

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

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**R.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pittsburgh, PA, Employer**

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**Docket No. 12-888  
Issued: March 15, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA HOWARD FITZGERALD, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 12, 2012 appellant filed a timely appeal from a February 13, 2012 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for further review of the merits of his claim. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the nonmerit decision by OWCP. The last merit decision of record was OWCP's January 25, 2011 decision. Because more than 180 days elapsed from the last merit decision to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case.<sup>2</sup>

**ISSUE**

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

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

<sup>2</sup> For decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

On December 15, 2003 appellant, then a 44-year-old mail carrier, sustained a thoracic and lumbar strain when he was carrying mail and felt pain in his back. OWCP accepted the claim for thoracic sprain and lumbar sprain. The claim was later accepted for an aggravation of thoracic degenerative disc disease. OWCP paid medical and wage-loss benefits.<sup>3</sup>

On January 31, 2008 OWCP notified appellant of a proposal to terminate his compensation benefits based on the reports of Dr. Michael Casey, his attending physician, who found that appellant was not experiencing any residuals or disability connected to his employment injury of December 15, 2003.<sup>4</sup>

OWCP referred appellant, a statement of accepted facts, the case file and a series of questions to Dr. Gerald W. Pifer, a Board-certified orthopedic surgeon, for a second opinion examination as to whether the employment-related condition had resolved and whether appellant required any work restrictions.

On April 30, 2009 the employing establishment offered appellant a limited-duty position as a mail carrier with restrictions of no lifting or carrying over 20 pounds.

In a May 14, 2009 medical report, Dr. Pifer reported that appellant could carry out his regular duties as a mail carrier with a 25-pound lifting restriction. He submitted a work capacity evaluation form (OWCP 5) and provided no other restrictions other than no lifting greater than 25 pounds. Appellant returned to work briefly on May 23, 2009 and stopped work on that same date stating that he needed to go to the hospital.

In a June 3, 2009 medical report, Dr. William Donaldson, a Board-certified orthopedic surgeon, reported that appellant could return to work with restrictions of no carrying, suggesting he process mail instead. In a June 5, 2009 functional capacity evaluation, Dr. Paul S. Lieber, Board-certified in pain medicine, restricted appellant from carrying a mailbag for mail delivery.

On June 5, 2009 the employing establishment again offered appellant a limited-duty position. Appellant's duties included answering telephones, writing notices and casing mail with restrictions of no lifting.

On June 14, 2009 appellant refused the modified job offer.

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<sup>3</sup> The Board notes that appellant has 12 workers' compensation claims on record and 2 retired claims for a total of 14 workers' compensation claims. Appellant's additional claims are not currently before the Board.

<sup>4</sup> Appellant began working modified duty and returned to full duty on January 13, 2004. He stopped work on March 13, 2004 and filed a recurrence claim (Form CA-2a) which was accepted on April 6, 2004. Appellant remained out of work until April 7, 2008 when he returned in full duty capacity. On April 11, 2008 he stopped working and filed another recurrence claim. Appellant returned to work briefly and stopped working again on April 29, 2008. He filed another recurrence claim on February 16, 2009 for a recurrence as of October 10, 2008, however, he was not working during that time.

In a June 23, 2009 letter, OWCP advised appellant that the June 5, 2009 job offer was suitable work. Appellant was informed that he had 30 days to accept the job or provide reasons for refusing it; otherwise, he risked the termination of his compensation.

By letter dated July 17, 2009, appellant stated that he refused the job offer because casing mail aggravated his back condition. He stated that he would work after July 31, 2009 if he was provided with a suitable job offer and, if not, he would retire on August 1, 2009. On July 1, 2009 appellant elected voluntary early retirement (VERA) effective July 31, 2009.

By letter dated July 23, 2009, OWCP advised appellant that the offered position of a limited-duty carrier was suitable work. It noted that his reasons for refusing the position were unacceptable. OWCP afforded appellant 15 additional days to accept the job offer.

By letter dated July 29, 2009, the employing establishment informed appellant that although he elected early retirement, the job offer remained open until his effective retirement date of July 31, 2009.

By letter dated July 30, 2009, appellant alleged that he was told he could not return to work on August 1, 2009 because of a hiring freeze.

On August 3, 2009 appellant accepted the June 5, 2009 job offer.

By letter dated August 24, 2009, the employing establishment reported that appellant's modified job offer was never withdrawn, but appellant did not return to work, noting that appellant had filed for VERA effective July 31, 2009.

By letter dated August 17, 2010, OWCP requested that appellant and the employing establishment provide clarification on whether there was a hiring freeze, whether appellant returned to work, whether the job offer was withdrawn or if appellant had retired.

By letter dated August 23, 2010, the employing establishment stated that appellant had not been informed that there was a hiring freeze. It informed him by letter dated July 29, 2009 that his job remained available. Appellant elected VERA retirement effective July 31, 2009. He did not report to work on July 31 or August 1, 2010 despite accepting the modified job offer.

