

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

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| K.M., Appellant |) | |
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| and |) | Docket No. 18-0479 |
| |) | Issued: September 17, 2018 |
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| U.S. POSTAL SERVICE, POST OFFICE, Tama, IA, Employer |) | |
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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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 9, 2018 appellant, through counsel, filed a timely appeal from a September 6, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated February 21, 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 lacks jurisdiction over the merits of this 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 record provided the Board includes evidence received after OWCP issued its September 6, 2017 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

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 3, 2014 appellant, then a 52-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on February 28, 2014, she slipped and fell on snow-covered ice while in the performance of duty. She claimed injuries to her left shoulder, collar bone, lower back, and left leg. Appellant stopped work on February 28, 2014, and returned to work in a limited-duty capacity on March 3, 2014. OWCP initially accepted her claim for left rotator cuff tear.⁴

On May 12, 2014 appellant underwent authorized left shoulder arthroscopy with rotator cuff repair and subacromial decompression. She stopped work and received wage-loss compensation for total disability. On June 20, 2014 appellant returned to limited duty. She stopped work again on February 23, 2015 after undergoing left shoulder manipulation under anesthesia and returned to part-time limited duty on March 2, 2015. On August 31, 2015 appellant underwent a second authorized left shoulder arthroscopy with revision rotator cuff repair. She stopped work and returned to part-time limited duty on September 16, 2015.

Appellant continued to receive medical treatment and work with restrictions.

In a January 19, 2016 report, Dr. Kyle D. Switzer, an orthopedic surgeon, reviewed appellant's history and noted that appellant was approximately four and a half months postsurgery. Upon physical examination of appellant's left shoulder, he observed external rotation to only 15 degrees and 4/5 strength to forward flexion and external rotation. Dr. Switzer diagnosed right wrist arthralgia, right carpal tunnel syndrome, complete rupture of the rotator cuff, and acquired tenosynovitis. In a work status note, he reported that appellant continue to work part-time limited duty with restrictions of overhead lifting up to 5 pounds and lifting up to 25 pounds to the waist.

On February 4, 2016 appellant underwent several diagnostic examinations. A cervical spine x-ray examination showed multilevel degenerative disc disease, moderate at C6-7, and severe facet arthropathy on the right at C5-6. A cervical spine magnetic resonance imaging (MRI) scan revealed cervical radiculopathy and degenerative changes with disc narrowing, greatest at C6-7.

In a February 5, 2016 work excuse note, Dr. Ross Huffman, a Board-certified family practitioner, requested that appellant be excused from work on February 6, 2016.

Dr. Jerry Wille, a Board-certified family practitioner examined appellant and noted on February 4 and 8, 2016 that she complained of severe neck pain that had gotten so bad over the

⁴ The present claim was assigned OWCP File No. xxxxxx462. On February 26, 2013 appellant was injured in separate work-related slip and fall, which OWCP accepted for cervical strain and temporary aggravation of lumbosacral degenerative disc disease, assigned OWCP File No. xxxxxx683. She also has an accepted occupational disease claim (Form CA-2) for right carpal tunnel syndrome and right trigger thumb, which arose on or about June 25, 2015, under OWCP File No. xxxxxx848. The above-noted claims have been administratively combined with OWCP File No. xxxxxx683 designated the master file.

weekend after therapy that she went to the emergency room. Dr. Wille provided examination findings and diagnosed cervical radiculopathy.

On February 25, 2016 appellant filed a claim for wage-loss compensation (Form CA-7) for the period February 6 to 19, 2016. In the attached Form CA-7a (time analysis form), appellant claimed eight hours of leave without pay (LWOP) on February 6, 2016 and indicated: "Called in. Too much pain from physical therapy [the] night before."

By letter dated March 1, 2016, OWCP requested that appellant submit additional medical evidence in order to establish her disability claim. Appellant was afforded 30 days to submit the requested information.

OWCP received several reports from 2015 regarding appellant's medical treatment for her left shoulder and neck following the February 28, 2014 employment injury.

By decision dated April 19, 2016, OWCP denied appellant's claim for wage-loss compensation for February 6, 2016.⁵ It found that the medical evidence of record was insufficient to establish that she was totally disabled from work on that date due to her February 28, 2014 employment injury.

On April 29, 2016 appellant, through counsel, requested a telephone hearing.

On September 14, 2016 OWCP expanded appellant's claim to include aggravation of cervical disc degeneration at C5-6, C6-7, and C7-T1.⁶

A telephone hearing was held on December 13, 2016. Appellant testified that she worked half-day on February 5, 2016 and went to the emergency room late at night because of worsening neck pain. She noted that she was discharged from the hospital on February 6, 2016 and went straight home.

