United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 11-1589**
	)	**Issued: February 6, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2011 appellant filed a timely appeal from a January 6, 2011 and February 24, 2011 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from the most recent merit decision dated December 9, 2010 to the filing of this appeal on June 28, 2011, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUES

The issues are: (1) whether OWCP properly denied appellant's request for reconsideration; and (2) whether it properly denied appellant's request for review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 16, 2010 appellant, then a 54-year-old carrier, filed a traumatic injury claim alleging that she injured her right knee and left hand and shoulder on that date when she tripped and fell while delivering mail. She stopped work on July 16, 2010.

Appellant submitted July 17, 2010 emergency room treatment records for the claimed work injury that day. Other medical records variously refer to the date of injury as July 16 or July 17, 2010. Appellant also submitted reports from Dr. Keith A. Lustig, a Board-certified orthopedist, dated July 26 to September 20, 2010. Dr. Lustig treated her for left hand injuries sustained in a fall at work. He noted that x-rays of the left wrist revealed left fifth carpal metacarpal dislocation. On July 27, 2010 Dr. Lustig performed an open reduction internal fixation of the left fifth carpometacarpal volar dislocation and diagnosed left fifth carpometacarpal dislocation. In reports dated August 2 to September 20, 2010, he noted appellant's status and advised that she was progressing well postoperatively.

By letter dated November 8, 2010, OWCP advised appellant that her claim was originally received as a simple, uncontroverted case which resulted in minimal or no time loss from work. Appellant's claim was administratively handled to allow medical payments up to $1,500.00; however, the merits of the claim had not been formally adjudicated. OWCP advised that, because the medical bills exceeded $1,500.00, her claim would be formally adjudicated. It requested that appellant explain the discrepancies in the evidence as to when the claimed injury occurred. OWCP also asked that she submit additional medical evidence addressing how specific work factors or incidents identified by her had contributed to her claimed injury. The letter was sent to appellant's address of record. Thereafter, OWCP received additional medical and physical records.

In a December 9, 2010 decision, OWCP denied appellant's claim finding that the evidence was not sufficient to establish that the July 16, 2010 incident occurred as alleged. It also found that the medical evidence was not sufficient to establish her claim.

On December 15, 2010 appellant requested reconsideration. She asserted that she never received the November 8, 2010 letter from OWCP requesting additional information for her claim. Appellant submitted discharge instructions from her July 27, 2010 surgery, which diagnosed closed dislocation of carpometacarpal joint caused by unspecified environmental and accidental causes. OWCP noted that she underwent a closed dislocation of the carpometacarpal joint. A history and physical prepared by Dr. Lustig noted that appellant sustained a left hand injury and fifth carpometacarpal dislocation which was surgically repaired.

In a January 6, 2011 decision, OWCP denied appellant's reconsideration request finding that her request was insufficient to warrant further review of the merits.

On January 26, 2011 appellant requested a review of the written record. She submitted the operative record and anesthesia notes for her July 27, 2010 surgery together with x-ray reports of the left hand, shoulder and wrist, previously of record. Appellant submitted reports from Dr. Lustig dated March 30, 2007 to January 19, 2011. Dr. Lustig noted that appellant was progressing well postoperatively and could return to full duty on October 13, 2010. On

January 19, 2011 he noted appellant's complaints of stiffness and pain in her left hand and carpometacarpal joints. Dr. Lustig diagnosed left carpometacarpal joint pain and recommended hand strengthening exercises.

In a decision dated February 24, 2011, OWCP denied appellant's request for a review of the written record finding that he had previously requested reconsideration on the same issue and was not entitled to a review of the written record as a matter of right. It also considered the matter in relation to the issues involved and further denied the request for the reason that the issues in this case could be addressed by requesting reconsideration from OWCP and submitting evidence not previously considered.

LEGAL PRECEDENT -- ISSUE 1

Under section 8128(a) of FECA,[2] OWCP has the discretion to reopen a case for review on the merits. OWCP must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(1) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(2) Advances a relevant legal argument not previously considered by OWCP; or
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> "(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[3]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[4]

ANALYSIS -- ISSUE 1

On December 9, 2010 OWCP denied appellant's claim for compensation on the grounds that the factual evidence was not sufficient to establish that the event of July 16, 2010 occurred as alleged. On January 6, 2011 it denied his December 15, 2010 reconsideration request, without a merit review, and he appealed this decision to the Board. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim.

