

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

R.L., Appellant

and

**U.S. POSTAL SERVICE, PALMDALE POST
OFFICE, Palmdale, CA, Employer**

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**Docket No. 19-1051
Issued: December 2, 2020**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 12, 2019 appellant, through counsel, filed a timely appeal from a February 5, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from the last merit decision, dated May 2, 2018, to the filing of this

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 The Board notes that, following the February 5, 2019 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.*

appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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 February 3, 2016 appellant, then a 30-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 2, 2016 she injured her left ankle and bruised her left elbow when she tripped and fell while in the performance of duty. OWCP accepted the claim for a left ankle sprain and resolved contusion of the left elbow. Appellant stopped work on February 4, 2016 and underwent left ankle surgery on November 2, 2016. She returned to modified work on February 24, 2017, but stopped work again on March 21, 2017. Appellant resumed her usual employment on June 21, 2017. She stopped work again on August 31, 2017 and returned to full-time modified employment on December 11, 2017.⁴

On February 20, 2018 Dr. Naim Kalhor, a podiatrist, noted that appellant had "severe swelling and edema" on evaluation of the left lower extremity. In a work status note of even date, he advised that he was treating her for a left ankle injury and that she could resume work after a magnetic resonance imaging (MRI) scan.

In a March 5, 2018 progress report, Dr. Kalhor discussed appellant's complaints of left ankle pain, swelling, and edema. On examination he found loss of sensation on the third and fourth digit of the left foot. Dr. Kalhor diagnosed Morton's neuroma of the left foot, to rule out a tendon rupture, and a left foot and ankle contusion. He found that appellant was unable to work due to left ankle swelling/edema. In a work status report of even date, Dr. Kalhor indicated that she was totally disabled from work.

An MRI scan of the left ankle dated March 10, 2018 revealed no acute abnormality, tendon tear, or tenosynovitis.

On March 12, 2018 appellant filed a claim for compensation (Form CA-7) for disability from work for the period February 20 to March 9, 2018.⁵ She continued to file Form CA-7 claims for wage-loss compensation for total disability until June 2018.

In a March 22, 2018 state workers' compensation form report, Dr. Stephen R. Greene, an internist, diagnosed a left ankle sprain and found that appellant could resume modified employment alternating sitting and standing. In a work status report of even date, he found that

³ 5 U.S.C. § 8102 *et seq.*

⁴ Appellant's restrictions included a driving route and walking no more than 20 minutes at a time intermittently.

⁵ By decision dated March 20, 2018, OWCP denied appellant's claim for wage-loss compensation from December 29, 2017 through January 3, 2018 and January 12 through 14, 2018.

she could not stand for over 50 percent of the time. In March 29, 2018 work status reports and state workers' compensation form reports, Dr. Greene determined that appellant could perform sitting work only; however, he further indicated that she could stand no more than 75 percent of the time, and perform intermittent walking up to 30 minutes per hour.

In a report dated April 9, 2018, Dr. Kalhor diagnosed a left ankle sprain, to rule out a tendon rupture, and a contusion of the left foot and ankle.⁶ He reviewed the MRI scan, which he noted showed scarring from the ligament rupture, but no tear. Dr. Kalhor advised that on February 20, 2018 appellant had informed him that she had experienced "another sprain while she was getting off her truck and she had severe swelling and edema." He took her off work beginning that date "to avoid any chronic pain issues." Dr. Kalhor indicated that appellant could return to work sitting only.

By decision dated May 2, 2018, OWCP found that appellant had not established a recurrence of disability beginning February 20, 2018 causally related to her February 2, 2016 employment injury. It noted that she had not submitted evidence supporting that the employing establishment withdrew her modified employment beginning February 20, 2018. OWCP further explained that the medical evidence of record did not establish that appellant was disabled from work due to a material change or worsening of the accepted employment conditions.

Thereafter, appellant resubmitted numerous reports already of record, including progress reports dated February 20, March 5, and April 9, 2018 from Dr. Kalhor, state workers' compensation form reports dated March 5, 22, and 29, 2018, and work status reports from March and April 2018. She additionally submitted medical evidence predating her claimed recurrence of disability beginning February 20, 2018.

