

FACTUAL HISTORY

This case has previously been before the Board. By decision dated April 2, 2010, the Board reversed OWCP's November 14, 2008 decision finding that appellant did not establish that the September 25, 2008 incident occurred as alleged. The Board remanded the case to OWCP for failing to properly review all of the evidence submitted prior to its January 23, 2009 denial of his request for reconsideration.³ The findings of fact and conclusions of law from the prior decision are incorporated by reference.

On October 1, 2008 appellant, then a 40-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on September 25, 2008 he sustained back pain when a plastic tray handle broke while he was bending over, causing him to jerk his back. He first received medical care and notified his supervisor on October 1, 2008.

In an October 1, 2008 emergency note and duty status report (Form CA-17), Michael Nogan, a physician's assistant (PA), reported that appellant was injured on September 25, 2008 when he was at the feeding station and a letter tray slipped from his hands. Mr. Nogan noted muscle sprain and diagnosed lower back sprain.

By decision dated November 14, 2008, OWCP denied appellant's claim finding that he did not establish that the September 25, 2008 incident occurred as alleged and that there was no evidence that he sustained an injury in connection with the alleged work incident.

Appellant requested reconsideration on November 18, 2008. In support of his request, he submitted an October 1, 2008 medical report from his physician diagnosing lower back pain and an October 24, 2008 duty status report diagnosing lumbar strain.

By decision dated January 23, 2009, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.

On June 20, 2009 appellant sought review by the Board.

As previously noted, in an order dated April 2, 2010, the Board reversed the November 18, 2008 merit decision and remanded the case to OWCP to review all of the evidence submitted prior to its January 23, 2009 decision.⁴

On remand, appellant submitted a January 19 and April 20, 2010 progress notes from Dr. Peter Ecksong, a treating physician, who reported that appellant continued to have lower back pain from his September 25, 2008 injury. Dr. Ecksong diagnosed lower back pain and lumbar strain.

³ Docket No. 09-1825 (issued April 2, 2010).

⁴ *Id.*

By decision dated June 1, 2010, OWCP found that the evidence of record established the claimed incident but failed to support causal relationship between the diagnosed condition and the accepted September 25, 2008 work incident.

On August 31, 2010 appellant requested reconsideration. In support of his request, he submitted progress notes from Dr. Ecksong dated between May 24 to October 4, 2010. In a May 24, 2010 report, Dr. Ecksong noted that appellant complained of back pain from a workers' compensation injury on September 25, 2008. The June 29, 2010 medical report additionally noted that appellant complained of back pain after riding a mechanical bull on June 25, 2010. In an October 4, 2010 report, Dr. Ecksong also noted that appellant threw his back out at work on September 8, 2010 and had been diagnosed with a pinched nerve.

By decision dated January 5, 2011, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.⁵

LEGAL PRECEDENT

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.⁶ Section 10.608(b) of OWCP regulations provide 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.⁷

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 because appellant failed to show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent evidence not previously considered.

The issue presented on appeal 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.

⁵ The Board notes that appellant submitted additional evidence after OWCP rendered its January 5, 2011 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore, this additional evidence cannot be considered by the Board. 20 C.F.R. § 10.510.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Appellant may submit this evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

⁶ *D.K.*, 59 ECAB 141 (2007).

⁷ *K.H.*, 59 ECAB 495 (2008).

In his August 31, 2010 application for reconsideration, he did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a new and relevant legal argument. His argument was that his injury was employment related and he provided additional details regarding the events surrounding the September 25, 2008 employment incident. The underlying issue in this case was whether appellant's injury was causally related to the accepted September 25, 2008 employment incident. That is a medical issue which must be addressed by relevant medical evidence.⁸

While appellant submitted new progress notes dated May 24 to October 4, 2010 from Dr. Eckson, these reports are essentially repetitive of the physician's January 19 and April 20, 2010 reports previously submitted. Moreover, the additional information in the reports merely noted that appellant hurt his back riding a mechanical bull on June 25, 2010 and threw his back out at work on September 8, 2010. These slight additions do not compensate for the failure of the record to provide detailed medical rationale to explain and support the medical opinion that appellant's diagnosed conditions were caused or aggravated entirely or in part by the September 25, 2008 employment incident. A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, while appellant submitted new evidence, it was not relevant in addressing causal relationship.

Evidence submitted by appellant after the final decision cannot be considered by the Board. As previously noted, the Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its decision.⁹ Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 constitute 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).

⁸ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁹ 20 C.F.R. § 501.2(c)(1).

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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