

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

_____)	
W.W., Appellant)	
)	
and)	Docket No. 19-1706
)	Issued: April 15, 2020
U.S. POSTAL SERVICE, POST OFFICE, Mountain View, CA, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On August 8, 2019 appellant filed a timely appeal from a February 28, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision in this case was a February 20, 2018 Board decision, which became final 30 days after issuance, and is not subject to further review.¹ As there was no merit decision issued by OWCP within 180 days from 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 to review the merits of this case.³

¹ 20 C.F.R. § 501.6(d).

² 5 U.S.C. § 8101 *et seq.*

³ The record provided to the Board includes evidence received after OWCP issued its February 28, 2019 decision. 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.*

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

This case had previously been before the Board.⁴ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 17, 2013 appellant, then a 55-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained neck and back conditions due to factors of her federal employment including repetitive lifting, reaching, twisting, pulling, pushing, and carrying on or before June 22, 2013. OWCP accepted the claim for a temporary aggravation of displacement of cervical intervertebral disc without myelopathy, and a temporary aggravation of brachial neuritis or radiculitis.

Appellant performed part-time modified duty for three hours per day from June 24 to November 25, 2013 and was paid wage-loss compensation for the remaining five hours a day on the supplemental rolls. She was followed by Dr. Mark J. Sontag, a Board-certified physiatrist, who provided reports dated from July 24 to November 18, 2013, noting her history of April 12, 2010 C5-6 and C6-7 fusions, after which she returned to modified duty. Dr. Sontag opined that appellant subsequently developed an aggravation of a C3-4 disc bulge with occipital neuralgia and C6 and C7 radiculopathy due to driving a delivery vehicle at work.

In a November 18, 2013 report, Dr. Sontag noted appellant's symptoms of left-sided throat pain when swallowing and esophageal pain when leaning forward. He diagnosed status post C5-6 and C6-7 anterior fusion, C4-5 and C7-T1 facet syndrome, chronic bilateral C7 radiculopathy, and rule out anterior dislodging of fixation hardware. Dr. Sontag held appellant off work from November 25, 2013 and continuing.

On November 27, 2013 appellant filed a claim for compensation (Form CA-7) for total disability for the period November 26 to December 19, 2013 and a subsequent CA-7 form, commencing December 20, 2013 and continuing. In support of her claims, appellant submitted reports from Dr. Sontag dated from December 19, 2013 to February 18, 2014, diagnosing dysphagia related to sensory nerve dysfunction caused by the C5-6 and C6-7 anterior fusion. Dr. Sontag continued to hold her off work.

By decision dated March 18, 2014, OWCP denied appellant's claim for total disability compensation, commencing November 26, 2013. Appellant subsequently requested a hearing before a representative of OWCP's Branch of Hearings and Review, held August 26, 2016. She submitted a March 18, 2014 report from Dr. Robert K. Wu, a Board-certified otolaryngologist, who found no obvious extension of the cervical fixation plate into the pharynx. Dr. Wu opined that he was unsure of the etiology of appellant's swallowing problems.

⁴ Docket No. 16-0660 (issued February 20, 2018).

In reports from March 25 to November 10, 2014, Dr. Sontag opined that appellant's dysphagia and esophageal irritation had been caused by the anterior cervical fixation plate. He found appellant totally disabled from work.

By decision dated November 14, 2014, OWCP affirmed the March 18, 2014 decision. Appellant requested reconsideration on November 2, 2015. She submitted reports from Dr. Sontag, dated December 8, 2014, March 3 and October 19, 2015, attributing her cervical spine pain, cervical radiculopathy, and swallowing difficulties to factors of her employment including repetitive neck flexion, overhead reaching, and lifting.

By decision dated January 29, 2016, OWCP affirmed its November 14, 2014 decision, finding that Dr. Sontag's reports were insufficiently rationalized to establish causal relationship. Appellant then appealed to the Board.

During the pendency of the prior Board appeal, appellant submitted chart notes from Dr. Sontag, dated from February 19, 2016 to January 29, 2018, which noted that he had determined that she was permanently and totally disabled from work

By decision dated February 20, 2018,⁵ the Board affirmed OWCP's January 29, 2016 decision, finding that Dr. Sontag had not provided sufficient medical rationale to establish that the accepted employment injuries had caused appellant's continuing head, neck, and swallowing conditions on and after November 26, 2013 such that she had established continuing work-related disability.

On February 19, 2019 appellant, through her representative, requested reconsideration of her claim by OWCP. She contended that additional medical reports from Dr. Sontag, particularly an April 16, 2018 report, were sufficient to meet her burden of proof.

In support of her request, appellant submitted reports by Dr. Sontag dated from March 26, 2018 to February 12, 2019, diagnosing status post C5 to C7 fusion, history of chronic bilateral C6 and C7 radiculopathy, and C4-5 and C7-T1 facet syndrome. Dr. Sontag found that her condition was unchanged and that she remained totally disabled from work. He reiterated, in an April 16, 2018 report, that appellant's employment duties of repetitive lifting, reaching, pulling, and pushing had aggravated the C5-6 and C6-7 segments, causing left-sided C6 and C7 radiculopathy. Dr. Sontag referenced that scientific literature indicated that "repetitive loading of the spine and twisting will contribute to the wearing of the disc and nerve root irritation."

Appellant also provided copies of Dr. Sontag's September 25 and November 27, 2017 and January 29, 2018 reports previously of record, physical therapy treatment notes, and employing establishment forms, noting that she had retired effective December 12, 2014.

By decision dated February 28, 2019, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a), finding that her reconsideration request neither raised substantive legal questions nor included new and relevant evidence.

⁵ *Supra* note 4.

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.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ 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.¹⁰

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

In support of her request for reconsideration, appellant submitted reports from Dr. Sontag which reiterated his prior opinion that repetitive lifting, reaching, pulling, and pushing aggravated her diagnosed cervical disc conditions. In his April 16, 2018 report, Dr. Sontag noted his communication with appellant following the denial of her claim for compensation by this Board. He expounded in detail with regard to the duties of appellant's employment position including the various movements and weights associated when she performed a multiplicity of tasks. Dr. Sontag opined in this report that appellant's employment duties included repetitive movements that had aggravated the C5-6 and C6-7 segments of appellant's spine, causing left-sided C6 and C7 radiculopathy. He discussed the bodily forces which resulted from the repetitive duties which appellant performed for the employing establishment and he further discussed that scientific

⁶ 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.*; *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the originally contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

literature was supportive of his medical opinion as it indicated that “repetitive loading of the spine and twisting will contribute to the wearing of the disc and nerve root irritation.” The Board finds that the April 16, 2018 report of Dr. Sontag is a new medical report which contains relevant and pertinent medical opinion evidence sufficient to warrant a merit review of appellant’s claim.

As appellant has submitted relevant and pertinent new evidence not previously considered by OWCP, she is entitled to a review of the merits of her claim pursuant to section 10.606(b)(3) of OWCP’s regulations.¹¹ Following such further development as may be deemed necessary, OWCP shall issue an appropriate merit decision on her claim for disability compensation.

CONCLUSION

The Board finds that OWCP improperly denied appellant’s request for reconsideration of the merits of her claim.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2019 decision of the Office of Workers’ Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 15, 2020
Washington, DC

Alec J. Koromilas, Chief Judge
Employees’ Compensation Appeals Board

Christopher J. Godfrey, Deputy Chief Judge
Employees’ Compensation Appeals Board

Janice B. Askin, Judge
Employees’ Compensation Appeals Board

¹¹ *T.P.*, Docket No. 18-0608 (issued August 2, 2018). *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).