or fibromyalgia.

Appellant submitted a December 16, 2016 report from Dr. Torres who treated appellant since 2011 for subacute cutaneous lupus erythematosus. Dr. Torres indicated that, after her initial diagnoses, appellant's condition progressed to include tendinitis, depression, anxiety, muscle pain, and fatigue. She advised that, due to the progression of her condition, appellant was unable to work in the sun or in ultraviolet lighting due to photosensitivity. Dr. Torres opined that appellant was totally disabled and her disease progressed to include cognitive impairment and insomnia. She further indicated that appellant tested negative for fibromyalgia and COPD.

By decision dated January 23, 2017, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁴ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁵

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

ANALYSIS

The Board finds that, with her December 26, 2016 reconsideration request, appellant submitted relevant and pertinent evidence not previously considered by OWCP. In his December 16, 2016 report submitted on reconsideration, Dr. Torres noted treating appellant since 2011 for subacute cutaneous lupus erythematosus. She indicated that, after her initial diagnoses, appellant's condition progressed to include tendinitis, depression, anxiety, muscle pain, and fatigue. Dr. Torres advised that, due to the progression of her condition, appellant was unable to work in the sun or in ultraviolet lighting due to photosensitivity. She opined that appellant was totally disabled and her disease progressed to include cognitive impairment and insomnia.

This medical evidence is relevant as Dr. Torres opined that appellant was totally disabled due to her accepted work-related condition. Although OWCP's January 23, 2017 decision found that the evidence was duplicative, this evidence had not previously been considered by OWCP in rendering a decision. The Board has held that the requirement for reopening a claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁰ The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(2)(iii), this new evidence from Dr. Torres is sufficient to require reopening appellant's case for further review on its merits.

Therefore, OWCP improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for OWCP to reopen appellant's claim for a merit review. Following this and such other development as deemed necessary, OWCP shall issue a *de novo* decision on the merits of appellant's claim.

⁶ *Id.* at § 10.608(b).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

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).

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2017 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision.

Issued: November 27, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board