

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

B.P., Appellant

and

**CORPORATION FOR NATIONAL &
COMMUNITY SERVICE, AMERICORPS
VISTA, Washington, DC, Employer**

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**Docket No. 12-104
Issued: December 13, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 11, 2011 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) September 29, 2011 nonmerit decision denying her request for merit review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision. The last merit decision of OWCP was issued on January 21, 2010. The Board lacks jurisdiction to review the merits of this claim.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. 8101 *et seq.*

² For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On August 5, 2008 appellant sustained a traumatic injury to her right upper extremity and hip when the doors of a Metro train closed on her. OWCP accepted her claim for right shoulder and upper arm contusions, reflex sympathetic dystrophy and backache. The employing establishment terminated appellant's employment on December 8, 2008 for medical reasons and she began receiving compensation benefits effective December 9, 2008.

On January 14, 2009 OWCP's second opinion physician, Dr. Robert Draper, a Board-certified orthopedic surgeon, opined that appellant could return to work four hours a day in a position that did not require that she lift more than 10 pounds. OWCP referred appellant for vocational rehabilitation in order to assist her in obtaining a position within her restrictions. Based upon the results of vocational testing, the position of home health aide instructor (tutor) was identified as a target job. After receiving job search assistance from the vocational counselor for more than 90 days, appellant was unable to obtain employment.

On December 9, 2009 OWCP issued a notice of proposed reduction of compensation based on appellant's ability to earn wages as a tutor (DOT #099.227-034), at the part-time weekly rate of \$400.00 a week (four hours a day). By decision dated January 21, 2010, it finalized its proposed termination, finding that the position of a part-time tutor was medically and vocationally suitable, reasonably available and therefore representative of her wage-earning capacity.

On January 19, 2011 appellant, through her representative, requested reconsideration. Counsel contended that the January 21, 2010 decision was contrary to fact and law because a part-time position could not be used for a loss of wage-earning capacity (LWEC) determination.

Appellant submitted reports dated September 17 and October 14, 2009 from Dr. Vinu Ganti, a Board-certified internist and a September 22, 2009 report from Dr. Ahmed Heshmet, a treating physician, all of which were previously received and reviewed by OWCP. She submitted the following documents, which had not been previously received by OWCP: a September 21, 2001 report from Dr. N.K. Nikhan, a Board-certified internist; an October 20, 2010 report from Dr. Ganti, which described her current symptoms of reflex sympathetic dystrophy syndrome (RSDS) and chronic back pain; a December 6, 2010 report from Dr. Leo M. Rozmaryn, a Board-certified orthopedic surgeon, who diagnosed chronic regional pain syndrome; a December 6, 2010 nerve conduction study; and a December 16, 2010 report from Dr. Riza Ghorbani, a treating physician, who diagnosed RSD, lumbago, sciatica and lumbar sprain.

By decision dated September 29, 2011, OWCP denied appellant's request for reconsideration, finding that the evidence presented was insufficient to warrant a merit review. The claims examiner found that counsel's legal argument that an LWEC cannot be based on a part-time position did not have a reasonable color of validity.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that 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) constituted relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ 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.⁶

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁸ 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.⁹

ANALYSIS

By decision dated January 21, 2010, OWCP reduced appellant's compensation based on her ability to earn wages as a tutor. The issue is whether the evidence and argument submitted in support of her January 19, 2011 request for reconsideration is sufficient to warrant further merit review pursuant to 20 C.F.R. § 10.606(b)(2). The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law and did not submit new and relevant medical evidence. The Board further finds that counsel's legal argument has no color of validity. Therefore, the Board finds that OWCP properly determined that appellant was not entitled to further review of the merits.

Counsel argued that OWCP's decision was contrary to fact and law because a part-time job cannot be the basis of a wage-earning capacity decision. His argument is without merit. In making a wage-earning capacity determination based on a constructed position, the test is whether the selected job appears reasonable, giving due regards to the factors specified in 5

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that "[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."

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

⁸ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

⁹ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

U.S.C. § 8115.¹⁰ In situations where a full-time position is not medically suitable, a part-time position must be considered in order to accommodate a claimant's physical restrictions. OWCP procedures contemplate such circumstances.¹¹ The Board has found that, if OWCP determines that appellant is capable of performing only part-time work, then it must find a position within her work limitation that is reasonably available on a part-time basis.¹² The Board finds that counsel's argument does not have a reasonable color of validity.

Evidence received in support of the reconsideration request included September 17 and October 14, 2009 reports from Dr. Ganti and a September 22, 2009 report from Dr. Heshmet. As these reports were previously received into evidence and reviewed by OWCP, they are cumulative and duplicative in nature and therefore have no evidentiary value.¹³ Neither the December 6, 2010 nerve conduction study nor reports from Drs. Ganti, Rozmaryn and Ghorbani addressed appellant's work capacity. These reports are therefore irrelevant to the issue in this case and do not constitute a basis for reopening this case.¹⁴ Dr. Nikhan's September 21, 2001 report from Dr. N.K. Nikis also irrelevant, as it predated the accepted injury. The Board finds that OWCP properly determined that the evidence submitted did not constitute a basis for reopening the case for a merit review.

The Board 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 or submit relevant and pertinent evidence not previously considered. Although counsel presented a legal argument not previously considered, the legal contention does not have a reasonable color of validity and is therefore insufficient to require OWCP to reopen this case. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (April 2011). Under section 8115(a), the claims examiner must consider the following aspects of the case in assessing suitability and availability: (1) the nature of the injury; (2) the degree of physical impairment (including impairments resulting from both injury-related and preexisting conditions); (3) the usual employment; (4) the claimant's age; (5) qualifications for other employment, including education, previous employment, and training as well as work limitations imposed by the injury-related and preexisting impairments; and (6) the availability of suitable employment. *Id.*

¹¹ *Id.* at Chapter 2.814.8(c)(3) (April 2011). If the employee can work only part time, the position must be reasonably available on a part-time basis. A general finding of reasonable availability is not sufficient because a position which can be obtained on a full-time basis may not be available on a part-time basis. *See D.L.*, Docket No. 10-2291 (issued July 13, 2011); *see also Lewis Jackson*, 32 ECAB 1225 (1981).

¹² *See D.L.*, *supra* note 11; *see also Lewis Jackson*, *supra* note 11.

¹³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

¹⁴ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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