

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

B.J., Appellant

and

**DEPARTMENT OF THE ARMY, RED RIVER
ARMY DEPOT, Texarkana, TX, Employer**

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**Docket No. 15-795
Issued: June 15, 2015**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 27, 2015 appellant filed a timely appeal from a February 11, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As more than 180 days elapsed between the last merit decision of OWCP dated, January 31, 2014, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

This case has previously been before the Board.³ In a September 17, 2014 decision, the Board affirmed a January 31, 2014 OWCP merit decision denying appellant's occupational disease claim, finding that the medical evidence failed to establish that the accepted work activity, namely, driving a forklift over bad potholes and being exposed to airborne metals and chemicals while driving a forklift 10 hours a day, 6 to 7 days a week, caused or contributed to a back and left eye condition. The Board also affirmed OWCP's March 18, 2014 nonmerit decision, denying appellant's request for reconsideration. The Board found that his request did not satisfy the criteria for obtaining a merit review of his case. The facts relevant to this appeal are set forth below.

On December 2, 2013 appellant, then a 47-year-old forklift operator, filed an occupational disease claim alleging that on April 11, 2012 he first became aware of his back injury and detached retina and realized that they were caused by driving over potholes at work. The employing establishment controverted the claim, contending that it was unaware of appellant's claimed injuries, there was insufficient proof of a causal relationship between his condition and employment. The employing establishment also reported that he did very little forklift work. Appellant retired on disability from the employing establishment on April 8, 2013.

Following issuance of the Board's September 17, 2014 decision appellant, on December 25, 2014, requested reconsideration before OWCP and submitted a December 21, 2014 medical report, from Dr. Roshan L. Sharma, a Board-certified physiatrist, who reported that an April 11, 2012 cervical magnetic resonance imaging (MRI) scan showed multilevel significant stenosis at C3-4, C4-5, C5-6, and C6-7 levels of the neck. Appellant had moderate spinal stenosis at each level except C5-6 where he was diagnosed with moderately severe stenosis of the spinal canal with flexing of the spinal cord from a central disc osteophyte complex. He also had multilevel degenerative changes in his cervical spine.

Dr. Sharma advised that an April 11, 2012 lumbar MRI scan showed severe facet arthropathy at the L2-3 level, moderate facet arthropathy at the L3-4 level, and a disc protrusion with moderate-to-severe left foraminal narrowing at the L5-S1 level. He noted that appellant was known to have had a significant eye problem dating back to 2002 with multiple surgeries for a detached retina. Dr. Sharma related that, while appellant's actual visual acuity was not known, the eye problem had led to chronic headache. He advised that appellant's overall function had been significantly restricted, noting difficulty with repetitive bending, stooping, and crawling.

Appellant was restricted to lifting, pushing, and pulling 20 pounds. Dr. Sharma stated that working at and above shoulder level in a repetitive fashion would be difficult for appellant because of his cervical spinal stenosis. Repetitive use of appellant's upper extremities would aggravate his chronic neck pain. Prolonged sitting, walking, or standing was difficult. Dr. Sharma restricted these activities. Working at height would be unsafe for appellant. Dr. Sharma opined that appellant was permanently disabled due to his current medical condition and significant restrictions.

³ Docket No. 14-1028 (issued September 17, 2014).

In a February 11, 2015 decision, OWCP denied further merit review of appellant's claim. It found that his request for reconsideration did not raise any substantive legal questions or include new and relevant evidence.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,⁴ OWCP's regulation 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.⁵ 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.⁶ Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁷

ANALYSIS

In support of his December 25, 2014 request for reconsideration, appellant neither demonstrated that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. He submitted a December 21, 2014 report from Dr. Sharma that had not been previously considered by OWCP or the Board. This evidence, while new, is not relevant to the issue of causal relationship. Dr. Sharma opined that appellant's permanent disability was due to his diagnosed cervical and lumbar conditions and significant physical restrictions. He, however, did not address whether appellant's medical conditions and restrictions were caused by the accepted employment factors. The submission of evidence or argument that does not address the particular issue involved does not constitute a basis for reopening a case.⁸ The Board finds, therefore, that Dr. Sharma's report is not relevant and pertinent and thus, insufficient to reopen appellant's claim for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

⁴ *Supra* note 1. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁸ *R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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