

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

L.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Colorado Springs, CO, Employer**

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**Docket No. 19-1380
Issued: February 11, 2020**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 10, 2019 appellant filed a timely appeal from a December 10, 2018 merit decision and a January 14, 2019 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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. See 20 C.F.R. § 501.3(e)-(f). One-hundred eighty days from December 10, 2018, the date of OWCP's last merit decision, was June 8, 2019. As this fell on a Saturday, the time period for filing her appeal did not expire until the next business day, which was Monday, June 10, 2019, rendering the appeal timely filed. See *M.H.*, Docket No. 13-1901 (issued January 8, 2014); *Debra McDavid*, 57 ECAB 149, 150 (2005); *Angel M. Lebron, Jr.*, 51 ECAB 488, 490 (2000); *Gary J. Martinez*, 41 ECAB 427, 427-28 (1990).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 14, 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.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective December 9, 2018, as she no longer had disability causally related to her accepted left hand contusion, bilateral knee contusions, left wrist and hand sprain, tear of the left knee lateral meniscus, and left shoulder impingement syndrome; 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 January 6, 2017 appellant, then a 59-year-old holiday clerk assistant, filed a traumatic injury claim (Form CA-1) alleging that on January 4, 2017 she sustained a left wrist injury when she tripped on a plastic board while in the performance of duty. OWCP accepted the claim for contusion of left hand, contusion of right knee, contusion of left knee, sprain of left wrist, tear of lateral meniscus of left knee, and impingement syndrome of left shoulder. Appellant stopped work on January 4, 2017 and received wage-loss compensation on the supplemental rolls as of January 21, 2017. OWCP paid her wage-loss compensation on the periodic rolls beginning March 4, 2018.⁴

On August 3, 2017 appellant underwent an OWCP-approved left knee arthroscopy.

Follow-up medical reports dated December 6, 2017 through July 16, 2018 were submitted from Dr. Jay Neubauer, Board-certified in preventative medicine. In his December 6, 2017 report, Dr. Neubauer diagnosed contusion of left hand, contusion of right knee, contusion of left knee, sprain of other part of left wrist and hand, sprain of left rotator cuff capsule, nondisplaced fracture of middle third navicular bone of left wrist with routine healing, other spontaneous disruption of anterior cruciate ligament of left knee, other tear of lateral meniscus left knee current injury, and trigger finger of left ring finger. He reported that the cause of appellant's problems were related to her work activities. Dr. Neubauer opined that she could perform modified duty, lifting up to five pounds with the left arm, and sedentary general work restrictions. On December 13, 2017 he completed a work capacity evaluation form (OWCP-5c) noting appellant's restrictions, including no grasping/typing/mousing with the left hand, no prolonged standing/walking greater than 15 minutes without rest, no lifting/carrying/pushing/pulling greater than two pounds. In progress notes dated January 4, 2018, Dr. Neubauer reiterated the diagnosis and work restrictions he provided in his December 6, 2017 report. In a January 7, 2018 Form OWCP-5c, he indicated that appellant should not perform repetitive grasping, kneeling, crawling, squatting; no prolonged standing/walking, and no lifting/carrying over five pounds with the left hand. Appellant was also seen on January 19, February 19, March 19, and April 16, 2018. In these reports, Dr. Neubauer related that her scaphoid fracture had now resolved however she had ongoing shoulder, wrist, and hand pain, which was thought to be arthritis. He also noted that appellant had undergone left knee surgery on August 2, 2017 and had been recovering slowly following this procedure. Dr. Neubauer again noted her work restrictions. In a narrative report dated May 15, 2018, he related appellant's continuing pain complaints. Dr. Neubauer related that surgery was not recommended for her left arm complaints and that she was reaching maximum medical improvement (MMI) as her arm symptoms were becoming stable. With regard to appellant's left

⁴ The record reflects that appellant was terminated from federal employment on January 6, 2017.

knee, he related that he had referred her for a functional capacity evaluation, and that her current work restrictions were temporary. Dr. Neubauer completed another Form OWCP-5c on May 16, 2018 noting that she could not perform typing or grasping with the left hand, or prolonged standing/walking for more than 60 minutes at a time/sedentary work only. He repeated these restrictions in May 23, 2018 narrative report. In a June 13, 2018 report, Dr. Neubauer related appellant's restrictions as no grasping/typing/mousing with left hand, no lifting/carrying/pushing/pulling greater than five pounds with the left hand, no prolonged standing or walking greater than 60 minutes, without rest, sedentary work only. He repeated these restrictions on July 16, 2018 and noted that "the cause of this problem is related to work activities."

