

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 28, 2010 appellant, then a 62-year-old welder supervisor, filed a traumatic injury claim (Form CA-1) alleging that he sustained an abscess of his left wrist on May 20, 2010 when he jammed his wrist in the door. He stopped work on May 25, 2010 and provided notice to his supervisor on June 21, 2010. Appellant's supervisor indicated in a separate statement that on May 20, 2010 appellant complained that his arm was sore after he tried pushing a jammed door open.

In support of his claim, appellant submitted medical reports dated June 22 and 24, 2010 from Dr. Leonard Leonidas, Board-certified in internal medicine, and Dr. R. Maxwell Alley, Board-certified in orthopedic surgery. The reports indicated that appellant underwent surgery for drainage of the carpal canal and forearm on May 28, 2010, was discharged from the hospital on May 31, 2010 and was released to work on June 21, 2010.

By decision dated July 7, 2010, OWCP accepted appellant's claim for abscess of the left wrist and forearm. In a separate decision of the same date, it denied his claim for continuation of pay finding that the injury was not reported on an appropriate form within 30 days of the injury.

By letter dated June 24, 2011, appellant, through his attorney, requested reconsideration of OWCP's July 7, 2010 decision denying continuation of pay. Counsel argued that the Form CA-1 was filed within 30 days of appellant's work stoppage on May 25, 2010, that appellant provided notice to his supervisor on the date of injury, that he was incapacitated due to his injury and that the employing establishment was closed on June 18, 2010 which caused a delay in timely filing his claim.

In a narrative statement, appellant provided an explanation as to why his claim was filed 31 days after his date of injury. He reported that on May 28, 2010 he was rushed into emergency surgery for his wrist. During his June 17, 2010 follow up, appellant's physician released him to work on June 21, 2010 because the employing establishment was closed on Friday, June 18, 2010. Thus, appellant's delay in filing his claim within 30 days was a result of his incapacitation from surgery and because the employing establishment was closed on June 18, 2010.

In support of his claim, appellant resubmitted his supervisor's statement and physician's reports already of record.

By decision dated September 21, 2011, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence.³

LEGAL PRECEDENT

To reopen a case for merit review under section 8128(a), 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.⁴ 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.⁵

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.

The only OWCP decision before the Board on appeal is the September 21, 2011 decision denying appellant's application for review. Because more than 180 days elapsed between the date of OWCP's most recent merit decision on July 7, 2010 and the filing of appellant's appeal on February 27, 2010, the Board lacks jurisdiction to review the merits of his claim.⁶

The issue presented on appeal is whether appellant met any of the three requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his June 24, 2011 application for reconsideration, appellant's attorney did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new, relevant legal argument. Counsel argued that OWCP improperly denied continuation of pay because appellant's supervisor had notice on the date of injury and that appellant's delay in filing was a result of incapacitation from his injury, as well as the employing establishment closure on June 18, 2010. FECA makes no provision for an exception to the time limitation in section 8118(a).⁷ No exceptional or mitigating circumstance, including error by the employing

³ The Board notes that appellant submitted additional evidence after OWCP rendered its September 21, 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. § 501.2(c)(1); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

⁶ 20 C.F.R. § 501.3(e) requires that an application for review by the Board be filed within 180 days of the date of OWCP's final decision being appealed.

⁷ 5 U.S.C. § 8118(a).

establishment, can entitle a claimant to continuation of pay who has not filed a claim within 30 days of the date of injury.⁸ Therefore, this argument is not relevant to the issue of whether appellant timely filed a claim for continuation of pay,⁹ and does not show that OWCP erroneously applied or interpreted a specific point of law.¹⁰ Counsel also resubmitted appellant's supervisor's statement and medical records previously of record. 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.¹¹ As appellant did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to further merit review.¹²

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 submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review in its September 21, 2011 decision.¹³

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration without a merit review.

⁸ *Id.*

⁹ 20 C.F.R. § 10.210 states that appellant must complete and submit a Form CA-1 to the employing establishment as soon as possible but no later than 30 days from the date that the traumatic injury occurred.

¹⁰ The Board notes that the exceptional circumstances provision of section 8122(d)(3), which may excuse the untimely filing of an original claim for compensation under section 8122(a) and (b), is not applicable to section 8118(a) which concerns a claim for continuation of pay. *See William E. Ostertag*, 33 ECAB 1925 (1982).

¹¹ *James W. Scott*, 55 ECAB 606, 608 n.4 (2004); *Freddie Mosley*, 54 ECAB 255 (2002).

¹² *See* 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB 207 (2005).

¹³ *Sherry A. Hunt*, 49 ECAB 467 (1998).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated September 21, 2011 is affirmed.

Issued: August 14, 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