By letter dated September 30, 2010, appellant reported that he returned to work. He stated that "I could not do the work in the job offer; however, I was going to report August 1, 2009 and request sick leave or vacation time to keep my medical benefits from your department."

By letter dated December 6, 2010, the employing establishment stated that appellant was advised that the modified job offer remained available up until the day of his voluntary early retirement. Appellant did not report to work on July 31 or August 1, 2009. He had the option of not retiring as he was never refused the job offer. Appellant contended that he was forced to convert to disability retirement because USPS did not accommodate him. The employing establishment stated that this was not true because appellant was provided with a limited-duty job offer and thus, reasonable accommodations were not necessary.

By decision dated January 25, 2011, OWCP terminated appellant's monetary compensation, effective January 6, 2010, on the grounds that he refused an offer of suitable work.

By letter dated January 13, 2012, appellant requested reconsideration of the January 25, 2011 decision. He resubmitted prior documents of record in support of his arguments. On January 29, 2012 appellant stated that he had not submitted new evidence for his January 13, 2012 reconsideration request but rather was clarifying the information that was already sent to OWCP.

By decision dated February 13, 2012, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.

### **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. OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>5</sup>

To require OWCP to reopen a case for merit review under FECA, section 8128(a), OWCP 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.<sup>6</sup> Section 10.608(b) of OWCP regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>7</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>8</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>9</sup>

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<sup>5</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>6</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>7</sup> *K.H.*, 59 ECAB 495 (2008).

<sup>8</sup> See *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>9</sup> *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

## ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only OWCP decision before the Board on appeal is the February 13, 2012 decision, denying appellant's application for review. Because more than 180 days elapsed from the date of OWCP's most recent merit decision of January 25, 2011 to the filing of appellant's appeal on March 12, 2012, the Board lacks jurisdiction to review the merits of his claim.<sup>10</sup>

The issue presented is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his January 13, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Appellant repeated arguments previously made which were addressed and evaluated in OWCP's January 25, 2011 merit decision. The crux of his argument was that USPS did not provide him suitable work which met his medical restrictions. OWCP already addressed these arguments in its January 25, 2011 decision as the medical and factual evidence of record established that the offered position was suitable. Appellant repeated his argument that his work stoppage should have been considered as a recurrence and also stated that OWCP made a retroactive finding of suitability in violation of FECA. These arguments are without merit and not relevant. The January 25, 2011 decision addressed that the employing establishment offered him a modified limited-duty position, that OWCP developed the evidence to determine if the position was suitable and after proper notices on June 23 and July 23, 2009, as well as numerous development letters, properly terminated his compensation for refusal of suitable work. Thus, the January 25, 2011 decision addressed appellant's arguments, finding that OWCP properly developed the evidence and case to determine that the position was suitable.<sup>11</sup> As appellant's arguments were already considered and addressed by OWCP, it properly denied merit review of his claim.

The Board also notes that the medical and factual evidence submitted and referenced by appellant in support of his claim were also already addressed and evaluated by OWCP. The Board finds that submission of these reports and documents did not require reopening his case for merit review because he had submitted the same reports, which were previously reviewed by OWCP in a decision dated January 25, 2011. As the reports repeat evidence already in the case record, they are duplicative and do not constitute relevant and pertinent new evidence. Moreover, by letter dated January 29, 2012, appellant himself acknowledged that he had not submitted new evidence with his reconsideration request. Therefore, appellant has not established a basis for reopening his case.<sup>12</sup> Because appellant only submitted repetitive

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<sup>10</sup> 20 C.F.R. § 501.3(e) requires that an application for review by the Board be filed within 180 days of the date of OWCP's final decision being appealed.

<sup>11</sup> See *M.W.*, Docket No. 12-502 (issued January 16, 2013).

<sup>12</sup> *D.K.*, Docket No. 12-299 (issued August 7, 2012); see also *D.K.*, 59 ECAB 141 (2007).

evidence with his request for reconsideration, the Board finds that he did not meet any of the necessary requirements and he is not entitled to further merit review.<sup>13</sup>

On appeal, appellant argues that this case should be remanded to OWCP to combine with Claim Nos. xxxxxx002, xxxxxx794, xxxxxx251 and xxxxxx002, stating that relevant documents were transferred into other case files and that he would be also filing appeals for those claims. The Board notes that appellant's Claim No. xxxxxx842 had already been doubled into this claim, No. xxxxxx939. Appellant had over one year from the date of OWCP's January 25, 2011 merit decision to submit evidence in support of his reconsideration request. The Board notes that appellant filed over 14 claims with OWCP and it is his responsibility to submit documentation pertaining to his claims. Appellant resubmitted the documents he believed supported his arguments on reconsideration which were previously of record. The Board finds his argument to be unsubstantiated.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He 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 submit relevant and pertinent evidence not previously considered. 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).

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<sup>13</sup> See *L.H.*, 59 ECAB 253 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 13, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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