

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

D.C., Appellant

and

**DEPARTMENT OF DEFENSE, DECA
SOUTHWEST REGION, Fort Lee, VA,
Employer**

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**Docket No. 11-555
Issued: November 7, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 22, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) nonmerit decision dated July 7, 2010, denying his request for further merit review of his claim. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision. Because more than 180 days has elapsed between the last merit decision of OWCP, dated June 18, 2009, to the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.

ISSUE

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

On appeal, appellant disagrees with the denial of his claim and asserted that he submitted evidence to support his claim.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 24, 2008 appellant, then a 48-year-old store associate, filed a traumatic injury claim alleging that he sustained a back and neck injury at work on June 11, 2008. He inventoried and rearranged over 50 bags of potatoes and onions on two separate occasions and lifted over 200 bags of vegetables. Appellant stopped work on June 13, 2008 and returned on July 7, 2008. The employing establishment advised that he did not report his injury within the 30-day time limitation and that he was terminated on October 28, 2008 for misconduct. Appellant also had a preexisting condition.

OWCP received an October 21, 2008 notice of discharge; work excuses placing appellant off work from June 21 to July 7, 2008 and physical therapy notes. Appellant submitted a September 2, 2008 functional ability request from a physician whose signature is illegible.

Appellant submitted reports from Dr. Ivan Hinnant, a Board-certified internist. In a September 24, 2008 report, Dr. Hinnant noted that appellant had “chronic lower back pain since 2000 while on jump at Fort Bragg.” In June at work, appellant was lifting large bags of potatoes and onions and sustained sharp pain on the left and right, radiating down the right leg to the toes. Dr. Hinnant stated that appellant retired on February 29, 2008 and was doing produce work when he “reinjured [his] neck and shoulder.” He diagnosed intervertebral disc degeneration and cervical disc degeneration at C5-C6. Dr. Hinnant diagnosed cervicgia; lumbar intervertebral disc degeneration, cervical disc degeneration; sacroiliac back strain and chronic lumbosacral strain. In a November 6, 2008 report, he diagnosed chronic neck pain due to spondylosis, cervical herniated nucleus pulposus (HNP) and lower back pain due to degenerative disc disease. In a December 8, 2008 report, Dr. Hinnant diagnosed intervertebral disc degeneration.

In a December 10, 2008 report, Dr. Eric L. Jones, a Board-certified internist, noted that he examined appellant on July 28, 2008. Appellant had recurrent neck and low back pain from diffuse degenerative disc disease. He was advised to quit his job because of his health and Dr. Jones recommended a desk job with frequent breaks.

In a January 6, 2009 report, Dr. David B. Mowery, Board-certified in family medicine, noted that appellant had chronic neck pain since June 2008. Appellant indicated that he performed lifting at work which initiated his problems, and a week later he had to perform similar tasks that included lifting over 1,500 pounds a day for several days in a row. Dr. Mowery stated that testing ordered by Dr. Hinnant showed degenerative disc disease and small left central focal bulge or prolapse at L5-S1 with no evidence of mass effect on adjacent neural structures. He opined that “[i]njury is likely to have occurred with repeated lifting as described.”

In a January 26, 2009 decision, OWCP denied appellant’s claim. It found that the factual evidence was insufficient to establish that the events at work occurred as alleged. OWCP also found that the medical evidence did not establish a workplace injury.

On March 21, 2009 appellant requested reconsideration and submitted additional evidence. He indicated that he sustained an injury in the performance of duty and provided the requested information.

In an August 23, 2008 statement, Eric Gidden, a coworker, noted that he observed appellant experience severe back pain upon performing normal movements in May 2008. He related that appellant indicated it was due to his recent employment.

In a June 18, 2009 decision, OWCP denied modification of the January 26, 2009 decision. It noted that appellant mentioned not only his June 11, 2008 incident, but he also mentioned work over a period of several weeks and the factual details were unclear as to time, place and frequency of his various work activities. OWCP found that appellant did not submit sufficient factual and medical evidence to establish that he sustained a traumatic injury on June 11, 2008.

