

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

A.W., Appellant

and

**DEPARTMENT OF THE NAVY,
PORTSMOUTH NAVAL SHIPYARD,
Portsmouth, NH, Employer**

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**Docket No. 12-420
Issued: August 1, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 1, 2011 appellant filed a timely appeal from a September 2, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from the last merit decision pertaining to the issue of attorney fees dated February 19, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his 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 reconsideration of his claim under 5 U.S.C. § 8128.

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. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

On January 21, 2004 appellant, then a 46-year-old pipefitter helper, injured his back while carrying fire extinguishers. He filed a claim for benefits on January 26, 2004, which OWCP accepted for lumbar strain and thoracic strain.

On November 7, 2009 appellant obtained the services of Marshall Tinkle, attorney, to represent him before OWCP. By letter dated November 10, 2009, a copy of which was forwarded to him, OWCP acknowledged its receipt of his statement designating Mr. Tinkle as his legal representative and included an explanation of its procedures pertaining to representatives' fee applications. It informed appellant that in each case where a representative's fee is desired, an application for approval of the fee must be submitted to OWCP; this application must contain an itemized statement acknowledging that the claimant is aware that he or she must pay the fee and that OWCP is not responsible for paying (or reimbursing) the fee or other costs associated with the representative's services.

In an OWCP memorandum dated August 27, 2010, it was indicated that appellant had called regarding reimbursement for attorneys' fees. OWCP informed him that under FECA, there is no provision for reimbursement of attorneys' fees. In an OWCP memorandum dated August 30, 2010, it was indicated that appellant had called indicating his intention to request reimbursement of attorney's fees pursuant to the Equal Access to Justice Act (EAJA). OWCP informed him that FECA to which he was referring was not under the jurisdiction of the Department of Labor.

On September 2, 2010 appellant signed his assent to a statement concerning attorneys' fees. The statement indicated that: he had retained Mr. Tinkle to represent him in this case; appellant had reviewed the accompanying fee application; he agreed with the amount charged; appellant was aware that he must pay the fees; and that OWCP was not responsible for paying the fee or other costs.

By decision dated September 20, 2010, OWCP denied appellant's request for payment of legal services pursuant to the EAJA.³ It cited the regulations at 20 C.F.R. § 10.702,⁴ which states that a claimant is solely responsible for payment of the attorney fee, that he will not be reimbursed by OWCP and that OWCP is not in any way liable for the amount of the fee.

By letter dated July 23, 2011, appellant requested reconsideration, asking that OWCP pay the entire bill for his legal services, plus interest. He contended that he was entitled to reimbursement for attorneys' fees based on 5 U.S.C. § 504(a)(1) -- the EAJA -- which states that an agency which conducts adversary adjudication shall award fees and other expenses incurred by that party in connection with said proceeding unless the agency was substantially justified or special circumstances make the award unjust.⁵ Appellant also argued that OWCP had

³ This decision stated that appellant's attorney submitted an August 24, 2010 letter indicating that appellant requested reimbursement of his legal fees pursuant to the EAJA. The letter is not contained in the instant record.

⁴ 20 C.F.R. § 10.702.

⁵ See 5 U.S.C. § 504(a)(1).

consistently engaged in improper practices in adjudicating the instant case and reviewing the medical evidence since he initially filed his claim. He asserted that these practices had delayed the resolution of the case.

By decision dated September 2, 2011, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require it to review its prior decision. It found that his argument did not have a reasonable color of validity, given that 5 U.S.C. § 504 were not applicable to FECA because its proceedings are not adversarial.

LEGAL PRECEDENT

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by establishing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.⁶ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁷

ANALYSIS

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 regulations at 20 C.F.R. § 10.702 specifically state that a claimant is solely responsible for payment of the attorney fee, that he will not be reimbursed by OWCP, and that OWCP is not in any way liable for the amount of the fee. In its November 10, 2009 letter and in subsequent August 2010 telephone conversations, OWCP informed appellant that he was not entitled to reimbursement of attorney fees. In addition, on September 2, 2010 appellant signed his assent to a statement from his attorney, which was attached to his fee request. There he indicated that he was aware that he must pay the attorney fees and that OWCP was not responsible for paying them. Appellant, however, argued in his reconsideration request that he was entitled to reimbursement of attorney fees pursuant to the EAJA at 5 U.S.C. § 504.

The Board has held that while reopening of a case may be predicated on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.⁸ As OWCP indicated, the Board has long held that the EAJA, which pertains to adversarial adjudications, is not applicable to FECA, whose proceedings are not adversarial in nature.⁹ Therefore it properly found that the argument proffered by the claimant has no reasonable color of validity and does not serve as a basis for merit review. In addition, appellant has provided no support for his argument that

⁶ 20 C.F.R. § 10.606(b). *See generally* 5 U.S.C. § 8128(a).

⁷ *Howard A. Williams*, 45 ECAB 853 (1994).

⁸ *Cleopatra McDougal-Saddler*, 50 ECAB 367 (1999).

⁹ *Dianna L. Smith*, 56 ECAB 524 (2005); *see also Andrew A. Miller*, 34 ECAB 1002 (1983).

OWCP had engaged in improper practices in adjudicating the instant case. His reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law. It also failed to advance a point of law or fact not previously considered by OWCP. Therefore, OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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