

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

P.J., Appellant and DEPARTMENT OF COMMERCE, U.S. PATENT & TRADEMARK OFFICE, Arlington, VA, Employer))))))))))))	Docket No. 19-1479 Issued: May 8, 2020
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On June 17, 2019 appellant filed a timely appeal from a June 6, 2019 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). The last merit decision in this case was a Board decision dated August 14, 2018 which became final after 30 days of issuance, and is not subject to further review.¹ As there was no merit decision issued by OWCP within 180 days of 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 does not have jurisdiction over the merits of this case.³

¹ 20 C.F.R. § 501.6(d).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the June 6, 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.*

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

On March 1, 2001 OWCP accepted under OWCP File No. xxxxxx548 that appellant, then a 39-year-old legal instrument examiner, sustained an occupational disease in the form of bilateral carpal tunnel syndrome due to performing the repetitious duties of her job.⁵ Appellant stopped work on March 12, 2001 and OWCP paid her disability compensation beginning that day based on a pay rate of \$691.52 per week. She returned to part-time work (four hours per day) on September 4, 2007 and stopped work on September 20, 2007. Beginning June 8, 2008, OWCP paid appellant disability compensation based on a weekly pay rate of \$868.63.

By decision dated September 29, 2016, OWCP granted appellant a schedule award for nine percent permanent impairment of her left upper extremity due to impairment stemming from her cervical spine. The award ran for 28.08 weeks from August 16, 2016 to February 28, 2017. OWCP indicated that appellant had a weekly pay rate of \$691.52, effective September 20, 2007.⁶

In a December 20, 2016 memorandum, OWCP indicated that an overpayment of compensation in the amount of \$20,237.63 occurred during the period June 8, 2008 to March 5, 2016 because appellant was paid compensation using an improper weekly pay rate during that period. It noted that, for wage loss beginning on June 8, 2008, it paid compensation for total disability using the pay rate of \$868.63 per week with an effective date of September 20, 2007, the date of appellant's most recent recurrence of disability. However, when the recurrence of disability occurred on September 20, 2007, appellant was working four hours per day, five days per week. OWCP indicated that the \$868.63 figure used was the weekly salary of a full-time employee (working eight hours per day, five days per week), but advised that the correct pay rate based on appellant's earnings at the time of the September 20, 2007 recurrence was \$434.32 per week due to the part-time nature of her work. It noted that, prior to the September 20, 2007 work stoppage,

⁴ Docket No. 18-0248 (issued August 14, 2018), *petition for recon. denied*, Docket No. 18-0248 (issued March 8, 2019).

⁵ Appellant underwent several OWCP-authorized upper extremity and cervical surgeries. OWCP previously accepted under OWCP File No. xxxxxx385 that, due to an April 19, 1999 reaching incident, appellant sustained intervertebral cervical disc disorder with myelopathy, cervical sprain, myalgia/myositis, brachial neuritis/radiculitis, and right shoulder/arm sprain. It administratively combined OWCP File Nos. xxxxxx385 and xxxxxx548, with the latter file serving as the master file.

⁶ By decision dated December 5, 2016, OWCP indicated that it was issuing a "corrected schedule award decision" and it noted that March 12, 2001 (rather than September 20, 2007) was the effective date of the weekly pay rate of \$691.52.

appellant last worked on March 11, 2001. Appellant stopped work on March 12, 2001 and began receiving compensation based on her pay rate at that time, which was \$691.52 per week. OWCP noted that its procedures provide that, where a claimant's pay rate for a recurrence of disability is lower than the prior compensation pay rate, then the higher compensation pay rate should be used for payment of compensation. Therefore, the correct compensation pay rate following the September 20, 2007 recurrence was \$691.52 per week (with the effective pay rate date of March 12, 2001) since that was higher than the \$434.32 weekly pay rate of September 20, 2007.⁷

In a January 4, 2017 notice, OWCP advised appellant of its preliminary determination that she received an overpayment of compensation in the amount of \$20,237.63 for the period June 8, 2008 to March 5, 2016 because she received compensation during this period which was paid at an incorrect pay rate. It provided an explanation of how the overpayment occurred which was similar to that contained in its December 20, 2016 memorandum. OWCP also advised appellant of its preliminary determination that she was without fault in the creation of the overpayment because she could not have been expected to know that she was paid at an incorrect pay rate. It informed her that she could submit evidence challenging the fact, amount, or finding of fault, and that she could request waiver of recovery of the overpayment within 30 days. OWCP requested that appellant complete and return an enclosed overpayment recovery questionnaire (Form OWCP-20) within the same period.

