

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

K.N., Appellant)	
)	
and)	Docket No. 20-1188
)	Issued: July 20, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Bellmawr, NJ, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 15, 2020 appellant filed a timely appeal from a May 5, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated August 9, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction² over the merits of this case.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 9, 2019 decision, appellant submitted additional evidence to OWCP. 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.³ The facts and circumstances as set forth in the Board's prior orders are incorporated herein by reference. The relevant facts are as follows.

On April 7, 2004 appellant, then a 42-year-old mail processor, filed an occupational disease claim (Form CA-2) alleging that factors of her federal employment caused numbness and tingling in her hands and elbows.⁴ By decision dated May 14, 2004, OWCP accepted the claim for bilateral carpal tunnel syndrome. On July 5, 2005 it accepted an April 27, 2005 modified job offer as a mail processor.

On December 13, 2012 OWCP expanded the acceptance of the claim to include bilateral lesion of the ulnar nerve; sprain of the shoulder and upper arm acromioclavicular, right; and right trigger finger (acquired).

On July 31, 2014 OWCP expanded the acceptance of appellant's claim to include left trigger thumb. On September 11, 2014 appellant underwent a left trigger finger release and OWCP paid appropriate compensation benefits. She returned to part-time limited-duty work on October 29, 2014.

On October 29, 2014 appellant accepted a part-time limited-duty assignment as an expedition clerk. The physical requirements involved intermittent simple grasping for two hours, intermittent fine manipulation for two hours, and standing for two hours. Appellant worked for two hours per day from October 29, 2014 through January 28, 2015.

In a November 26, 2014 medical report appellant's treating physician, Dr. Leo Rasis, a Board-certified orthopedic surgeon, provided work restrictions pertaining to the repetitive use of her upper extremities, which included repetitive gripping, pushing or pulling, and use of the arms at shoulder level or above. He reported that she could lift 5 to 10 pounds continuously and up to 20 pounds intermittently. Appellant could also do one to two hours of simple grasping and fine manipulation per day. Dr. Rasis noted that she complained of pain when driving a car for a long time due to her upper extremity conditions.

³ *Order Remanding Case*, Docket No. 17-0771 (issued August 9, 2018); *Order Remanding Case*, Docket No. 16-1412 (issued December 20, 2016); *Order Remanding Case*, Docket No. 11-0779 (issued January 12, 2011).

⁴ OWCP assigned the claim OWCP File No. xxxxxx674. The record indicates that appellant had a prior occupational disease claim, which was accepted for bilateral carpal tunnel syndrome under OWCP File No. xxxxxx739. On March 15, 2006 OWCP administratively combined OWCP File Nos. xxxxxx739 and xxxxxx674, with the latter serving as the master file. OWCP File No. xxxxxx674 has also been administratively combined with a number of other claim files including an accepted as resolved right shoulder and upper arm strain/sprain under OWCP File No. xxxxxx841, and a September 21, 2012 occupational disease claim OWCP File No. xxxxxx659, accepted for right carpal tunnel syndrome and right trigger finger.

In a January 20, 2015 medical note, Dr. Rasis advised that appellant should not drive more than 15 miles per day “for work purposes.” Medical evidence indicated that appellant was complaining of increased pain when driving and wanted a job closer to home. No reasoning or clarification was provided by the physician.

In a January 23, 2015 letter, the employing establishment advised OWCP that appellant had provided a medical narrative informing them that she could no longer drive more than 15 miles per day for work purposes. It noted that driving was not a requirement of her job and requested further information pertaining to whether this request required consideration pertaining to a work-related injury. The employing establishment further reported that appellant provided the documentation to the reasonable accommodations team.

On January 29, 2015 appellant filed a notice of recurrence (Form CA-2a) under OWCP File No. xxxxxx674, reporting that on January 28, 2015 the employing establishment informed her that there was no available work within her restrictions. She indicated that the recurrence was solely due to time loss from work after her supervisor informed her that no work was available within her restrictions.

On February 23, 2015 OWCP requested clarification from the employing establishment as to whether they could no longer accommodate the appellant at working two hours per day.

The employing establishment responded advising that appellant provided a limitation that stated that she could not drive more than 15 miles per day for work, but that she lived more than 15 miles from her assigned-duty station. It noted that her modified-duty job was still available for two hours per day, which did not entail any driving, but that management would not allow her to drive to work in violation of what her physician wrote.

