

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

_____)	
T.H., Appellant)	
)	
and)	Docket No. 19-0436
)	Issued: August 13, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Gary, IN, Employer)	
_____)	

Appearances:
Appellant, pro se
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 December 27, 2018 appellant filed a timely appeal from a November 1, 2018 merit decision and a November 30, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ On December 27, 2018 appellant filed her appeal to the Board. On January 30, 2019 she filed a notice of recurrence of disability (Form CA-2a) claiming wage-loss compensation for the same period as on the present appeal. As noted, the Board obtained jurisdiction over this matter on December 27, 2018. Therefore, the subsequent decision of OWCP dated March 5, 2019 is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. See 20 C.F.R. § 501.2(c)(3), § 10.626; see also *M.C.*, Docket No. 18-1278, n.1 (issued March 7, 2019); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the November 30, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish total disability commencing May 8, 2016 due to her accepted employment injury; and (2) 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 September 28, 2016 appellant, then a 38-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging a lower back condition that allegedly occurred on May 8, 2016 due to factors of her federal employment. She indicated that she pulled her lower back unloading mail from an all-purpose container (APC) and placing it onto/into a delivery barcode sorter (DBCS) machine. Appellant stopped work on May 8, 2016. OWCP assigned the claim OWCP File No. xxxxxx688.⁴ Appellant was working part-time, limited duty at the time of the May 8, 2016 injury.

Appellant was treated by Dr. Bruce J. Montella, a Board-certified orthopedic surgeon, who in an October 20, 2016 report noted that as of that date she was required to remain off work. Dr. Montella explained that she could require additional pain medications and thus become a danger to coworkers. Thereafter, he also completed a work restriction form dated November 3, 2016 in which he reported that appellant was "unable to perform [appellant] job duties as a mail clerk due to her on[-]the[-]job injury." Dr. Montella noted that she was to remain off work until further evaluation.

After development of the evidence, OWCP initially denied appellant's claim by decision dated January 4, 2017. Appellant submitted several requests for reconsideration on January 13, April 3,⁵ and July 14, 2017.⁶

By decision dated September 7, 2017, OWCP accepted appellant's claim for lumbar sprain.

On September 12, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability for the period May 8, 2016 to September 1, 2017. On the reverse side of the claim form the employing establishment confirmed that she was on leave without pay status for the claimed period. Appellant filed numerous additional CA-7 forms claiming continuing compensation for total disability.

In a development letter dated September 21, 2017, OWCP informed appellant that it received her claim for wage-loss compensation commencing May 8, 2016. It advised her that the

⁴ Appellant has two prior lumbar injury claims, which have been administratively combined with the current claim. Under OWCP File No. xxxxxx420, she has an accepted traumatic injury claim (Form CA-1) for a lumbar sprain, which arose on June 21, 2005. Under OWCP File No. xxxxxx047, appellant has an accepted occupational disease claim (Form CA-2) for lumbar sprain, which arose on or about August 21, 2012.

⁵ Appellant requested reconsideration of OWCP's March 21, 2017 decision, which denied modification of the January 4, 2017 denial decision.

⁶ Appellant requested reconsideration of OWCP's July 5, 2017 decision, which denied modification of the March 21, 2017 decision.

evidence submitted was insufficient to establish her claim and requested that she submit additional evidence to establish that she was unable to work during the period claimed as a result of her May 8, 2016 employment injury. Appellant was afforded 30 days to submit the requested information.

In a September 26, 2017 letter, Dr. Montella, indicated that on May 8, 2016 appellant aggravated her back when she felt a pull and sharp pain in her back while loading mail out of the APCs on the DBCS machine. He provided examination findings and reported that she had been off work since May 13, 2016 per his prior recommendation. Dr. Montella noted that appellant might require surgery in the future.

By decision dated January 30, 2018, OWCP denied appellant's claim for wage-loss compensation commencing May 8, 2016 finding that the medical evidence of record failed to establish that she was disabled from work commencing on May 8, 2016 as a result of her accepted lumbar sprain injury.

On February 12, 2018 appellant again requested reconsideration.