On March 1, 2018 OWCP referred appellant, the case file, and a statement of accepted facts (SOAF) to Dr. William Ciccone, a Board-certified orthopedic surgeon, for a second opinion examination regarding the status of her accepted January 4, 2017 work-related injury.

In a March 28, 2018 report, Dr. Ciccone recounted appellant's history of injury and medical treatment. He reported that she sustained a minor contusion to the left wrist and right knee as a result of the work-related fall which had since resolved, and that any complaints related to her current conditions involved her preexisting degenerative conditions. Dr. Ciccone reported that appellant's left wrist condition was related to degenerative changes which were not caused or aggravated by the January 4, 2017 employment incident. He explained that, following her minor left wrist contusion, radiographs revealed degenerative changes, but no fracture. Furthermore, appellant's wrist condition and symptoms had improved since the employment injury and there was no evidence of fracture on any diagnostic studies other than her preexisting degenerative conditions. Dr. Ciccone opined that her left wrist condition had resolved and any intermittent pain she experienced in the thumb was unrelated to the work injury and caused by her preexisting degenerative condition. He further reported that appellant's magnetic resonance imaging (MRI) scan of the left shoulder revealed labral tearing and glenohumeral cartilage loss, which were degenerative in nature and unrelated to any work trauma. Dr. Ciccone noted that tendon degeneration was called tendinopathy and was caused by the natural degeneration of the tendon, not trauma. Furthermore, labral tearing was associated with the degenerative changes in the shoulder (glenohumeral) joint while loss of cartilage in the shoulder joint was commonly associated with degenerative labral tearing which were unrelated to trauma. Dr. Ciccone noted that appellant did not have any pain in the left shoulder following the fall and had no evidence of an acute injury on her diagnostic study to establish continuing residuals of a left shoulder injury. He further opined that her right knee condition had resolved as her diagnostic studies showed no evidence of fracture and her February 22, 2018 examination revealed nearly full range of motion and minimal knee pain. Dr. Ciccone concluded that appellant did not sustain a work-related injury to the left knee or left shoulder and suffered minor contusions to the left wrist and right knee as a result of the fall. However, he indicated that her continued symptoms were related to preexisting degenerative changes and not an acute injury. Dr. Ciccone reported that appellant did not require any further medical treatment for her work-related conditions and could return to full-duty work without restrictions.

On August 3, 2018 OWCP requested a supplemental report from Dr. Ciccone and asked that he provide a medical opinion within the framework of the SOAF. It noted that, while he did not agree with some of the accepted conditions in the claim, he should provide an opinion based on the conditions which had been established as causally related to the employment injury.

In a supplemental August 13, 2018 medical report, Dr. Ciccone reported that according to the SOAF, appellant had minor injuries to multiple joints and that imaging studies revealed degenerative changes in the joints. He opined that she was no longer suffering from any residuals of the employment injury and that the continued joint pain was related to the preexisting degenerative changes and not the work-related injury. Dr. Ciccone again concluded that appellant could return to full-duty work without restrictions. He also completed a work restriction evaluation (Form OWCP-5c) form in which he indicated that she could return to work without restrictions.

Medical reports dated August 17 and October 23, 2018 were submitted from Dr. Richard Meinig, a Board-certified orthopedic surgeon, who diagnosed traumatic arthritis of left knee and acute lateral meniscus tear of left knee. In his August 17, 2018 report, Dr. Meinig related that appellant was back to hiking and swimming and could continue her activities without restriction regarding her left knee. In his October 23, 2018 report, he related that she was exhibiting some early signs of lateral knee and patellofemoral osteoarthritis and had probably reached MMI in terms of the arthroscopy for the lateral meniscus tear. Dr. Meinig indicated that appellant had no significant functional restrictions.

In an August 21, 2018 medical report, Dr. Ky Kobayashi, a Board-certified orthopedic surgeon diagnosed left hand ulnar neuropathy. He noted that appellant's prior nerve conduction studies in February 2018 were reported as within normal limits; however, he recommended new diagnostic studies.

In an August 28, 2018 medical report, Dr. Centi noted appellant's complaints of continued pain to the left wrist and left knee which began on January 4, 2017. He diagnosed contusion of left hand, contusion of right knee, contusion of left knee, sprain of other part of left wrist and hand, sprain of left rotator cuff capsule, nondisplaced fracture of middle third navicular bone of left wrist with routine healing, other spontaneous disruption of anterior cruciate ligament of left knee, and other tear of lateral meniscus of left knee current injury. Dr. Centi reported that the cause of these conditions was the employment injury. He projected that appellant would reach MMI on September 24, 2018 when she could work full duty without restrictions.

By letter dated September 10, 2018, OWCP provided Dr. Centi a copy of Dr. Ciccone's second opinion report for review. It requested the physician provide a narrative medical report supported by objective medical rationale if he disagreed with the findings of the second opinion physician.

