

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

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**M.A., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Portland, ME, Employer**

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**Docket No. 11-1322  
Issued: December 13, 2011**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 10, 2011 appellant filed a timely appeal from a January 20, 2011 Office of Workers' Compensation Programs (OWCP) decision denying his request for reconsideration of the merits of his claim. As more than 180 days has elapsed from the date of the last merit decision of August 5, 2010 to the filing date of the current appeal on May 10, 2011, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction over the nonmerit decision.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's claim 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.*

## **FACTUAL HISTORY**

On December 23, 2009 appellant, then a 53-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that he sprained two fingers on his right hand after he slipped on ice in the performance of duty on December 17, 2009.

On January 5, 2010 the employing establishment controverted appellant's claim.

Appellant submitted a December 18, 2009 report by Dr. Amy Rodgers, a family practitioner, diagnosed right hand pain and restricted him from grasping and lifting with his right hand for five days.

In another December 18, 2009 report, Dr. Charles E. O'Brien, a radiologist, reviewed an x-ray of appellant's right hand and wrist and diagnosed possible nondisplaced fracture at the base of the middle phalanx of the middle finger, verses Mach effect, normal wrist and early degenerative changes of the interphalangeal joints of the fingers.

On December 19, 2009 Dr. Rodgers reiterated her diagnosis and restricted appellant from using his right hand.

In a December 30, 2009 report, Diana W. Brennan, a physician's assistant, diagnosed hand sprain and released appellant to full duty as of January 6, 2010.

By decision dated February 9, 2010, OWCP denied appellant's claim on the basis that the evidence submitted was not sufficient to establish fact of injury.

Subsequently, appellant submitted a December 22, 2009 report by Dr. John T. Chance, a Board-certified orthopedic hand surgeon, who diagnosed right hand sprain with residual pain over the third phalanx. Dr. Chance indicated that appellant stepped out of his truck and slipped on black ice spraining his right hand in the performance of duty as a postal carrier. He placed appellant in a short-arm splint.

On March 4, 2010 appellant requested an oral hearing *via* telephone and submitted two narrative statements dated January 25 and February 3, 2010.

On June 16, 2010 an oral hearing was held *via* telephone before an OWCP hearing representative.

By decision dated August 5, 2010, an OWCP hearing representative affirmed the February 9, 2010 decision, finding that, while appellant established that the incident occurred as alleged, the evidence he submitted did not establish causal relationship between his right hand injury and the December 17, 2009 slip and fall incident.

On November 5, 2010 appellant requested reconsideration and submitted additional evidence, including a September 13, 2010 report by Diana H. Wagman, a physician's assistant, indicating that he was seen on December 22, 2009 with an injury sustained while working which she related was well documented in an initial note and on forms used for workers' compensation. He also submitted a December 22, 2009 report by Ms. Brennan, indicating that he was on mail

delivery, slipped on ice and injured fingers on his right hand. Appellant also resubmitted a December 18, 2009 report by Dr. O'Brien and a December 30, 2009 report by Ms. Brennan.

By decision dated January 20, 2011, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit new relevant and pertinent new evidence, did not show that OWCP erroneously applied or interpreted a point of law nor advanced a point of law or a fact not previously considered by OWCP.

### **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.<sup>2</sup> OWCP, through regulations, has imposed limitation on the exercise of its discretionary authority under section 8128(a).<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument is already in the case record.<sup>7</sup>

### **ANALYSIS**

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by OWCP; and he has not constituted relevant and pertinent new evidence not previously considered by OWCP.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.* 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).

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

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

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> See *A.L.*, *supra* note 4. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

In support of his November 5, 2010 reconsideration request, appellant submitted a September 13, 2010 report by Ms. Wagman and a December 22, 2009 report by Ms. Brennan. The Board finds that submission of these reports did not require reopening his case for merit review. OWCP denied appellant claim based on the lack of supportive medical evidence. These reports do not constitute medical evidence as physician's assistants are not physicians under FECA.<sup>8</sup> As the underlying issue is medical in nature, these reports are not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also submitted a December 18, 2009 report by Dr. O'Brien and a December 30, 2009 report by Ms. Brennan. The Board finds that submission of these reports did not require reopening appellant's case for merit review because he had submitted the same reports, which were previously reviewed by OWCP in a decision dated February 9, 2010. As the reports repeat evidence already in the case record, they are duplicative and do not constitute relevant and pertinent new evidence. Therefore, appellant has not established a basis for reopening his case.<sup>9</sup>

Because appellant only submitted repetitive and duplicative evidence with his request for reconsideration, the Board finds that OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that appellant failed to submit relevant and pertinent new evidence, a relevant legal argument not previously considered by OWCP or evidence or argument which shows that OWCP erroneously applied or interpreted a specific point of law. Therefore, OWCP properly refused to reopen his claim for further consideration of the merits of his claim under 5 U.S.C. § 8128.

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<sup>8</sup> 5 U.S.C. § 8101(2).

<sup>9</sup> *D.K.*, 59 ECAB 141 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 20, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 13, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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