

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

M.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fayetteville, NC, Employer**

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**Docket No. 11-1982
Issued: April 10, 2012**

Appearances:
Antonio J. Cruz, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 23, 2011 appellant, through his representative, filed a timely appeal from a February 25, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Since more than 180 days elapsed since the most recent merit decision of September 7, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly denied appellant's January 9, 2011 claim for reconsideration under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² For OWCP decisions issued prior to November 19, 2008, a claimant had 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. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

FACTUAL HISTORY

On October 9, 2009 appellant, then a 59-year-old mail processor, filed an occupational disease claim alleging that he suffered from lumbar spondylosis as a result of constant twisting, bending, reaching and sweeping as he worked on automation machines. He first became aware of his condition on April 30, 2007 and realized it resulted from his employment on May 4, 2007.

In an October 20, 2009 letter, the employing establishment controverted appellant's claim contending that the medical evidence did not establish that his back condition was causally related to his employment. Appellant had been on light duty since May 2007.

Appellant received medical treatment from Dr. Thirston Phillips, Board-certified in physical medicine and rehabilitation. In a June 14 and 25, 2007 reports, Dr. Thirston diagnosed lumbar spondylarthritis and radicular syndrome of the lower limbs.

In an April 28, 2007 record, Dr. Jorge L. Franco, a Board-certified family practitioner, noted that appellant was seen in the emergency room with complaints of left leg pain. He authorized appellant to return to light duty with restrictions. In an October 8, 2009 report, Dr. Franco noted appellant's history of chronic back pain and degenerative disc disease. He related that appellant was doing well until an April 30, 2007 work injury, which resulted in disc protrusion.

On October 26, 2009 OWCP advised appellant that the evidence submitted was insufficient to establish his claim and requested additional factual and medical evidence.

Appellant submitted additional historical medical reports to the record. In a June 28, 2007 report, Dr. Robin F. Koeleveld, a Board-certified neurological surgeon, related that appellant was at work several months prior when he developed a shooting pain from the right foot up the right leg. Appellant received medical treatment, but a lumbar magnetic resonance imaging (MRI) scan and x-rays did not reveal any conditions. Dr. Koeleveld reviewed his history and noted that a 2007 lumbar spine MRI scan showed fairly mild degenerative changes with no herniation or stenosis. She pointed out that appellant had unusual symptoms of shooting pains in his right leg and sometimes his left leg. Dr. Koeleveld opined that this was not typical for radiculopathy and concluded that she was not sure what the diagnosis was.

In an October 29, 2007 report, Dr. Michael M. Haglund, a Board-certified neurological surgeon, noted that MRI scan studies revealed some degenerative changes with some mild scoliosis. He stated that appellant would not benefit from any surgical intervention and would best be treated in the pain clinic.

In an August 20, 2009 MRI scan report, Dr. Richard Falter, Jr., diagnosed chronic disc extrusion at the T8-9 level with degenerative disc disease, osteophytosis and postoperative changes at vertebral column S3-4.

In an October 14, 2009 MRI scan of the lumbar spine, Dr. Max H. Faykus, Jr., a Board-certified diagnostic radiologist, noted appellant's complaints of low back and abdominal pain. He observed stable degenerative disc disease at L4-5 and L5-S1 and facet joint degenerative changes in the lower lumbar spine. Dr. Faykus also noted bridging osteophytes

anteriorly within the mid and upper lumbar spine and some disc space narrowing in a lower thoracic spine upper lumbar spine. He diagnosed stable diffuse chronic changes throughout the lumbar spine.

In a decision dated January 13, 2010, OWCP denied appellant's claim finding insufficient medical evidence to establish that he sustained a back condition causally related to factors of his employment.

On January 9, 2011 appellant, through his representative, requested reconsideration. In an attached statement, counsel stated that the latest July 21, 2010 incident occurred while appellant was working at the postal facility.

In a handwritten statement, a witness explained that she worked with appellant. She described an incident where she observed that he was not walking very well and advised him to go home because he was not going to make it that night.

In a May 6, 2010 statement, Antonio de Castro, an automation clerk, described a 2007 incident where appellant was reportedly hurt during work hours. He noticed that appellant was moving slowly and having difficulty moving a specific piece of equipment. Appellant asked his supervisor for permission to see his doctor. Mr. de Castro assisted him to his vehicle.

In a July 21, 2010 hospital report, Dr. Mark A. Boney, Board-certified in emergency medicine, noted that appellant was treated in the emergency room for low back pain. Appellant received ibuprofen for his back pain and discomfort and was seen by a physician's assistant. He was diagnosed with musculoskeletal low back pain. Dr. Boney stated that he agreed with the physician's assistant's recommendation to discharge appellant and instructed him to follow-up with his primary care provider.

In a July 27, 2010 MRI scan report, Dr. Faykus noted that appellant had a history of low back pain and observed stable severe degenerative disc disease at L5-S1. He diagnosed stable multilevel degenerative disc disease with no compression deformities.

By decision dated February 25, 2011, OWCP denied appellant's request for reconsideration finding that the additional evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a). It determined that the materials submitted were duplicative to the evidence already on record or immaterial to the issue of causal relationship.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.³ OWCP's regulations provide that OWCP may

³ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

review an award for or against compensation at anytime on its own motion or upon application. The employee shall exercise his right through a request to the district OWCP.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.⁶ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

The Board has no jurisdiction to review OWCP's January 13, 2010 merit decision denying appellant's occupational disease claim. As appellant did not file a timely appeal of that decision, the Board may not review the merits of his case. The only decision the Board may review is OWCP's February 25, 2011 nonmerit decision denying appellant's request for reconsideration. The only issue before the Board, therefore, is whether OWCP properly denied appellant's January 9, 2011 request for reconsideration. The Board finds that OWCP properly denied appellant's request for reconsideration as he did not meet any of the requirements sufficient to warrant merit review.

In his January 9, 2011 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument not previously considered by OWCP. To support his request for reconsideration, appellant submitted July 21, 2010 hospital records and a July 27, 2010 MRI scan report. Although these medical records were not previously considered, they fail to provide any opinion on causal relationship and are, therefore, irrelevant to his claim. The underlying issue on reconsideration was whether appellant submitted sufficient medical evidence to establish that he developed a back condition causally related to factors of his employment. The reports indicated that he complained of back pain and suffered from degenerative disc disease, but neither

⁴ 20 C.F.R. § 10.605; *see also* *R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁵ *Id.* at § 10.606(b); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

physician provided any opinion on the cause of appellant's back symptoms. Accordingly, these reports are not relevant as they do not address the underlying issue of causal relationship. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.⁹ Similarly, the witness statements provided did not address appellant's back symptoms and its relationship to his employment. As the underlying issue was medical in nature, these statements did not constitute relevant evidence.

Because appellant's request for reconsideration failed to show that OWCP erroneously applied or interpreted a specific point of law, failed to advance a relevant legal argument not previously considered by OWCP and failed to provide relevant and pertinent new evidence not previously considered by OWCP, the Board finds that OWCP properly denied further merit review of his case. The Board will affirm the February 25, 2011 decision.

On appeal, appellant related his belief that the constant wear and tear of working for the employing establishment for over 36 years caused his back symptoms. He did not, however, show that OWCP erroneously applied a specific point of law nor advance any new legal argument. Thus, appellant's request did not meet any of the requirements warranting further merit review.

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

CONCLUSION

The Board find that OWCP properly denied appellant's January 9, 2011 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

⁹ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2012
Washington, DC

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

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

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