

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

A.Z., Appellant

and

**DEPARTMENT OF AGRICULTURE,
INSPECTIONS OPERATIONS PROGRAM,
Wyalusing, PA, Employer**

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**Docket No. 13-631
Issued: July 25, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 22, 2013 appellant filed a timely appeal of an October 10, 2012 decision of the Office of Workers' Compensation Programs (OWCP) which denied reconsideration without conducting a merit review. As OWCP did not issue a merit decision within 180 days of the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 26, 2012 appellant then a 50-year-old veterinarian, filed a traumatic injury claim alleging that while performing antemortem inspections on cattle that day he was struck by a gate and knocked unconscious. He alleged injury to his head, right shoulder, neck and forearm. Appellant stopped work on March 26, 2012. He submitted a witness statement from a coworker who noted that on March 26, 2012 appellant was trying to close a gate to a pen when a steer struck the gate causing it to move fast and knock appellant down.

Appellant submitted a computerized axial tomography (CAT) scan of the brain dated March 26, 2012 which revealed no abnormalities. A CAT scan of the cervical spine revealed no abnormalities. A March 27, 2012 PhysicianCare report, which was unsigned and prepared by an unidentified health care provider, listed that appellant sustained an acute right shoulder and neck injury at work. The healthcare provider diagnosed possible mild concussion.

On May 4, 2012 OWCP advised appellant of the evidence needed to establish his claim. It requested that he submit a physician's report addressing the causal relationship of his claimed condition to specific work factors.

In a statement dated April 5, 2012, appellant's supervisor, Charles Hubbert, advised that appellant was injured on March 26, 2012 while in the performance of duty. Mr. Hubbert stated that appellant's injury was a direct result of the fast-paced environment in which he worked which contained many potential safety hazards.

In a June 8, 2012 decision, OWCP denied appellant's claim finding the medical evidence insufficient to establish that he sustained injury causally related to the March 26, 2012 incident.

On August 16, 2012 appellant requested reconsideration and submitted additional evidence. He submitted a "PhysicianCare" report dated March 26, 2012 from Dr. Walter A. Black, a Board-certified family practitioner, who noted that appellant complained of acute pain in the right shoulder, neck and head from a work-related injury. In a treatment note dated March 26, 2012, Dr. Black obtained a history that, while attending to cattle, appellant was struck by a gate and fell and hit his head. Appellant was diagnosed with a work-related injury and neck sprain secondary to a fall at work. In an August 3, 2012 attending physician's report, Dr. Black noted that appellant was injured on March 26, 2012. He noted normal physical findings and diagnosed mild concussion and cervicgia. Dr. Black indicated with a checkmark "yes" on a CA-20 form without explanation that appellant's condition was caused or aggravated by the employment activity. He listed that appellant was partially disabled from March 26 to April 1, 2012 and could resume regular duty on April 2, 2012. Dr. Black referenced his note dated March 26, 2012 for a history of injury.

By decision dated October 10, 2012, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review. It found that the evidence submitted was duplicative or repetitious.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP has the discretion to reopen a case for review on the merits. OWCP must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain 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.”³

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.⁴

ANALYSIS

OWCP’s October 10, 2012 decision, denied appellant’s reconsideration request, without conducting a merit review. It found that the evidence was insufficient to warrant further merit review of the claim.

The Board notes that appellant submitted relevant and pertinent evidence not previously considered by OWCP. The June 8, 2012 decision denied his claim because he had not submitted sufficient medical evidence to establish a medical condition causally related to the accepted incident. Appellant submitted an August 3, 2012 attending physician’s report from Dr. Black, who noted that appellant was injured on March 26, 2012. Dr. Black noted normal physical findings and diagnosed mild concussion and cervicgia. He noted with a checkmark “yes” that appellant’s condition was caused or aggravated by an employment activity. Dr. Black listed that appellant was partially disabled from March 26 to April 1, 2012 and could resume regular duty on April 2, 2012. He referenced his March 26, 2012 treatment note dated for a history of injury. In the treatment note, Dr. Black noted the history of the claimed work injury and also provided support for a neck sprain secondary to a fall at work

This medical evidence is new and relevant. Dr. Black opined that appellant was injured on March 26, 2012. Although OWCP’s October 10, 2012 decision found that the evidence was duplicative, the evidence from Dr. Black was not previously of record or considered by OWCP in rendering the June 8, 2012 decision. The Board has held that the requirement for reopening a

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

⁴ *Id.* at § 10.608(b).

claim for merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.⁵ The Board finds that, in accordance with 20 C.F.R. § 10.606(b)(2)(iii), the new evidence from Dr. Black is sufficient to require reopening appellant's case for further review on its merits.

Therefore, OWCP improperly refused to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128. Consequently, the case must be remanded for OWCP to reopen appellant's claim for a merit review. Following this and such other development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that OWCP, in its decision dated October 10, 2012, improperly denied appellant's request for reconsideration of his case on its merits.

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further development in accordance with this decision.

Issued: July 25, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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

⁵ See *Helen E. Tschantz*, 39 ECAB 1382 (1988).