

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

H.D., Appellant

and

**DEPARTMENT OF THE NAVY, PUGET
SOUND NAVAL SHIPYARD, Bremerton, WA,
Employer**

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**Docket No. 12-264
Issued: June 14, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 22, 2011 appellant filed a timely appeal from an October 6, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than 180 days elapsed between the most recent merit decision of February 10, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 26, 2006 appellant, then a 51-year-old maintenance worker, filed a claim for occupational disease. He alleged that his employment activities required working on hard surfaces, climbing ladders, and working on his hands and knees and aggravated his low back condition and caused bilateral loss of knee cartilage.

In support of his claim, appellant submitted progress reports from his treating physician, Dr. Bosco Soares, dated June 26, 2003 to January 20, 2006. Dr. Soares diagnosed degenerative disc disease and knee pain. He also submitted an October 16, 2003 radiology report from Dr. Reiley Kidd, a Board-certified radiologist, who diagnosed left knee degenerative joint disease and right knee effusion.

By decision dated April 11, 2006, OWCP denied appellant's claim finding that the medical evidence failed to establish that his back and knee conditions were causally related to the accepted employment activities.

Appellant requested a hearing before the Branch of Hearings and Review on May 2, 2006.

In a report dated May 17, 2006, Dr. Karen M. Wooten, an attending physician, diagnosed bilateral medial compartment knee osteoarthritis with bilateral patellar compartment osteoarthritis and chronic back pain. She opined that the degree of physical labor required by appellant's employment duties very likely contributed to his diagnosed conditions.

On July 12, 2006 OWCP's hearing representative remanded the case for further medical development.

In an August 3, 2006 report, Dr. David Smith, a Board-certified orthopedic surgeon, selected as a second opinion physician, opined that appellant's bilateral knee and lumbar conditions were degenerative in nature and were not causally related to his employment as a maintenance worker.

On September 25, 2006 OWCP found a conflict in the medical opinion between appellant's physicians and Dr. Smith regarding the cause of appellant's diagnosed conditions. It referred appellant for an impartial medical examination with Dr. William Thieme, a Board-certified specialist in orthopedic surgery. In an October 31, 2006 report, Dr. Thieme found that appellant's back and bilateral knee conditions were preexisting or degenerative in nature and not due to his employment as a maintenance worker.

In a November 13, 2006 decision, OWCP denied appellant's claim based upon Dr. Thieme's report.

Appellant requested reconsideration on February 15, 2007. Following merit review on August 30, 2007, OWCP denied modification of the prior decision.

Appellant filed an appeal with the Board on January 22, 2008. By decision dated July 11, 2008, the Board vacated the denial of the claim and remanded the case to OWCP. On remand OWCP was to obtain a supplemental report from Dr. Thieme addressing causal relationship.²

In a supplemental report dated September 29, 2008, Dr. Thieme opined that no specific or general work duties had aggravated appellant's knee or lumbar conditions.

By decision dated October 7, 2008, OWCP denied appellant's claim based upon Dr. Thieme's impartial opinion.

Appellant filed a second appeal with the Board on October 28, 2008. By decision dated July 6, 2009, the Board found that Dr. Thieme had not resolved the conflict of medical opinion. The Board remanded the case for a new impartial medical evaluation.³

On September 17, 2009 OWCP prepared a statement of accepted facts and referred appellant to Dr. Lance Brigham, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 5, 2009, Dr. Brigham diagnosed appellant with a history of osteoarthritis of the knees and degenerative lumbar disc disease. Regarding causal relationship, he stated: "There was no job[-]related injury to either the low back or the knee, as documented by Mr. Davis, and it is felt by this examiner that his work was a major contributing factor to the degenerative changes of the lumbar spine or knees."

OWCP again denied appellant's claim by decision dated October 29, 2009.

