

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

D.S., Appellant

and

U.S. POSTAL SERVICE, GULF ATLANTIC
DISTRICT PERFORMANCE CENTER,
Jacksonville, FL, Employer

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**Docket No. 20-1086
Issued: January 27, 2021**

Appearances:

Paul H. Felser, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 28, 2020 appellant, through counsel, filed a timely appeal from an October 31, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 24, 2018, to 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 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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the October 31, 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

On December 19, 2014 appellant, then a 61-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 20, 2014 she picked up a bucket of mail to empty onto a ledge and injured her lower back and right shoulder while in the performance of duty. OWCP accepted her claim for aggravation of lumbar degenerative disc disease and bursitis of the right shoulder, and paid wage-loss compensation for total disability, commencing January 5, 2015. On October 20, 2015 Dr. William W. Brooks, a Board-certified orthopedic surgeon, performed OWCP-authorized bilateral laminectomies at L4, bilateral facetectomies and foraminal decompression procedures at L4-5, and posterior spine fusion at L4-5.

Appellant received medical care from Dr. Dennis Jorgensen, a Board-certified orthopedic surgeon, and Dr. Jeremy Prine, a Board-certified anesthesiologist. On August 18, 2016 she underwent a functional capacity evaluation (FCE), which demonstrated that she had physical work capacity at the sedentary-light level. On September 7, 2016 Dr. Brooks completed a September 7, 2016 report and work capacity evaluation (Form OWCP-5c) in which he advised that appellant was capable of working full time with restrictions, including no reaching above shoulder level with her right arm.

On November 21, 2016 OWCP referred appellant for a second opinion examination with Dr. Sarveswar Naidu, a Board-certified orthopedic surgeon. It requested that Dr. Naidu evaluate appellant's work capacity. In a December 6, 2016 report, Dr. Naidu diagnosed complete rotator cuff tear of the right shoulder and postoperative lumbar fusion at L4-5 with stenosis and radiculopathy. He noted that appellant's lumbar sprain and right shoulder bursitis had resolved, but noted that there were residuals from the intervertebral disc degeneration and fusion of the lumbar spine and from the rotator cuff injury. Dr. Naidu confirmed that appellant needed repair of the right rotator cuff and follow-up therapy, but opined that she was still capable of performing a sedentary job as discussed in the FCE. He completed a Form OWCP-5c on December 6, 2016, which listed recommended work restrictions, including no lifting, pushing, or pulling more than 10 pounds, and no reaching above shoulder level with the right arm. Dr. Naidu advised that appellant needed to take a 10-minute break every 2 hours. In a February 8, 2017 addendum report, he opined that the diagnosed rotator cuff tear was causally related to the November 20, 2014 work injury.

As a result of Dr. Naidu's reports, OWCP expanded the accepted conditions to include sprain of the rotator cuff capsule and complete rotator cuff tear of the right shoulder.

On June 15, 2017 OWCP requested that the employing establishment extend a job offer to appellant based on the work restrictions of Dr. Naidu.

Appellant was scheduled for rotator cuff repair surgery on June 20, 2017; however, the surgery was postponed due to nonwork-related bronchial symptoms. A June 15, 2017 report was later received from Dr. Prine in which he noted that appellant was not medically able to return to work at that time. Dr. Prine indicated that she was unable to return to work without restrictions,

noting that she first needed to undergo treatment with steroid epidural injections. OWCP authorized this treatment and appellant underwent the first injection on August 23, 2017.

On August 31, 2017 the employing establishment offered appellant a temporary limited-duty job as a modified rural carrier. The duties of the full-time, modified position included answering telephone calls, handling web camera alerts, engaging in package location resolution duties, and enterprise customer care duties. Each of these four duties was to be performed for two hours per day. The physical requirement of sitting for eight hours per day was listed on the first page of the job offer.⁴ On the second page of the job offer the position was listed as sedentary in nature, and noted that, in general, sedentary work involved sitting most of the time, but might involve walking or standing for brief periods of time. The job offer also noted that sedentary work involved exerting up to 10 pounds of force occasionally to lift, carry, push, pull, or otherwise move objects, including the human body. Further, the job offer noted that the package location resolution duties required appellant to investigate customer inquiries utilizing a computer or telephone, and that enterprise customer care duties involved case research and follow up of closed cases to ensure quality closure and timely handling of customer issues. Handling the web camera alerts required monitoring lobby activity on a web camera in order to improve customer service.