On March 29, 2010 appellant requested reconsideration and submitted additional factual and medical evidence. In his request, he repeated that his injury was sustained in the performance of duty on or about June 11, 2008. Appellant noted that, during the week of June 5 to 11, 2008, he rearranged the area where a large order of potatoes were stored and which had to be cleaned, inventoried and arranged. He stated that Ms. Nimfa Holloway directed this and he had to arrange orders of potatoes that arrived with those already there in addition to ones that were on the floor for resale. Appellant noted that, during that time, he was in pain but worked. He also noted that he reported to work on June 8, 2008 at 5:30 a.m. and not 8:00 a.m. as found by OWCP. Appellant also discussed his medical history.

Appellant submitted a June 13, 2008 note signed by Dr. Mowery. He sought an appointment related to his neck and right shoulder. Appellant noted that he was working on Sunday at the employing establishment and attributed his neck and shoulder condition to lifting potatoes.² Dr. Mowery saw him on June 13, 2008 and noted that appellant experienced pain in the neck and shoulder since Sunday. While appellant had previously experienced such pain, it was worse than in the past. Dr. Mowery diagnosed a neck strain. In a radiology report of June 13, 2008, Dr. Sidney Suneja, a Board-certified diagnostic radiologist, diagnosed degenerative disc disease and mild degenerative joint disease. Also submitted were copies of Dr. Hinnant's September 24, and November 6, 2008 reports; diagnostic tests from August 2008, a September 2, 2008 functional ability request form and a time sheet.

By decision dated July 7, 2010, OWCP denied appellant's request for reconsideration finding that his request did not raise any substantial legal questions or include new and relevant evidence and was insufficient to warrant further merit review.³

² Sunday would have been June 8, 2008.

³ The Board notes that OWCP issued a July 22, 2011 decision denying appellant's May 15, 2011 request for reconsideration on the basis it was untimely filed and failed to present clear evidence of error. As this decision was issued after appellant filed his appeal with the Board on December 22, 2010, and also pertains to whether OWCP should reopen the claim for a merit review, it is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990); *R.T.*, Docket No. 08-408 (issued December 16, 2008). *See also* 20 C.F.R. § 501.2(c)(3).

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁴ OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(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.”⁵

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.⁶

ANALYSIS

The Board finds that OWCP improperly denied appellant’s request for reconsideration.

Appellant provided relevant and pertinent new evidence to the underlying factual issue on reconsideration with regard to whether the events giving rise to his claimed injury occurred as alleged. In OWCP’s June 18, 2009 merit decision, it found that the factual details were unclear as to time, place and frequency of his various work activities. OWCP found that appellant did not submit sufficient factual and medical evidence to establish that he sustained a traumatic injury on June 11, 2008, as alleged.

In a March 29, 2010 request for reconsideration, appellant submitted additional evidence. In a statement, he asserted that he was injured on or about June 11, 2008. Appellant described his activities from June 5 to 11, 2008 to which he attributed his injury. He gave a more detailed description of his duties, noting his cleaning, arranging and inventorying of potatoes. A June 13, 2008 note signed by Dr. Mowery revealed that appellant indicated he was working on Sunday, June 8, 2008, at the employing establishment and believed that his neck and shoulder started hurting after lifting potatoes. This report provides a contemporaneous account that generally confirms appellant’s duties. As OWCP denied the claim because the factual evidence was insufficient to establish that the work incident occurred as alleged, this new evidence from appellant regarding his duties at the time of the alleged injury is relevant. The Board finds that appellant’s statement and the contemporaneous history reported in the June 13, 2008 medical

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b).

⁶ *Id.* at § 10.608(b).

record are relevant, pertinent and new to the issue of whether appellant showed that the workplace events occurred as alleged.

The requirement for reopening a claim for merit review does not include the requirement that a claimant shall submit all evidence necessary to discharge his or her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.⁷ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁸ Accordingly, it should have reviewed appellant's case on the merits and discussed this relevant and pertinent new evidence not previously considered. After such development as is deemed necessary, OWCP shall issue an appropriate merit decision.⁹

CONCLUSION

The Board finds that OWCP improperly denied a reopening of appellant's case for a review of the merits.

⁷ See *Sydney W. Anderson*, 53 ECAB 347 (2002).

⁸ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

⁹ The Board notes that subsequent to OWCP's July 7, 2010 decision, appellant submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2010 decision of the Office of Workers' Compensation Programs is set aside and this case remanded for further action consistent with this decision.

Issued: November 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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