Appellant requested reconsideration on December 14, 2009. In support of this request for reconsideration, he submitted a November 19, 1997 emergency room report signed by Dr. Paul Tice, Board-certified in emergency medicine. This report noted appellant's history of back injury while in the Navy and diagnosed low back pain with suspected sciatica secondary to herniated disc, L3-4.

By decision dated January 21, 2010, OWCP denied merit review of the case.

Appellant filed another appeal with the Board on February 17, 2010. By decision dated November 23, 2010, the Board found that the conflict of medical evidence was still unresolved. The Board again remanded the case and directed OWCP to obtain a supplemental report from Dr. Brigham to address the issue of whether appellant's work duties as provided in the statement of accepted facts caused or aggravated his diagnosed back and knee conditions.⁴

In a January 10, 2011 supplemental report, Dr. Brigham concluded that appellant's lumbar and bilateral knee conditions were solely due to his obesity, genetics and the natural

² Docket No. 08-348 (issued July 11, 2008). The facts of the case as presented in the prior decision are hereby incorporated by reference.

³ Docket No. 09-93 (issued July 6, 2009).

⁴ Docket No. 10-877 (issued November 23, 2010).

progression of the degenerative process. He added that appellant's back and bilateral arthritis knee conditions were not permanently aggravated or caused by any of his work activities.

By decision dated February 10, 2011, OWCP found that the weight of the medical evidence rested with Dr. Brigham's reports and denied appellant's claim.

Appellant requested reconsideration on July 18, 2011. He submitted a document issued by American Academy of Orthopedic Surgeons titled "Frequently Asked Questions about Osteoarthritis of the Knee," which discussed the causes of knee osteoarthritis as well as the factors that increased the risk of developing knee osteoarthritis.

By decision dated October 6, 2011, OWCP denied further merit review of the case on the grounds that appellant did not advance any legal arguments to establish that OWCP erred in its decision, or submit any new and relevant evidence not previously considered.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP regulations provide that the evidence or argument submitted by a claimant must either: (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 Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

ANALYSIS

The Board does not have jurisdiction over the merits of the claim. The only issue is whether OWCP abused its discretion by denying merit review on October 6, 2011.

Appellant requested reconsideration on July 18, 2011 and alleged that OWCP had failed to obtain an explanation from the referee examiner as to why his job duties did not cause or aggravate his diagnosed conditions. This assertion does not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. The Board notes that OWCP obtained Dr. Brigham's supplemental report dated January 10, 2011 and based the merit decision of February 10, 2011 upon this report. The Board does not have jurisdiction to review the February 10, 2011 decision.

Appellant also submitted copies of an Internet article that described the causes of knee osteoarthritis. This evidence, while new, is not relevant to the underlying medical issue. The Board has held that such articles lack evidentiary value as they are of general application and not determinative regarding whether specific conditions are causally related to the particular

⁵ 5 U.S.C. § 8128(a).

⁶ *E.K.*, Docket No. 09-1827 (issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

⁷ *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.608(b).

employment factors in a claim.⁸ Therefore, appellant did not provide new and pertinent evidence warranting further merit review of his case.

Appellant did not submit new and pertinent medical evidence. Furthermore, he did not contend that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP.⁹ Because appellant did not provide evidence or argument satisfying any of the three regulatory criteria for reopening a claim, he is not entitled to reconsideration under section 8128(a) of FECA.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a) without further merit review.

ORDER

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

Issued: June 14, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

⁸ *K.R.*, Docket No. 11-34 (issued August 2, 2011); *B.C.*, Docket No. 10-691 (issued October 19, 2010).

⁹ On appeal, appellant also argued that OWCP omitted sending him Dr. Brigham's January 10, 2011 report before issuing the February 10, 2011 decision, thus denying his chance to dispute Dr. Brigham's findings. The Board has no jurisdiction over this issue. *See* 20 C.F.R. § 10.12(a)(3) (any administrative appeal taken from a denial issued by the employing establishment or OWCP shall be filed with the Solicitor of Labor in accordance with 29 C.F.R. § 71.7 and 71.9).