

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

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**Estate of M.S., deceased, Appellant** )  
 )  
**and** )  
 )  
**DEPARTMENT OF VETERANS AFFAIRS,** )  
**VETERANS HEALTH ADMINISTRATION,** )  
**BRONX VETERANS MEDICAL CENTER,** )  
**Bronx, NY, Employer** )

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**Docket No. 13-1913**  
**Issued: February 25, 2014**

*Appearances:*  
*Thomas S. Harkins, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 23, 2013 the employee filed a timely appeal from a March 7, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying reconsideration. Because more than 180 days elapsed from the most recent merit decision dated August 4, 2011 to the filing of this appeal and pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> An appeal of final adverse OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. See 20 C.F.R. § 501.3(e).

## ISSUE

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

## FACTUAL HISTORY

On October 19, 2004 the employee, then a 53-year-old nurse, filed a traumatic injury claim alleging that on that day she injured herself after a slip and fall on a wet floor. OWCP accepted the conditions of a lumbosacral sprain; left shoulder strain; right hip strain; and right hand sprain and paid benefits. By decision dated January 21, 2011, it reduced the employee's compensation benefits to zero based on her ability to earn wages in a selected position as a nurse consultant. Determinative weight was accorded to the opinion of Dr. Martin Barschi, a Board-certified orthopedic surgeon, serving as the impartial medical examiner.

Appellant's former counsel, Alan Shapiro, Esquire, requested a telephonic hearing, which was held on May 10, 2011. By decision dated August 4, 2011, an OWCP hearing representative affirmed the January 21, 2011 wage-earning capacity decision. The hearing representative found that Dr. Barschi took into account work restrictions due to all of appellant's diagnoses at the time of his examination, including the nonwork-related preexisting right shoulder condition and the low back condition that was aggravated by the work injury. Dr. Barschi found that appellant's other conditions had resolved. OWCP's hearing representative noted that any subsequently acquired conditions unrelated to the accepted injury were not considered and were properly excluded from the wage-earning capacity determination. He also found that the reports from Dr. Deborah Eisen, a Board-certified family practitioner and appellant's treating physician, dated March 15, 2011, December 2010 and a similar undated report, which opined that the claim should be expanded to include several other medical conditions related to the work injury, were insufficient to overcome the weight of Dr. Barschi's impartial opinion or to create a new conflict in medical opinion.

On September 28, 2011 Mr. Shapiro requested reconsideration, citing the decision of *M.V.*, Docket 10-1642 (issued June 15, 2011).<sup>3</sup> No new evidence was submitted.

By decision dated January 11, 2012, OWCP denied reconsideration on the grounds that the employee's September 28, 2011 request did not provide new, relevant evidence or legal argument.

In a July 26, 2012 letter, received by OWCP on July 27, 2012, the employee's current counsel, Thomas S. Harkins, Esq., requested reconsideration.<sup>4</sup> He argued the loss of wage-earning capacity decision was improper as OWCP had not accepted as compensable all injuries and conditions the employee had sustained as a result of the work injury and that she was not medically capable of performing the duties of the selected nurse consultant position. In support

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<sup>3</sup> Mr. Shapiro did not discuss this cited Board decision or explain how it was applicable to the employee's case.

<sup>4</sup> On February 10, 2012 the employee authorized Mr. Harkins, to serve as her counsel of record. She died on February 23, 2012.

of his assertion, Mr. Harkins submitted an undated report from Dr. Eisen previously of record along with medical reports dated May 14, 2005 through March 15, 2011, also previously of record.

Counsel asserted in letters dated December 8, 2012 and February 12, 2013 that OWCP received his reconsideration request on July 27, 2012 and failed to timely issue a decision within 90 days pursuant to its procedures.

By decision dated March 7, 2013, OWCP denied reconsideration. It stated that while counsel properly noted that its procedures require decisions on reconsideration be provided within 90 days of receipt, appellant's appeal rights were not jeopardized by the delay.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128 of FECA,<sup>5</sup> 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) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> 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.<sup>7</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>8</sup>

### **ANALYSIS**

By decision dated August 4, 2011, an OWCP hearing representative affirmed a January 21, 2011 wage-earning capacity decision finding that the employee was medically capable of performing the selected position of nurse consultant. By decision dated January 11, 2012, OWCP denied review of the merits of the employee's reconsideration request, as there had been no new relevant evidence submitted.

In his July 26, 2012 reconsideration request, counsel alleged that OWCP failed to issue the January 11, 2012 decision within 90 days of the previous request for reconsideration. The Board notes however that appellant's rights to seek further review were not prejudiced by this delay. The last merit review in this case was conducted by OWCP on August 4, 2011. A request

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<sup>5</sup> Under section 8128 of FECA, the 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).

<sup>6</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Annette Louise*, 54 ECAB 783 (2003).

for reconsideration was filed on September 28, 2011. A nonmerit review was conducted on January 11, 2012. By the time the employee's counsel requested reconsideration on July 26, 2012, the Board no longer had jurisdiction to review the August 4, 2011 merit decision. He could however pursue modification of the wage-earning capacity determination at any time, by requesting that OWCP review new evidence or argument in support of a modification request.<sup>9</sup> The employee's counsel did not otherwise contend that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted.

Counsel also did not advance a new and relevant legal argument. He contended that the employee had other medical conditions, besides those accepted by OWCP, which were causally related to the work injury and which were not taken into account in the wage-earning capacity decision. This argument was previously set forth and addressed by OWCP in its January 11, 2012 decision. In support of his argument, counsel submitted medical evidence previously of record. The Board has held that the submission of evidence which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.<sup>10</sup>

The Board accordingly finds that the employee did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). The employee 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 constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. For the reasons set forth above, his contention lacks merit. Furthermore, as noted, the Board lacks jurisdiction to review the merits of the claim.

### **CONCLUSION**

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

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<sup>9</sup> See *N.V.*, Docket No. 13-1533 (issued December 18, 2013).

<sup>10</sup> *Denis M. Dupor*, 51 ECAB 482 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 7, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 25, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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