On September 18, 2017 the employing establishment advised OWCP that appellant had not reported to work.

Appellant submitted a September 15, 2017 report from Dr. Prine who opined that appellant was unable to sit for eight hours at a time, and recommended an additional FCE be performed before she returned to work. A September 19, 2017 report from Dr. Jorgensen noted that appellant was at maximum medical improvement (MMI) regarding her back and that she wanted to discuss being rescheduled for right shoulder surgery. Dr. Jorgensen indicated work restrictions of no lifting greater than five pounds, no pushing or pulling, and no above-head activity pending surgery approval. The case record reflects that appellant underwent a second lumbar injection on September 28, 2017.

On October 5, 2017 the employing establishment confirmed that the temporary job offer remained available.

On October 12, 2017 OWCP issued a notice of proposed termination of wage-loss compensation in accordance with 20 C.F.R. §10.500(a), advising appellant that the temporary modified assignment offered by the employing establishment on August 31, 2017 appropriately accommodated Dr. Naidu's work restrictions, which constituted the weight of medical evidence with respect to such restrictions. It afforded appellant 30 days to accept the job and return to work, or to provide written explanation for not doing so.

In a November 10, 2017 response, counsel noted that appellant still had not been medically cleared to undergo the approved right shoulder surgery. He noted the restrictions of Dr. Naidu and indicated that the job offer did not mention his recommendation for a 10-minute break every 2 hours. Counsel asserted that on September 19, 2017 Dr. Jorgensen limited appellant's lifting capacity to 5 pounds, rather than the 10 pounds indicated by Dr. Naidu. He contended that

⁴ The employing establishment indicated that appellant had to engage in "sitting/walking/standing" for four hours per day. Moreover, appellant could not reach above shoulder level, twist with her right arm, bend, stoop, squat, kneel, or operate a motor vehicle at work.

appellant was denied due process because OWCP did not provide her treating physicians with a copy of Dr. Naidu's second opinion report, and that there was a conflict in the medical opinion evidence between Dr. Jorgensen and Dr. Naidu regarding the lifting restrictions. Counsel argued that Dr. Naidu's restrictions were not contemporaneous to the job offer and should not be relied upon. For these reasons, he contended that OWCP had failed to meet its burden of proof to terminate appellant's wage-loss compensation.

Appellant submitted additional medical evidence, including October 10, November 14, December 12, 2017, and January 30, 2018 reports from Dr. Prine. A November 28, 2017 letter from the employing establishment advised that appellant had failed to respond to the job offer, which was still available, and that she had not reported back to work.

By decision dated February 27, 2018, OWCP terminated appellant's entitlement to wage-loss compensation benefits, effective February 28, 2018, in accordance with 20 C.F.R. §10.500(a), on the basis that appellant failed to accept and return to the temporary job assignment deemed appropriate by OWCP.

On March 22, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

During the hearing held on July 11, 2018, counsel argued that Dr. Naidu's work restrictions were stale with respect to the job offered by the employing establishment. He also noted that Dr. Naidu's work restrictions were not consistent with the physical requirements of the job. Counsel alternatively argued that there was a conflict in the medical opinion evidence between Dr. Jorgensen and Dr. Naidu regarding lifting restrictions. He also noted that appellant had been prescribed narcotic medication for her work-related injuries which impacted her ability to work. Counsel asserted that there were additional conditions which had arisen as a result of the November 20, 2014 work injury, including a herniated disc at L4-5, which required additional development of the medical evidence.

Appellant submitted additional medical records, including a July 19, 2018 report from Dr. Jorgensen, who provided work restrictions which included no pushing, pulling, or lifting greater than 10 pounds for above shoulder level work. She also submitted June 22, July 20, and August 24, 2018 reports from Dr. Prine.