On February 27, 2015 OWCP advised the employing establishment that appellant’s claim had been accepted for carpal tunnel and that it was reasonable to assume her work-related injury prevented her from driving to work. It requested that the employing establishment consider offering the position within the restrictions if available.

On March 6, 2015 OWCP referred appellant, along with a statement of accepted facts (SOAF), for a second opinion examination with Dr. Robert F. Draper, a Board-certified orthopedic surgeon. In a March 23, 2015 report, Dr. Draper noted that the claim was accepted for bilateral carpal tunnel syndrome, bilateral lesion of ulnar nerve, right sprain of shoulder and upper arm, and bilateral trigger finger. He reported that appellant continued to suffer from residuals of her occupational injuries. Dr. Draper provided work restrictions, which included lifting no more than 10 pounds occasionally and 5 pounds frequently, and to avoid excessive use of the upper extremities bilaterally. He further reported that appellant could drive for a total of one hour each way, to and from work.

By decision dated March 30, 2015, OWCP denied appellant’s recurrence claim, finding that the medical evidence of record was insufficient to establish a recurrence of disability commencing January 29, 2015 due to a material change/worsening of her accepted work-related conditions. It noted that the weight of the medical evidence rested with Dr. Draper.

On April 13, 2015 appellant requested review of the written record by a representative of OWCP's Branch of Hearings and Review. An April 17, 2015 work capacity evaluation (Form OWCP-5c) was submitted from her physician who reported that she could drive up to 20 miles at a time, allowing for intermittent rest between standing and sitting.

By decision dated September 25, 2015, an OWCP hearing representative affirmed the March 30, 2015 decision.

On June 27, 2016 appellant appealed to the Board.

On August 1, 2016 OWCP referred appellant, along with a SOAF, for a second opinion examination with Dr. Steven J. Valentino, a Board-certified orthopedic surgeon. In his August 22, 2016 report, Dr. Valentino evaluated her and opined that she could work full time in a sedentary capacity.

On December 20, 2016 the Board set aside OWCP's September 25, 2015 decision, finding that the decision was never received by appellant as it was returned to OWCP as undeliverable and never resent or reissued in a timely manner.⁵ The Board remanded the case to OWCP for a *de novo* decision.

Appellant continued to submit various medical documents discussing her treatment, disability, and work restrictions.

Upon return of the case record from the Board, by decision dated February 8, 2017, an OWCP hearing representative affirmed the March 30, 2015 decision.

On February 21, 2017 appellant appealed to the Board.

During the pendency of the appeal before the Board, OWCP referred appellant, along with a SOAF, for an impartial medical examination to resolve the conflict in medical opinion between Dr. Raisis, appellant's attending physician, and Dr. Valentino, the second opinion physician, pertaining to her work-related restrictions and whether she could drive to and from work for more than 15 miles per day. In a January 25, 2018 medical conflict statement, OWCP requested the impartial medical examiner (IME) provide clarification pertaining to whether appellant required driving restrictions based on the effects of the accepted work-related injuries.

On March 23, 2018 appellant was examined by Dr. Richard G. Schmidt, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion surrounding her work-related restrictions. Dr. Schmidt noted issues pertaining to her bilateral carpal tunnel, ulnar nerve dysfunction, right shoulder sprain, acromioclavicular joint (AC) arthritis, and multiple trigger finger problems. He opined that appellant was capable of working in a full-time, sedentary position. Dr. Schmidt concluded that he agreed with the restrictions imposed by Dr. Valentino and would not impose any restrictions on her ability to drive during her commute to and from work.

⁵ *Order Remanding Case*, Docket No. 16-1412 (issued December 20, 2016).

By decision dated August 9, 2018, the Board set aside the February 8, 2017 decision, finding that OWCP failed to follow its instructions on remand.⁶ The Board again remanded the case for OWCP to issue a *de novo* decision as previously ordered by the Board.

By *de novo* decision dated January 8, 2019, OWCP denied appellant's recurrence claim, finding that evidence of record was insufficient to establish disability due to a material change/worsening of her accepted work-related conditions.