Post-hearing, OWCP received a February 5, 2016 emergency room record. It indicated that appellant was admitted in the emergency room at 10:55 p.m. and treated by Dr. Huffman. Dr. Huffman examined appellant's neck and observed spontaneous range of motion and tenderness to the left paracervical musculature with palpation and muscle spasms. He diagnosed cervical muscle strain. Appellant was discharged on February 6, 2016 at 12:41 a.m.

By decision dated February 21, 2017, an OWCP hearing representative affirmed the April 19, 2016 denial decision. He found that the medical evidence of record was insufficient to establish that appellant was unable to work on February 6, 2016 due to her accepted conditions.

On March 8, 2017 appellant requested reconsideration. In a handwritten February 27, 2017 statement, she explained that before being released that same morning of February 6, 2016 from the emergency room she was instructed to go home, rest, and not drive with medication. Appellant

⁵ OWCP paid wage-loss compensation for the period February 8 through 19, 2016.

⁶ OWCP expanded appellant's claim based on the June 21, 2016 second opinion report of Dr. Richard W. Naylor, a Board-certified orthopedic surgeon, who determined that appellant sustained an exacerbation of a neck condition on February 28, 2014.

indicated that she was including complete medical documentation from that night of February 5, 2016 until her early morning release on February 6, 2016. She noted that she had been prescribed Fentanyl and Flexeril in the emergency room, and that the treatment notes indicated that she had been “Educated ... on sedative.” Appellant interpreted this to mean that she should not drive while medicated.

Appellant resubmitted Dr. Huffman’s February 5, 2016 emergency room records. She also continued to provide medical reports for her current treatment of her neck and shoulder symptoms.

By decision dated September 6, 2017, OWCP denied reconsideration of the merits of appellant’s claim. It specifically found that the February 5, 2016 emergency room records were previously received on December 19, 2016 and considered by OWCP in its February 21, 2017 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must also be received by OWCP within one year of the date of OWCP’s decision for which review is sought.⁹ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ 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.¹¹

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant’s claim for further consideration of the merits, under 5 U.S.C. § 8128(a).

⁷ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁸ 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; advanced a relevant legal argument not previously considered by OWCP; or submitted relevant and pertinent new evidence not previously considered by OWCP.

In its February 21, 2017 merit decision, OWCP affirmed the April 19, 2016 decision, which denied appellant's disability claim due to insufficient medical evidence to establish that she was unable to work on February 6, 2016 due to her February 28, 2014 employment injury. Appellant subsequently requested reconsideration on March 8, 2017 and submitted medical evidence.

In support of her reconsideration request, appellant resubmitted Dr. Huffman's February 5, 2016 emergency room records.¹² As OWCP's hearing representative correctly noted in her February 21, 2017 decision, those records do not support that appellant could not return to work for her regular hours on February 6, 2016. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹³

Appellant also submitted a handwritten statement explaining that on February 5, 2016 she went to the emergency room due to worsening neck pain and was not discharged from the hospital until the morning of February 6, 2016. She related that she was instructed to go home and rest. Appellant also claimed that she was clearly instructed "not to drive with medications." She noted that she had been prescribed Fentanyl and Flexeril in the emergency room, and that the treatment notes indicated that she had been "Educated ... on sedative." Appellant interpreted this to mean that she should not drive while medicated. However, her statement does not advance a new legal argument, nor allege that OWCP erroneously applied or interpreted a specific point of law. Accordingly, the Board finds that appellant did not provide OWCP with any evidence which has met the requirements of 20 C.F.R. § 10.606(b)(3) sufficient to require further merit review of her claim.

On appeal counsel alleges that OWCP failed to adjudicate the claim in accordance with the standard of causation and failed to give due deference to the attending physician's findings. As explained above, however, the Board does not have jurisdiction to review the merits of the denial of appellant's wage-loss compensation claim. The only decision properly before the Board on this appeal is the September 6, 2017 nonmerit decision, which denied appellant's request for further merit review.

The Board finds, therefore, that appellant has not met any of the regulatory requirements and OWCP properly declined her request for reconsideration of the merits of her claim under

¹² The February 5, 2016 emergency room records were initially associated with OWCP File No. xxxxxx683. However, appellant submitted another copy on May 15, 2017, which was properly associated with OWCP File No. xxxxxx462.

¹³ *E.M.*, Docket No. 09-0039 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

5 U.S.C. § 8128(a).¹⁴ Thus, OWCP did not abuse its discretion in refusing to reopen her claim for a review on the merits.

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 September 6, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 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

¹⁴ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).