

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Youngstown, NY, Employer**

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**Docket No. 13-764
Issued: July 15, 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 February 13, 2013 appellant filed a timely appeal from a September 4, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the date of OWCP's most recent merit decision of May 23, 2011 to the filing of this appeal on February 13, 2013, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

ISSUE

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

On appeal, appellant contends that he is entitled to a merit review as he submitted factual evidence in his April 11, 2012 request for reconsideration.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 24, 2010 appellant, then a 38-year-old letter carrier, filed a traumatic injury claim alleging that on November 23, 2010 he injured his back when he slipped on mud in the performance of duty. He submitted two medical excuse notes from Dr. Andrew Green, a chiropractor, dated November 24 and December 1, 2010.

In an April 22, 2011 letter, OWCP advised appellant of the deficiencies in his claim. It requested additional evidence pertaining to both the factual and medical aspect of his claim. Appellant was accorded 30 days within which to submit the evidence. No further evidence was received.

By decision dated May 23, 2011, OWCP denied the claim finding that fact of injury was not established. It found the evidence was not sufficient to establish that the incident occurred as alleged as appellant did not respond to the development letter. OWCP also found the medical evidence insufficient to establish a back condition was causally related to the incident.

In an April 11, 2012 letter postmarked April 12, 2012, appellant requested reconsideration. He submitted a July 11, 2011 letter describing how the November 23, 2010 injury occurred; a July 8, 2011 statement of certification; diagnostic studies and several reports from Dr. Green, his chiropractor.

By decision dated September 4, 2012, OWCP denied appellant's request for reconsideration finding that only medical evidence was submitted in support of the request for reconsideration. It explained that, since the factual component of the claim had not been addressed, a merit review on the basis of the additional medical evidence was not warranted.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.² OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by 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.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

² *Id.* 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).

³ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁴ 20 C.F.R. § 10.606(b)(2). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

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

ANALYSIS

In support of his April 11, 2012 reconsideration request, appellant submitted a July 11, 2011 statement in which he described how the November 23, 2010 injury occurred. His statement directly addresses grounds upon which OWCP denied his claim as it relates to the factual component of fact of injury. The Board finds that appellant's July 11, 2011 statement constitutes relevant and pertinent new evidence not previously considered by OWCP. As it meets one of the standards for obtaining a merit review of his case, the Board finds that OWCP improperly denied appellant's request. Appellant is entitled to a merit review.⁷

The Board will remand the case for a merit review. After such further development of the evidence as might be necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ In light of the disposition of this case, appellant's further arguments on appeal will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further development consistent with this decision of the Board.

Issued: July 15, 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