Appellant submitted a Form OWCP-20, completed on January 25, 2017, in which she challenged the finding of overpayment and requested a telephonic prerecoupment hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on June 28, 2017, she testified regarding her financial situation.

By decision dated August 3, 2017, OWCP's hearing representative determined that appellant received an overpayment of compensation in the amount of \$20,237.63 because she was paid compensation at an improper pay rate from June 8, 2008 to March 5, 2016. The hearing representative found that she was without fault in the creation of the overpayment, but that the overpayment was not subject to waiver of recovery because her monthly income exceeded her monthly expenses by more than \$50.00. The overpayment was to be recovered by deducting \$900.00 from appellant's continuing compensation payments every 28 days.

Appellant appealed to the Board and, by decision dated August 14, 2018,⁸ the Board affirmed OWCP's August 3, 2017 decision, finding that, the overpayment was created because appellant received compensation at an improper pay rate.

On March 10, 2019 appellant requested reconsideration of OWCP's August 3, 2017 final overpayment determination. In three letters, she argued that she was entitled to receive disability

⁷ OWCP provided calculations showing that appellant received \$237,590.11 in compensation for the period June 8, 2008 to March 5, 2016 when she was only entitled to receive \$217,352.48 for this period given the error in the pay rate for compensation purposes. The difference between \$237,590.11 and \$217,352.48 is \$20,237.63.

⁸ *Supra* note 3.

compensation based on a weekly pay rate of \$868.63 for the period June 8, 2008 to March 5, 2016, *i.e.*, the period for which OWCP later declared an overpayment of compensation.⁹

By decision dated June 6, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that she had not submitted evidence or argument warranting such merit review of her claim under the standards of 5 U.S.C. § 8128(a) and the associated OWCP regulations, including those set forth at 20 C.F.R § 10.606(b).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.¹⁰ OWCP's regulations provide standards to be met before a request for reconsideration of the merits of a given claim is granted.¹¹ A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹² However, section 10.440(b) of OWCP's regulations specifically provides that the only review of a final overpayment determination of OWCP is to the Board and that section 8128(a) of FECA does not apply to such a final overpayment determination.¹³

ANALYSIS

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

On March 10, 2019 appellant requested reconsideration of OWCP's August 3, 2017 overpayment determination and submitted three letters containing argument in support of her request. By decision dated June 6, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that appellant did not submit evidence or argument warranting such merit review of her claim under the standards of 5 U.S.C. § 8128(a) and associated OWCP regulations, including those set forth at 20 C.F.R. § 10.606.

Section 10.440(b) of OWCP's regulations, however, specifically provides that the only review of a final overpayment determination of OWCP is to the Board and that 5 U.S.C. § 8128(a) does not apply to such a final overpayment determination.¹⁴ The Board finds that OWCP erred in

⁹ The letters were dated March 11, April 15, and May 15, 2019. The dating of the first of these letters appears to be in error as OWCP received appellant's reconsideration request on March 10, 2019.

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b).

¹² *Id.* at § 10.607(a). According to OWCP procedures, the one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

¹³ *Id.* at § 10.440(b).

¹⁴ *See id.*

applying 5 U.S.C. § 8128(a) and its associated regulations in its June 6, 2019 decision. Therefore, the Board shall modify OWCP's June 6, 2019 decision denying appellant's request for reconsideration of the merits of her claim to reflect that the basis of the denial was not her failure to meet the standards of 5 U.S.C. § 8128(a), but rather was the fact that 5 U.S.C. § 8128(a) does not apply to a final overpayment determination of OWCP.¹⁵

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the June 6, 2019 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: May 8, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁵ See *E.M.*, Docket No. 19-0857 (issued December 31, 2019). See also *K.G.*, Docket No. 17-0517 (issued September 8, 2017).