In a September 24, 2018 state workers' compensation form report, Dr. Centi reported that appellant could return to full-duty work without restrictions and had reached MMI.

On November 6, 2018 OWCP proposed to terminate appellant's wage-loss compensation benefits because she no longer had disability causally related to her January 4, 2017 employment injury. It found that the weight of medical evidence established that her work-related disability related to the January 4, 2017 employment injury had ceased based on Dr. Ciccone's second opinion reports as well as the opinion of Dr. Centi, her attending physician. OWCP noted that the decision did not propose to terminate appellant's medical benefits which would remain open if treatment was still needed for her accepted conditions. It provided her 30 days to submit additional evidence and argument if she disagreed with the proposed termination of her wage-loss compensation benefits.

By narrative statement dated December 6, 2018, appellant reported that she had been under the care of Dr. Neubauer until July 17, 2018 who provided work restrictions. Dr. Neubauer was subsequently replaced by Dr. Centi on August 20, 2018 who provided her with the same work restrictions. Appellant stated that on September 24, 2018 she was evaluated again by Dr. Centi who informed her that he was “closing [appellant’s] case because he was required to agree” with the second opinion physician and had no choice in the matter. Dr. Centi informed her that she had to cover her own medical expenses. Appellant further stated that she contacted the employing establishment on December 4, 2018 regarding her position as a holiday clerk assistant, but was told the position ended on January 6, 2017.

By decision dated December 10, 2018, OWCP terminated appellant’s wage-loss compensation benefits, effective December 9, 2018, finding that Dr. Centi, her attending physician, had agreed with Dr. Ciccone’s opinion and released her to full-duty work without restrictions on September 24, 2018.

On January 8, 2019 appellant requested reconsideration of OWCP’s decision. In support of her claim, she submitted a July 12, 2018 MRI scan of the left hand and an August 17, 2018 medical report from Dr. Meinig previously of record.

By decision dated January 14, 2019, OWCP denied appellant’s request for reconsideration of the merits of her claim. It found that she failed to submit any new and pertinent medical evidence as the medical reports were previously submitted and considered in its prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.⁵ Having determined that, an employee has a disability causally related to factors of his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁶ OWCP’s burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

For conditions not accepted by OWCP as being employment related, it is the employee’s burden to provide rationalized medical evidence sufficient to establish causal relationship, not OWCP’s burden to disprove such relationship.⁸

⁵ *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁷ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Furman G. Peake*, 41 ECAB 351 (1975).

⁸ *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits effective December 9, 2018 as she no longer had disability causally related to the January 4, 2017 employment injury.⁹

On March 28, 2018 OWCP referred appellant for a second opinion examination with Dr. Ciccone.¹⁰ In his March 28 and August 13, 2018 medical reports, Dr. Ciccone noted review of her medical history, diagnostic testing, and findings on physical examination. He opined that appellant was no longer disabled due to the accepted work-related injuries and that any continued pain and conditions were related to preexisting degenerative changes unrelated to the January 4, 2017 employment injury. The Board has reviewed the opinion of Dr. Ciccone and finds that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue in the present case.¹¹ Dr. Ciccone's opinion is based on a proper factual and medical history and he thoroughly reviewed the SOAF and medical records.¹² He provided medical rationale for his opinion by stating that appellant's current left wrist condition related to degenerative changes which were not caused or aggravated by the January 4, 2017 employment incident, explaining that her left wrist condition and symptoms had improved since the employment incident and there was no evidence of fracture on any diagnostic studies other than her preexisting degenerative conditions. Dr. Ciccone further explained that her left shoulder condition had resolved based on physical examination findings and diagnostic studies which revealed labral tearing and glenohumeral cartilage loss, which were preexisting and degenerative in nature and unrelated to any acute work trauma. He discussed appellant's right knee condition which had resolved as her diagnostic studies showed no evidence of fracture and her February 22, 2018 examination revealed nearly full range of motion and minimal knee pain. Dr. Ciccone further explained that the left knee condition had resolved based on physical examination findings and diagnostic studies which showed that her current left knee complaints were unrelated to an acute injury and caused by preexisting degenerative changes. Given the above findings, he opined that appellant's disability had ceased and she had no limitations as a result of her January 4, 2017 employment incident. Dr. Ciccone based his opinion on a proper factual and medical history and physical examination findings and provided medical rationale. The Board further notes that Dr. Centi, in his September 24, 2018 report, concurred that appellant was no longer disabled and could return to full-time full-duty work without restrictions. The Board thus finds that OWCP properly relied on Dr. Ciccone's second-opinion report and Dr. Centi's concurrence in terminating her wage-loss compensation.¹³

OWCP also received medical reports from other treating physicians. Dr. Meinig's August 17 and October 23, 2018 medical reports noted appellant's left knee diagnoses, but related

⁹ *B.W.*, Docket No. 17-0972 (issued July 6, 2018).

