

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

J.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Seattle, WA, Employer**

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**Docket No. 11-2075
Issued: April 20, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 27, 2011 appellant filed a timely appeal of a July 6, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for reconsideration without merit review. Because more than one year elapsed from the most recent merit decision dated February 4, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's 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 refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² For final adverse decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On November 18, 2010 appellant, then a 48-year-old mail handler, filed an occupational disease claim for chronic pain in both shoulders due to unloading containers from trucks at work. He became aware of the condition on July 25, 2010 and realized it was caused or aggravated by his work on November 1, 2010. Appellant stopped work on November 18, 2010. He submitted work restrictions from a physician's assistant.

By decision dated February 4, 2011, OWCP denied appellant's claim finding that he did not submit sufficient medical evidence to establish that work factors caused or aggravated his shoulder condition.

On May 2, 2011 appellant filed a claim for recurrence of disability on December 1, 2010. In a letter dated May 18, 2011, OWCP notified appellant that his claim was denied and it could not consider a recurrence on a denied claim. It advised appellant to pursue his appeal rights.

On May 24, 2011 appellant requested reconsideration. OWCP received a November 16, 2010 report from a physician's assistant.

By decision dated July 6, 2011, OWCP denied appellant's request for reconsideration without a review of the merits as his request neither raised substantial legal questions nor included new and relevant evidence and was insufficient to warrant merit review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA, OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(ii) Advances a relevant legal argument not previously considered by OWCP; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁴

³ 20 C.F.R. § 10.606(b).

⁴ *Id.*

ANALYSIS

Appellant disagreed with OWCP's February 4, 2011 decision, which denied his claim on the grounds that the medical evidence was insufficient to establish that employment factors caused or aggravated his claimed condition. In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law nor has he advanced a relevant legal argument not previously considered by OWCP. The evidence he submitted is not pertinent to the underlying issue in this appeal, which is medical in nature, whether he has established an injury in the performance of duty.

In his May 24, 2011 request for reconsideration, appellant did not assert or show any particular error of law and he did not advance a legal argument. He submitted a November 16, 2010 report from a physician's assistant. The Board notes that, while the underlying issue of causal relationship is medical in nature, section 8101(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by the applicable state law.⁵ Consequently, medical opinion, in general, can only be given by a qualified physician and lay individuals such as physicians' assistants are not competent to render a medical opinion under FECA.⁶ As the report from a physician's assistant does not constitute medical evidence under section 8101(2) it is not relevant to the underlying medical issue and is not a basis for reopening the claim for a merit review.

Appellant did not submit evidence or argument showing that OWCP erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent new evidence not previously considered by OWCP. Thus, OWCP properly denied his reconsideration request.

On appeal, appellant generally asserts that his condition is work related. Appellant's belief that his condition is work related is not relevant as it is not medical evidence. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁷ Appellant also provided new medical evidence on appeal. However, the Board has no jurisdiction to review this evidence for the first time on appeal.⁸

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

⁵ 5 U.S.C. § 8101(2).

⁶ *E.K.*, Docket No. 09-1827 (issued April 21, 2010).

⁷ *See David J. McDonald*, 50 ECAB 185 (1998).

⁸ 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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