Appellant also submitted various additional reports by Dr. Montella. In a February 6, 2018 examination note and work restriction form, Dr. Montella related her complaints of constant low back pain radiating into her bilateral lower extremities. He continued to opine that appellant should not work until further evaluation.

In a February 20, 2018 letter, Dr. Montella noted that appellant was working limited duty on May 8, 2016 when she traumatically injured her back while loading mail out of APCs on the DBCS machine. He indicated that, since the May 8, 2016 employment incident, appellant had ongoing and chronic lumbosacral spasms, weakness, and antalgic appearing gait pattern and tenderness to palpation at the midline and decreased forward flexion and tenderness upon examination. Dr. Montella reported that she had been off work since May 13, 2016.

OWCP received additional work restriction notes from Dr. Montella dated May 13, June 22, August 9, November 9, and December 21, 2016 and February 20, July 28, September 15, and October 30, 2017. Each note indicated that appellant should be off work until further evaluation. Dr. Montella reported diagnoses of intervertebral disc disorders and lumbar spine sprain.

In a letter dated April 18, 2018, OWCP requested that Dr. Montella review a statement of accepted facts and provide a narrative report explaining how the May 8, 2016 employment incident caused or contributed to an aggravation of lumbar herniated disc condition and how appellant's accepted lumbar sprain injury had worsened to the extent that she was unable to work commencing May 13, 2016.

Dr. Montella responded to OWCP's letter on April 24, 2018. He noted that on May 8, 2016 appellant sustained an aggravation of her work-related back injury, which included aggravated lumbar sprain and lumbar disc herniation. Dr. Montella explained which examination findings supported the diagnosis of an aggravation of lumbar disc herniation, including persistent paraspinal tenderness, diminished range of motion, mildly diminished sensation bilaterally at L5, and an antalgic gait. He reported that appellant was "not medically capable to return to work because of ongoing pain and difficulty and the medical care required to treat [appellant's]

condition.” Dr. Montella explained that her increasing pain resulted from any increasing of exertion and required increasing pain medication, which put her and other people in her work environment at risk. He completed a work restriction form and work capacity evaluation (Form OWCP-5c) which related that appellant could not work.

By decision dated June 7, 2018, OWCP denied modification of its January 30, 2018 decision denying appellant’s claim for wage-loss compensation commencing May 8, 2016.

On July 11, 2018 appellant requested reconsideration of the June 7, 2018 decision denying wage-loss compensation benefits.

In a June 25, 2018 letter, Dr. Montella noted that after the May 8, 2016 aggravation appellant was “unable to work at all.” He opined that the comparisons and measurements were evidence of a significant change in her lumbar condition following the May 8, 2016 employment incident.

By decision dated October 4, 2018, OWCP denied modification of its June 7, 2018 decision.

On October 11, 2018 appellant requested reconsideration and submitted additional evidence.

In an October 30, 2018 report, Dr. Jerry Powell, an emergency medicine specialist, reviewed appellant’s history and opined that the May 8, 2016 injury still caused her “daily pain and limits function and restricts [appellant’s] range of motion and ability to work.”

By decision dated November 1, 2018, OWCP denied modification of the October 4, 2018 decision.

On November 8, 2018 appellant requested reconsideration.

By decision dated November 30, 2018, OWCP denied further merit review of appellant’s claim under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.⁸ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁹

⁷ *Supra* note 2.

⁸ *See B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

⁹ *See D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson, id.*

The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.¹⁰ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.¹¹ An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹²

Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of reliable, probative, and substantial medical evidence.¹³ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work.¹⁴ The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty, and must include objective findings in support of its conclusions.¹⁵

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹⁶ To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish total disability commencing May 8, 2016 due to the accepted employment injury.