¹⁰ *See* 20 C.F.R. § 10.320.

¹¹ *C.E.*, Docket No. 19-0661 (issued October 1, 2019); *see also R.W.*, Docket No. 12-375 (issued October 28, 2013).

¹² *See M.H.*, Docket No. 17-0210 (issued July 3, 2018); *Melvina Jackson*, 38 ECAB 443 (1987).

¹³ *K.W.*, Docket No. 19-1224 (issued November 15, 2019).

that she had no functional restrictions from her left knee condition. His reports therefore did not support that she continued to have disability causally related to the accepted conditions.

While Dr. Neubauer noted that appellant's diagnosed conditions were related to her work activities and he provided diagnoses of contusion of left hand, contusion of right knee, contusion of left knee, sprain of left wrist and hand, sprain of left rotator cuff capsule, nondisplaced fracture of middle third navicular bone of left wrist with routine healing, other spontaneous disruption of anterior cruciate ligament of left knee, other tear of lateral meniscus of left knee current injury, and trigger finger of left ring finger, he failed to provide any explanation as to why she was disabled of the accepted employment conditions.¹⁴ The Board further notes that as he last evaluated her on July 16, 2018 his medical restrictions were not contemporaneous with the termination of her wage-loss benefits.¹⁵

While on August 21, 2018 Dr. Kobayashi diagnosed appellant's left hand condition as ulnar neuropathy, he did not provide a rationalized medical opinion explaining how this condition was disabling and was causally related to the accepted employment injury.¹⁶ As such, his report was insufficient to establish her entitlement to wage-loss compensation after December 9, 2018.

As the evidence of record establishes appellant no longer has disability due to her accepted January 4, 2017 employment conditions, the Board finds that OWCP properly terminated her entitlement to wage-loss compensation benefits effective December 9, 2018.

LEGAL PRECEDENT -- ISSUE 2

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 payment of compensation at any time on his own motion or on application.¹⁷

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁸

¹⁴ See *M.M.*, Docket No. 19-0061 (issued November 21, 2019).

¹⁵ See *B.A.*, Docket No. 17-1471 (issued July 27, 2018).

¹⁶ *R.B.*, Docket No. 19-0204 (issued September 6, 2019).

¹⁷ 5 U.S.C. § 8128(a).

¹⁸ 20 C.F.R. § 10.606(b)(3); see also *B.W.*, Docket No. 18-1259 (issued January 25, 2019); *D.K.*, 59 ECAB 141 (2007).

Section 10.608(b) of OWCP's regulations provides that when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁹

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).

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

The Board notes that the underlying issue in this case is whether OWCP properly terminated appellant's compensation benefits as she no longer had continuing disability causally related to her accepted January 4, 2017 employment injury on or after December 9, 2018. That is a medical issue which must be addressed by relevant medical evidence not previously considered.²¹ In support of her claim, appellant resubmitted a July 12, 2018 MRI scan of the left hand and an August 17, 2018 medical report from Dr. Meinig. The Board notes that these reports were previously addressed and evaluated by OWCP in its December 10, 2018 merit decision. As the reports are duplicative and repeated evidence already in the case record, they do not constitute a basis for reopening the case.²² A claimant may obtain a merit review of an OWCP decision by submitting relevant and pertinent new evidence. In this case, appellant failed to submit any relevant and pertinent new evidence in support of her claim and she is not entitled to a merit review based on the third requirement under section 10.606(b)(3).²³

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).²⁴ Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective December 9, 2018, as she no longer had disability causally related to her accepted left hand contusion, bilateral knee contusions, left wrist and hand sprain, tear of the left knee lateral meniscus, and left shoulder impingement syndrome. The Board also finds that

¹⁹ *Id.* at § 10.608(b); *A.G.*, Docket No 19-0113 (issued July 12, 2019); *K.H.*, 59 ECAB 495 (2008).

²⁰ *E.M.*, Docket No. 18-1546 (issued December 12, 2019); *Sherry A. Hunt*, 49 ECAB 467 (1998).

²¹ *A.K.*, Docket No. 19-1210 (issued November 20, 2019); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

²² *J.S.*, Docket No. 18-0726 (issued November 5, 2018).

²³ *R.L.*, Docket No. 18-0175 (issued September 5, 2018).

²⁴ *L.S.*, Docket No. 18-0367 (issued September 23, 2019).

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 January 14, 2019 and December 10, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 11, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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