Appellant further submitted an April 9, 2018 state workers' compensation form report from Dr. Kalhor. Dr. Kalhor diagnosed a left ankle sprain and found that she could perform modified employment.

In a report dated May 10, 2018, Dr. Kalhor evaluated appellant for left foot and ankle pain, noting that she experienced swelling and edema with extensive standing and walking. He diagnosed a left foot and ankle contusion, an unstable ankle and foot, and left foot edema. Dr. Kalhor opined that appellant could work with restrictions of no prolonged standing or walking. In a work status form of the same date, he found that she could intermittently walk as tolerated for 20 minutes.

In a May 17, 2018 employing establishment request for or notification of absence form, appellant requested time off due to her accepted employment injury from May 7 to June 7, 2018, noting that there was no work available. Her supervisor signed the form.

On June 7, 2018 Dr. Kalhor advised that appellant had numbness and pain in the third and fourth digits extending to the ankle of the left foot. He noted that she was status post ligament

⁶ In work status reports dated April 9, 2018, Dr. Kalhor found that appellant could perform modified employment.

repair of the left ankle and diagnosed a left foot and ankle contusion and sprain. In a work status form of even date, Dr. Kalhor provided the same work restrictions.

On June 16, 2018 appellant accepted a position as a modified city carrier at the employing establishment.

Appellant submitted medical evidence addressing her current condition following her return to work in June 2018.

On July 25, 2018 Dr. Kalhor performed a left ankle ligament repair, excision of an osteochondral lesion, and excision of scar tissue and tenosynovitic tissue.

In an October 24, 2018 report of telephone call (Form CA-110), appellant advised that she had submitted her claims for compensation as there was no work available at the employing establishment. In a statement of even date, she questioned why she had not received wage-loss compensation beginning February 20, 2018. Appellant asserted that from February 20 to June 15, 2018 management had not provided her with work within her restrictions. She advised that she had filed an Equal Employment Opportunity (EEO) complaint as she was not provided with available work within her restrictions.

On January 25, 2019 appellant, through counsel, requested reconsideration. He asserted that he was submitting a June 15, 2018 settlement agreement from the Equal Employment Opportunity Commission (EEOC) not previously considered.

In a June 15, 2018 EEOC settlement agreement, the employing establishment agreed to provide appellant with a temporary job as a lobby director beginning June 15, 2018 and ending July 7, 2018 at which point it would conduct a search for a position within her updated work restrictions.

By decision dated February 5, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim.

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 which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by

⁷ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it 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 improperly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law nor did she advance a new and relevant legal argument not previously considered. On reconsideration she contended that the employing establishment failed to provide her work within her restrictions. OWCP, however, previously addressed whether appellant had established that the employing establishment withdrew her modified employment. Consequently, appellant was not entitled to a review of the merits based on the first or second above-noted requirements as she did not show that OWCP erred in interpreting or applying the law nor did she advance a new and relevant legal argument.¹²

The underlying issue on reconsideration is whether appellant has established that she sustained a recurrence of disability beginning February 20, 2018 because either the employing establishment withdrew her modified employment or she submitted sufficient medical evidence to establish that she was disabled from her limited-duty work. On reconsideration she submitted a form requesting absence from May 7 to June 7, 2018 due to her employment injury as there was no work available. Appellant's supervisor signed the form. She also submitted an EEOC settlement agreement providing appellant with a temporary job as a lobby director beginning June 15, 2018. The Board finds that this evidence addresses the underlying issue of whether appellant sustained a recurrence of disability due to the employing establishment's withdrawal of

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

⁹ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. 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). Chapter 2.1602.4b.

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

¹¹ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² 20 C.F.R. § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

her modified position. Consequently, it is relevant and pertinent new evidence and its submission requires reopening of appellant's claim for merit review pursuant to the third prong of section 10.606(b).¹³

The Board will therefore set aside OWCP's February 5, 2019 decision and remand the case for an appropriate merit decision on appellant's claim.

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 February 5, 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: December 2, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹³ See *M.E.*, Docket No. 20-0067 (issued October 15, 2020); *C.H.*, Docket No. 17-1065 (issued December 14, 2017).