The medical evidence received relevant to the claimed period of disability include reports by Dr. Montella. In a May 13, 2016 examination note, he reported that appellant had not worked since May 9, 2016. Dr. Montella completed a work restriction form, which indicated that she was "unable to perform her job duties as a mail clerk due to her on[-]the[-]job injury." In an October 14, 2016 report, he explained that due to her work-related injury, any continuance of her job duties or any lifting would aggravate her condition. He recommended that appellant be excused from work pending further evaluation. Dr. Montella continued to treat her and provide

¹⁰ 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹¹ *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

¹² *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

¹³ *J.A.*, Docket No. 18-1304 (issued May 1, 2019); *William A. Archer*, 55 ECAB 674 (2004).

¹⁴ *B.W.*, Docket No. 19-0049 (issued April 25, 2019); *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹⁵ *C.B.*, Docket No. 18-0633 (issued November 16, 2018).

¹⁶ *J.S.*, Docket No. 16-1014 (issued October 27, 2014); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁷ *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

examination reports and work-restriction forms dated May 13, 2016 to October 30, 2017, which indicated that she should be off work until further evaluation.

The Board finds that Dr. Montella did insufficiently explain how appellant's inability to work was related to her accepted conditions caused by the May 8, 2016 employment injury. Dr. Montella did not discuss objective findings to support her inability to work, nor did he explain why she was unable to work her part-time limited-duty position as a result of her accepted lumbar sprain injury.¹⁸ He did not identify the specific dates that appellant was disabled from work nor did he explain how she was no longer able to work due to her accepted injury. As noted above, the Board will not require OWCP to pay compensation for disability, in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹⁹ As Dr. Montella did not provide medical rationale for his conclusion that appellant was unable to work due to her May 8, 2016 employment injury, his reports are of diminished probative value and are insufficient to establish her disability claim.²⁰

Dr. Montella opined in a letter dated April 24, 2018 that appellant was "not medically capable to return to work because of ongoing pain and difficulty and the medical care required to treat [appellant's] condition." As he did not explain with sufficient rationale as to how her inability to work was due to her accepted May 8, 2016 lumbar sprain injury, his opinion is of limited probative value and thus this report is insufficient to establish the claimed period of disability.²¹

Likewise, Dr. Powell's September 24 and October 30, 2018 examination notes also did not attribute appellant's inability to work to her accepted May 8, 2016 lumbar sprain injury. As he did not expressly opine that she was unable to work due to her accepted May 8, 2016 employment injury, his opinion is insufficient to establish her claim.²²

As the medical evidence of record does not contain sufficient rationale to establish disability commencing May 8, 2016, the Board finds that appellant has not met her burden of proof to establish her claim.

Appellant may submit new evidence or argument with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁸ See *M.C.*, Docket No. 16-1238 (issued January 26, 2017); see also *Jaja K. Asaramo*, 55 ECAB 200 (2004) (the Board found that, for conditions not accepted or approved by OWCP as due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury). *M.M.*, Docket No. 16-0541 (issued April 27, 2010).

¹⁹ *Supra* note 11.

²⁰ *G.R.*, Docket No. 15-1685 (issued June 14, 2016); *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

²¹ *C.B.*, Docket No. 18-0040 (issued May 7, 2019).

²² *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *J.H.*, Docket No. 14-0775 (issued July 14, 2014).

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA²³ 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 payment of compensation at any time on his own motion or on application.²⁴

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.²⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²⁶ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.²⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, it will deny the request for reconsideration without reopening the case for review on the merits.²⁸

ANALYSIS -- ISSUE 2

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).

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law or advance a new and relevant legal argument not previously considered by OWCP. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant has not submitted relevant and pertinent new evidence in support of her request for reconsideration under 20 C.F.R. § 10.606(b)(3). The Board notes that the underlying issue in this case is whether she established entitlement to ongoing total disability compensation. Appellant did not submit new evidence relevant to the issue of disability entitlement with her November 8, 2018 request for reconsideration. Thus, she is not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).

²³ *Supra* note 2.

²⁴ 5 U.S.C. § 8128(a).

²⁵ 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).

²⁶ *Id.* at § 10.607(a).

²⁷ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

²⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁹

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability commencing May 8, 2016 due to her accepted May 8, 2016 employment injury. The Board also finds that OWCP properly denied her 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 30 and 1, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 13, 2019
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

²⁹ *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (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).