On January 22, 2019 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In an accompanying narrative statement, she argued that her claim was improperly denied. Appellant listed the submission of 30 documents in support of her claim and reiterated that she had filed a recurrence claim because the light-duty position made specifically to accommodate her was withdrawn by the employing establishment on January 29, 2015. She asserted that her supervisor provided no explanation as to why she was denied work and sent home on January 29, 2015. Appellant noted accepting an offer of modified assignment from the employing establishment in late 2014. Following her return to work as a modified clerk, appellant submitted additional work restrictions from her physician, which limited driving to and from work. She noted that she was working in the modified position for almost two months before her supervisor instructed her that there was no work available within her restrictions.

In support of her claim, appellant submitted documentation from the employing establishment pertaining to her offer of modified assignment and request for reasonable accommodations, various correspondence from OWCP, and prior medical reports discussing her work limitations.

An oral hearing was held on June 12, 2019.

By decision dated August 9, 2019, OWCP's hearing representative affirmed the January 8, 2019 decision.

On August 19, 2019 appellant requested reconsideration of the August 9, 2019 decision. She noted that both the second opinion physician and IME agreed with her attending physician's prior work restrictions and only disagreed about her capability to drive to and from work. Appellant argued that Dr. Valentino and Dr. Schmidt should not have been afforded the weight of the medical evidence as they only evaluated her on one occasion. She asserted that her attending physician provided the most relevant assessment because he was well acquainted with her detailed medical history and conditions from treating her throughout the years. Appellant further argued that the physicians selected by OWCP are not impartial. She explained that she filed the Form CA-2a due to loss time from work after she was denied work by the employing establishment. Appellant argued that her recurrence claim was filed because of the withdrawal of her light-duty assignment made specifically to accommodate her work-related conditions. She further noted that her work restrictions were permanent and had been in place for over 13 years determined by previous functional capacity evaluations. As such, the employing establishment provided her modified-job assignments within these restrictions. Appellant referenced Dr. Rasis' prior medical

⁶ *Order Remanding Case*, Docket No. 17-0771 (issued August 9, 2018).

reports, which found that she had reached maximum medical improvement, that her conditions were permanent in nature, and that she experienced upper extremity pain when driving a car for a long time. She argued that Dr. Raisis never opined that her work restrictions were due to a change/worsening of her accepted work-related conditions. Rather, these restrictions were provided as a result of her initial work-related injuries. Appellant provided supporting documentation for her arguments including correspondence from the employing establishment, the January 28, 2015 Form CA-2a, prior medical reports, and two accepted offers of modified-job assignment from the employing establishment.

By decision dated May 5, 2020, 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 or her 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 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

⁷ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

⁸ 20 C.F.R. § 10.606(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *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). *Id.* at Chapter 2.1602.4b.

¹⁰ *Id.* at § 10.608(a). *See also D.P.*, Docket No. 19-0001 (issued June 13, 2019); *M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *S.M.*, Docket No. 18-1158 (issued January 16, 2019); *J.F.*, Docket No. 17-1508 (issued March 28, 2018); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

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

On reconsideration, appellant submitted a relevant legal argument not previously considered. She asserted that she had accepted an offer of a modified-duty assignment and worked for two hours per day based on these restrictions prior to the withdrawal of her limited-duty position. Appellant alleged that when she requested additional work restrictions pertaining to her commute, the employing establishment withdrew the current light-duty position she had been assigned. She argued that OWCP did not acknowledge that her actual modified employment position had been withdrawn. Appellant explained that she was not alleging a material change/worsening of her work-related conditions, but was rather alleging a recurrence of disability due to withdrawal of her light-duty position.

As this argument is relevant to the underlying issue of whether appellant has established a recurrence of disability due to withdrawal of a light-duty assignment, the Board finds that reconsideration of the merits of the claim is warranted.¹² This legal argument requires reopening of appellant's claim for merit review pursuant to the second prong of section 10.606(b).¹³

Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608. The case shall therefore be remanded to OWCP for consideration of the merits of appellant's claim, to be followed by an appropriate merit decision.¹⁴

CONCLUSION

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

¹² *B.S.*, Docket No. 20-0555 (issued April 22, 2021).

¹³ See *M.E.*, Docket No. 20-0067 (issued October 15, 2020); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁴ *V.S.*, Docket No. 20-0502 (issued December 31, 2020).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2020 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: July 20, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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