

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

L.A., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Brockton, MA, Employer)

Docket No. 10-2255
Issued: July 7, 2011

Appearances:

Karen S. Hambleton, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2010 appellant, through her representative, filed a timely appeal from the August 27, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP), which denied her reconsideration request. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this decision.

ISSUE

The issue is whether OWCP properly denied appellant's reconsideration request pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 1, 2008 appellant, then a 38-year-old food service worker, injured her left wrist in the performance of duty when she struck a doorknob with her left hand and the wrist buckled. OWCP accepted her claim for left distal radius fracture.² Appellant received compensation for temporary total disability on the periodic rolls and underwent surgery.

In a November 19, 2008 decision, OWCP terminated appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work. It found that the orthopedic surgeon, Dr. Andrew B. Stein, had released her to limited duty and that the offered position was consistent with her medical limitations. In a July 21, 2009 decision, OWCP's hearing representative affirmed.

On December 31, 2009 appellant requested reconsideration. She repeated the argument she made to OWCP's hearing representative on May 1, 2009 that the employing establishment based its offer of employment on Dr. Stein's August 4, 2008 work status form, but that Dr. Stein altered appellant's work status on September 17, 2008 with no indication from the employing establishment that it would comply with that change. Appellant resubmitted medical evidence that she stated that OWCP's hearing representative did not consider, including a June 16, 2009 surgical report and subsequent treatment records. She returned to work on September 16, 2009.

Appellant also submitted an October 30, 2009 decision from the Social Security Administration's Office of Disability Adjudication and Review. The decision found that she had the residual functional capacity to perform sedentary work except for lifting and carrying objects weighing more than five pounds with her left upper extremity. It further found that there were no jobs that existed in significant numbers in the national economy that appellant could perform, and that she had been under a disability, as defined by the Social Security Act, from January 14, 2008 through the date of the decision.

Appellant argued that the administrative law judge accepted her testimony, and the testimony of a vocational expert, that she was unable to engage in substantial gainful activity from January 14, 2008 to January 26, 2009 and from April 15 to September 16, 2009.

In a decision dated August 27, 2010, OWCP found that appellant's request for reconsideration neither raised substantive legal questions nor included new medical evidence to support her refusal of suitable work. It found that some of the medical reports submitted were duplicates and that evidence previously considered was no basis for reopening a case for merit review. OWCP found that none of the reports offered an opinion on the medical issue presented,

² OWCP would later described the accepted conditions as radial fracture, lower end, late effect of fracture of upper extremity, tenosynovitis, left wrist, contracture joint, left wrist and interstitial myositis, left wrist.

namely, whether she had the physical ability to perform the modified position offered by the employing establishment. It further found that the decision of the Social Security Administration had no bearing on her case.³

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.⁴ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (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.⁵

A request for reconsideration must be sent within one year of the date of OWCP decision for which review is sought.⁶ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷

Evidence that repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.⁸ Evidence that does not address the particular issue involved also constitutes no basis for reopening a case.⁹

ANALYSIS

OWCP issued a merit decision on November 19, 2008 terminating appellant's compensation under 5 U.S.C. § 8106(c)(2) on the grounds that she refused an offer of suitable work. OWCP's hearing representative affirmed the termination on July 21, 2009. On December 31, 2009 appellant requested reconsideration.

³ Notwithstanding the phrasing of the issue to be determined and the finding that appellant's request neither raised a substantial legal question nor included new and relevant medical evidence, the decision's final sentence read: "It is determined that modification of the prior decision dated July 21, 2009 is hereby denied." The cover letter generally indicated that OWCP reviewed the merits of the case.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606.

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608.

⁸ *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

⁹ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

The Board has no jurisdiction to review OWCP's November 19, 2008 or July 21, 2009 decisions. Appellant did not appeal those decisions to the Board. The Board's jurisdiction is limited to reviewing OWCP's August 27, 2010 decision on appellant request for reconsideration. The content and substance of that decision show that OWCP did not conduct a merit review of her case. OWCP identified the issue as whether appellant submitted sufficient evidence to warrant a merit review of the prior decision and it found that her request neither raised a substantial legal question nor included new and relevant evidence, a finding consistent with a nonmerit decision denying reconsideration. As it did not conduct a merit review, the Board finds that OWCP's August 27, 2010 decision was a nonmerit decision denying appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a reopening of her case.¹⁰

As appellant's request for reconsideration was timely, the question before the Board is whether her request met at least one of the three standards for obtaining a merit review of her case. In her December 31, 2009 request for reconsideration, appellant did not contend that the Office erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that OWCP erroneously applied or interpreted it. Appellant did not advance a new and relevant legal argument. She argued that her orthopedic surgeon, Dr. Stein, altered her work status on September 17, 2008, but this was the same argument she had made to OWCP hearing representative on May 1, 2009, an argument OWCP's hearing representative addressed in his July 21, 2009 decision. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence not previously considered by OWCP, but appellant submitted no such evidence with her reconsideration request. The June 16, 2009 operative report, subsequent treatment records and appellant's return to work on September 16, 2009 were all irrelevant to whether she refused an offer of suitable work prior to November 19, 2008. None of the evidence addressed that issue and the decision of the Social Security Administration had no bearing on proceedings under FECA.¹¹

Accordingly, the Board finds that appellant did not meet at least one of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied a merit review of her case.

¹⁰ Only the final sentence of the decision and the cover letter suggested that OWCP had reviewed the merits of appellant's case and was denying modification of her prior decision. The Board gives more weight to the content or substance of the decision than to its form or description. See *Bettie J. Conley*, Docket No. 00-1259 (issued October 18, 2001) (where OWCP decision purporting to deny the claimant's reconsideration request revealed that OWCP had conducted a merit review of the evidence, the Board found that the decision was a decision on the merits); *Wade A. Jones*, Docket No. 00-2804 (issued October 2, 2001) (although OWCP concluded that the claimant's reconsideration request did not warrant a review of its prior decision, the Board found that OWCP had conducted a merit review); *Sandra D. Boles*, Docket No. 98-2519 (issued August 23, 2000) (although OWCP denied the claimant's reconsideration request in the form of a nonmerit decision, the Board found that it had conducted a merit review because it weighed the medical evidence submitted and made findings on its evidentiary value).

¹¹ *Hazelee K. Anderson*, 37 ECAB 277 (1986) (wherein the employee contended that because the Social Security Administration awarded her benefits, she was therefore disabled for compensation purposes under FECA).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board