United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant **and** **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, South Burlington, VT, Employer**	))))))))))	**Docket No. 12-384** **Issued: June 13, 2012**

Appearances:
Alan D. Overton, Esq., for the appellant
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 December 13, 2011 appellant, through her attorney, filed a timely appeal from the June 16, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for merit review. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this nonmerit decision. Because more than 180 days elapsed from the last merit decision of OWCP dated March 19, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On May 8, 2009 appellant, then a 60-year-old transportation security officer, filed an occupational disease claim (Form CA-2) alleging injury to her lower back, including lateral lumbar stenosis, due to the repetitive physical requirements associated with her job. She first became aware of her claimed condition in March 2008 and its relationship to her work in January 2009. Appellant asserted that her injury was caused by lifting and carrying bags weighing up to 80 pounds and engaging in twisting, turning and bending. She began working a light-duty position which limited her lifting to 25 pounds.

Appellant submitted an April 24, 2009 report in which Dr. Mary T. Flimlin, Board-certified in physical medicine and rehabilitation, diagnosed mild lateral lumbar stenosis. Dr. Flimlin recommended that appellant work in a light-duty position.

In a May 22, 2009 letter, appellant was apprised by OWCP of the deficiencies in her claim and the need to arrange for the submission of additional medical and factual evidence to include a narrative report from her physician that contained a detailed history of her condition, diagnosis based on results of examination and testing and the physician's reasoned medical opinion on the cause of her condition and how her employment contributed to the condition found. OWCP provided her 30 days from the date of the letter to submit such evidence.

In a March 16, 2009 report, Dr. Flimlin stated that appellant had low back pain caused by spondylolisthesis at L5-S1 with degenerative disc disease and facet arthritis.

By decision dated July 24, 2009, OWCP denied appellant's claim on the grounds that she failed to submit evidence sufficient to establish a causal connection between her back condition and factors of her federal employment.

Appellant filed a request for reconsideration on August 14, 2009. She submitted diagnostic testing from January and February 2009. In a November 5, 2009 decision, OWCP affirmed its July 24, 2009 decision on the grounds that the medical evidence submitted in support of appellant's reconsideration request failed to address causal relationship to work.

On January 19, 2010 appellant, through her counsel, requested reconsideration of OWCP's November 5, 2009 decision. She submitted the March 16 and August 7, 2009 reports from Dr. Flimlin and treatment notes dated between August 2008 and September 2009 from Dr. Tania F. Bertsch, an attending Board-certified internist.

On March 16, 2009 Dr. Flimlin related appellant's low back pain to spondylolisthesis at L5-S1 in combination with degenerative disc disease and facet arthritis at that level. She reported that appellant noted improvement in her back pain following placement in a modified job with a 25-pound lifting restriction.

On August 7, 2009 Dr. Flimlin noted that appellant presented with a history of having experienced an acute flare of back pain related to lifting at work. She diagnosed spondylolisthesis at L5-S1 in combination with degenerative disc disease and facet arthritis and opined that repetitive lifting at work caused an acute exacerbation of pain related to these

conditions. Dr. Flimlin indicated that appellant was placed on modified work with a 25-pound lifting restriction and noted that she had remained free of pain since this work was implemented.

On August 18, 2009 Dr. Bertsch diagnosed "mechanical back pain exacerbated by heavy lifting at work." She reported that appellant lifted bags at work which weighed between 50 and 60 pounds and made note of appellant's observation that her back pain improved once her lifting activity was limited.

In a March 19, 2010 decision, OWCP denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that her back condition arose in the performance of duty. It noted that her physicians did not clearly describe her work duties as causing or aggravating a specific, diagnosed back condition.

In a March 18, 2011 letter, appellant, through counsel, requested reconsideration of OWCP's March 19, 2010 decision denying the claimed work-related condition. Counsel indicated that he was submitting a March 4, 2011 report of Dr. Flimlin. He provided brief excerpts from the report which he believed supported appellant's claim that she sustained a work-related occupational disease, but no new medical report of Dr. Flimlin was submitted in connection with appellant's reconsideration request. In the March 18, 2011 letter, counsel further argued that OWCP's conclusions in its March 19, 2010 decision were not valid given the substance of Dr. Flimlin's August 7, 2009 and March 4, 2011 reports.

In a June 16, 2011 decision, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It noted that counsel provided excerpts from a referenced March 4, 2011 report of Dr. Flimlin, but he did not submit a copy of the report.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[2] OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[3] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[4]

When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[5] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or

[2] Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[3] 20 C.F.R. § 10.606(b)(2).

[4] *Id.* at § 10.607(a).

[5] *Id.* at § 10.608(b).

argument already in the case record[6] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[7] While a 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.[8]

ANALYSIS

OWCP issued a decision on March 19, 2010 denying appellant's claim for a work-related occupational disease which she believed was due to her repetitive work duties, including engaging in repetitive lifting, twisting, turning and bending. It found that she did not submit sufficient medical evidence in support of her claim. Appellant, through counsel, requested reconsideration of this decision on March 18, 2010.

The Board does not have jurisdiction over the March 19, 2010 OWCP decision. 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. In her application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. 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 indicated that she was submitting a March 4, 2011 report of Dr. Flimlin, an attending Board-certified physical medicine and rehabilitation physician, which she believed supported her claim that she sustained a work-related occupational disease. However, this report was not, in fact, submitted in connection with the reconsideration claim. The underlying issue in this case is whether appellant sustained a work-related injury due to her repetitive work duties overtime. That is a medical issue which must be addressed by relevant medical evidence.[9] A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant medical evidence in this case.[10] Appellant further argued that OWCP's conclusions in its March 19, 2010 decision were not valid given the substance of Dr. Flimlin's August 7, 2009 and March 4, 2011 reports. However, OWCP had previously considered Dr. Flimlin's August 7, 2009 report and, as noted, a March 4, 2011 report was not submitted.[11]

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

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[6] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[7] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[8] *John F. Critz*, 44 ECAB 788, 794 (1993).

[9] *See Bobbie F. Cowart,* 55 ECAB 746 (2004).

[10] Appellant provided brief excerpts from the referenced March 4, 2011 report, but these would not constitute probative evidence in the absence of the submission of the actual report.

[11] Appellant submitted additional evidence after OWCP's March 19, 2010 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

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.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 13, 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