As noted above, the Board does not have jurisdiction over the December 9, 2010 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20

[2] 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(2).

[4] *Id*. at § 10.608(b).

C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her December 15, 2010 application for reconsideration, appellant did not attempt to explain the discrepancy in the date of the claimed injury which was the basis for OWCP's denial of her claim. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. She asserted that she never received a November 8, 2010 OWCP letter requesting additional information for her claim. However, this assertion has no color of validity[5] as the record shows that OWCP's request for information was sent to appellant's address of record. The Board has found that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business is presumed to have arrived at the mailing address in due course. This is known as the "mailbox rule."[6] The record contains no evidence to rebut the presumption that appellant received the November 8, 2010 letter apprising her of the defects in her claim and advising her of the type of evidence needed to cure the deficiencies in her claim. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit relevant new evidence in support of her reconsideration request. The underlying issue in this case is whether appellant submitted sufficient factual evidence to establish that the July 16, 2010 incident occurred as alleged. Appellant did not submit any factual evidence that addressed the discrepancy in the date of injury that was the basis of OWCP's finding that appellant had not established that the event of July 16, 2010 occurred as alleged. Rather, she submitted medical and physical therapy records that did not address this discrepancy. Thus, while this evidence is new, it is not relevant because it does not address the point at issue. Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[7] Therefore, this new evidence is not relevant and is insufficient to warrant reopening the case for a merit review.

The Board accordingly finds that appellant did not meet any 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 evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal appellant reiterated her assertion that she sustained a left hand injury when she fell at work, that the claimed injury occurred on July 17, 2010 and she resubmitted medical evidence. The Board notes, however, that it only has jurisdiction over whether OWCP properly denied a merit review of the claim. As explained, appellant did not submit evidence or argument in support of her reconsideration request that warrants reopening of her claim for a merit review under 20 C.F.R. § 10.606(b)(2).

[5] *See M.E.*, 58 ECAB 694 (2007) (while the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity).

[6] *W.P.*, 59 ECAB 514 (2008).

[7] *J.P.*, 58 ECAB 289 (2007).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that "before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[8] Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[9] OWCP's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that "the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision."[10]

Additionally, the Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that OWCP must exercise this discretionary authority in deciding whether to grant a hearing.[11] OWCP's procedures, which require it to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of FECA and Board precedent.[12]

ANALYSIS -- ISSUE 2

Appellant's January 26, 2011 request for a review of the written record was denied on the grounds that she had previously requested reconsideration pursuant to 5 U.S.C. § 8128(a).[13] In its February 24, 2011 decision, OWCP noted that, while she was not entitled to a review of the written record as a matter of right, it had considered the matter in relation to the issue involved and, under its discretionary authority, denied the request as she could pursue her claim further by requesting reconsideration and submitting rationalized medical evidence in support of her claim.

In the instant case, appellant's request for a review of the written record, dated January 26, 2011, was made after OWCP issued its January 6, 2011 decision on her request for reconsideration made pursuant to 5 U.S.C. § 8128. Hence, OWCP correctly found that appellant was not entitled to a review of the written record by an OWCP hearing representative as a matter of right as she had previously requested reconsideration.

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[8] 5 U.S.C. § 8124(b)(1).

[9] 20 C.F.R. § 10.615.

[10] *Id*. at § 10.616(a).

[11] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[12] *Teresa M. Valle*, 57 ECAB 542 (2006). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

[13] *See Peggy R. Lee*, 46 ECAB 527 (1995) (where the Board found that appellant's request for an oral hearing was made after OWCP issued its decision on his request for reconsideration made pursuant to 5 U.S.C. § 8128 and therefore appellant was not entitled to an oral hearing before an OWCP hearing representative as a matter of right).

In its February 24, 2011 decision, OWCP acknowledged that, although there was no entitlement to a review of the written record, it could allow such a review of the written record within its discretion. It properly exercised its discretion by indicating that it had also denied appellant's request for a review of the written record on the basis that the case could be equally well addressed by requesting reconsideration and submitting additional medical evidence. There is no evidence of an abuse of discretion in this case.[14]

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration. The Board further finds that OWCP properly denied her request for a review of the written record pursuant to 5 U.S.C. § 8124(b)(1).

ORDER

IT IS HEREBY ORDERED THAT the February 24 and January 6, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 6, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[14] *See Daniel J. Perea*, 42 ECAB 214 (1990).