

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

L.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hillsborough, NC, Employer**

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**Docket No. 13-1239
Issued: October 25, 2013**

Appearances:

*Humphrey S. Cummings, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 24, 2013 appellant, through her representative, filed a timely appeal of a November 15, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration of the merits of her claim. As more than 180 days elapsed from the issuance of the last merit decision of OWCP dated July 12, 2011 to the filing of this appeal on April 24, 2013, the Board has no jurisdiction over the merits of the case.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over only the November 15, 2012 nonmerit decision.

¹ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant has up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e); *R.C.*, Docket No. 10-2371 (issued July 14, 2011).

² 5 U.S.C. §§ 8101-8193.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a).

On appeal her attorney asserts that OWCP did not abide by the mandate of the Board in an August 5, 2010 remand decision and erred in not addressing the merits of appellant's claim in its November 15, 2012 decision.

FACTUAL HISTORY

This case has previously been before the Board. In an August 5, 2010 decision, the Board found that appellant did not establish that she sustained an injury in the performance of duty on January 22, 2008 and affirmed a July 15, 2008 decision. The Board further found that appellant presented a new and relevant argument with a March 17, 2009 reconsideration request, that she was performing a required safety check before entering her vehicle when she slipped and fell on January 22, 2008; thus, OWCP erred in refusing to reopen her case for further consideration of the merits in a May 4, 2009 decision.³ The law and facts of the previous Board decision are incorporated herein by reference.

On September 22, 2010 OWCP issued a decision on the merits of appellant's claim. It addressed her argument that she was performing a required safety check on her motor vehicle when she slipped and fell on ice on January 22, 2008. OWCP found that the evidence did not support that she was performing a safety check when she slipped and fell and was therefore not in the performance of duty when injured.

On June 3, 2011 appellant, through her representative, requested reconsideration. He argued that appellant was in the performance of duty when injured because she had entered her vehicle and then returned to her house to get items required for her job. Counsel opined that Larson, *The Law of Workers' Compensation*,⁴ and the Board case, *Kathryn A. Tuel-Gillem*,⁵ supported this conclusion. He further argued that, as appellant was walking to her vehicle, she was performing a safety check by looking under her vehicle. In an attached statement dated May 16, 2011, appellant maintained that she always glanced under her vehicle looking for leaks when she approached it, to check for a safety or mechanical problem. She noted that her house was approximately 18 feet from her parked car and she fell approximately 13 feet from it.

³ Docket No. 09-1798 (issued August 5, 2010). On January 22, 2008 appellant, a rural carrier, broke her ankle when she slipped and fell on ice while walking from her house to her motor vehicle. On her claim form, she stated that she slipped and fell while entering her car. The employing establishment controverted the claim. In a March 5, 2008 statement, appellant indicated that she had gone out to her vehicle, started it to warm it up, and returned to her house to gather belongings needed for her job. She stated, "as I approached my vehicle, I slipped on ice and broke my ankle." Appellant had right ankle surgery on January 30, 2008.

⁴ A. Larson, *The Law of Workers' Compensation*.

⁵ 52 ECAB 451 (2001).

In a merit decision dated July 12, 2011, OWCP addressed appellant's arguments and denied her claim.

On July 5, 2012 appellant, through her attorney,⁶ requested reconsideration. He maintained that OWCP erroneously applied or interpreted the law because it failed to follow the Board's mandate in its August 5, 2010 decision. Counsel reiterated that Larson⁷ and Board decisions in *Maryann Battista*,⁸ *J.E.*,⁹ and *L.K.*,¹⁰ supported that appellant was in the performance of duty on January 22, 2008 as she was loading her vehicle, she had commenced to perform a safety check and the ultimate effect of her actions was helping others.

In a nonmerit decision dated November 15, 2012, OWCP denied appellant's reconsideration request. It found the arguments raised were similar to those previously presented, were repetitious, and that the statement on reconsideration did not provide any new factual evidence.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹¹ Section 10.608(a) of Title 20 of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹² This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹³ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁴

⁶ Appellant had changed representatives.

⁷ A. Larson, *supra* note 4.

⁸ 50 ECAB 343 (1999) (in the performance of duty while performing incidental duties at supervisor's request).

⁹ 59 ECAB 119 (2007) (in performance of duty while driving to work because personal vehicle used for job duties).

¹⁰ 59 ECAB 465 (2008) (in performance of duty when injured on employing establishment premises 15 minutes before shift because she was safety officer and was salting an employing establishment parking lot).

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.608(a).

¹³ *Id.* at § 10.608(b)(1) and (2).

¹⁴ *Id.* at § 10.608(b).

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated November 15, 2012 denying appellant's application for review. Because there is no OWCP merit decision within the Board's jurisdiction, it lacks jurisdiction to review the merits of appellant's claim.¹⁵

The Board finds that appellant's assertion on appeal that OWCP did not follow the directions of the prior decision in this case is without merit. In its August 5, 2010 decision, the Board found that OWCP erred by refusing to reopen appellant's case for further consideration of the merits in a May 4, 2009 decision. Appellant presented a new argument that she was performing a required safety check before entering her vehicle when she slipped and fell on January 22, 2008. Following the Board's remand, in a September 22, 2010 merit decision, OWCP addressed this argument. It found that appellant was not performing a safety check when she slipped and fell. OWCP found that she was not in the performance of duty when injured on January 22, 2008. By addressing the merits of appellant's claim, OWCP followed the Board's direction that it consider the argument first raised on appeal in Docket No. 09-1798.

With the July 5, 2012 reconsideration request, appellant's attorney repeated his contention that OWCP erroneously applied or interpreted the law. He stated that Larson and Board precedent supported that appellant was in the performance of duty on January 22, 2008 because, while loading her vehicle, she commenced to perform a safety check and that the ultimate effect of her actions was helping others.

The merit issue in this case is whether appellant, a rural mail carrier, was in the performance of duty on January 22, 2008 when she slipped and fell on ice while walking to her motor vehicle from her house. Following the Board's remand on August 5, 2010, OWCP issued two decisions on the merits of appellant's claim discussing her allegation that she was performing a safety check and in the performance of duty when injured. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.¹⁶

Consequently, appellant is not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁷ Furthermore, she did not submit additional evidence with the July 5, 2012 reconsideration request.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied her reconsideration request.

¹⁵ *Supra* note 1.

¹⁶ *J.P.*, 58 ECAB 289 (2007).

¹⁷ 20 C.F.R. § 10.606(b)(2).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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