By decision dated September 24, 2018, OWCP's hearing representative affirmed the February 27, 2018 decision.

Appellant then submitted numerous medical reports, including reports of Dr. Prine dated September 18, October 15 and 29, November 11, and December 5, 2018, and February 19, 2019, and reports of Dr. Jorgensen dated November 29 and December 11, 2018. She also submitted numerous reports from her hospitalization related to OWCP-authorized right shoulder surgery performed on February 13, 2019.

On September 23, 2019 appellant, through counsel, requested reconsideration of the September 24, 2018 decision. Counsel noted, in his September 23, 2019 reconsideration letter, "Additional documentation has been submitted to the file for your consideration.... [Appellant]

contends that the new evidence warrants a merit review of this request and the claim in its entirety.”⁵

By decision dated October 31, 2019, OWCP denied appellant’s request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It noted, “In his letter [counsel] noted that additional documentation was submitted to your file for consideration. However, the evidence was not included with his letter. Counsel also failed to specify the supporting evidence. Because [counsel’s] letter neither raised substantive legal questions nor included new and relevant evidence, it is insufficient to warrant a review of our prior decision at this time.”

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 or her own motion or on application.⁶

To require OWCP to reopen a case for merit review pursuant to FECA, appellant 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 The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹¹ and the

⁵ Appellant also submitted additional medical evidence after making her reconsideration request.

⁶ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

⁷ 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original 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 D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

ANALYSIS

The Board finds that the case is not in posture for decision.

The Board notes that on September 24, 2018 OWCP's hearing representative affirmed OWCP's February 27, 2018 decision, which effectuated the termination of appellant's entitlement to wage-loss compensation, in accordance with 20 C.F.R. § 10.500(a).

After the issuance of the September 24, 2018 decision, appellant submitted numerous medical reports, including reports of Dr. Prine dated September 18, October 15 and 29, November 11, December 5, 2018, and February 19, 2019, and reports of Dr. Jorgensen dated November 29 and December 11, 2018. She also submitted numerous reports from her hospitalization related to OWCP-authorized right shoulder surgery performed on February 13, 2019. Collectively, these medical reports consisted of hundreds of pages. On September 23, 2019 appellant, through counsel, filed a timely request for reconsideration of the September 24, 2018 decision and specifically mentioned that new medical evidence had been submitted in conjunction with the reconsideration request.¹³

By decision dated October 31, 2019, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). However, it did not discuss or otherwise consider any of the medical reports that had been submitted by appellant.

In deciding matters pertaining to a given claimant's entitlement to compensation benefits, OWCP is required by statute and regulation to make findings of fact.¹⁴ The Federal (FECA) Procedure Manual further specifies that a final decision of OWCP "should be clear and detailed so that the reader understands the reason for the disallowance of the benefit and the evidence necessary to overcome the defect of the claim."¹⁵ These requirements are supported by Board precedent.¹⁶

The Board finds that, given OWCP's failure to discuss or otherwise consider any of the medical reports submitted by appellant upon reconsideration, it did not provide adequate facts and findings in support of its denial of appellant's request for review of the merits of her claim. Therefore, appellant would not understand the reason for the disallowance of her claim and the evidence necessary to overcome the defect of the claim. Consequently, the case shall be remanded

¹² *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ *See supra* note 8. Appellant also submitted additional medical evidence after making her reconsideration request.

¹⁴ 5 U.S.C. § 8124(a) provides that OWCP "shall determine and make a finding of facts and make an award for or against payment of compensation." 20 C.F.R. § 10.126 provides in pertinent part that the final decision of OWCP "shall contain findings of fact and a statement of reasons."

¹⁵ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5c(3)(e) (February 2013).

¹⁶ *See P.G.*, Docket No. 17-1461 (February 7, 2019); *James D. Boller, Jr.*, 12 ECAB 45, 46 (1960).

to OWCP in order for it to provide an appropriate decision which contains adequate facts and findings regarding appellant's reconsideration request.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the October 31, 2019 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 27, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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