

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

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**B.H., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Anthony, TX, Employer**

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**Docket No. 12-474  
Issued: June 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 December 27, 2011 appellant filed a timely appeal from an August 24, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days has elapsed from the last merit decision dated February 8, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> 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**

Appellant, a 34-year old correctional officer, injured his lower back, his right upper back, and his right wrist and forearm on December 3, 1985 when he slipped while carrying a heavy juice jug up a flight of stairs. He filed a claim for benefits on December 4, 1985, which OWCP accepted for right elbow and forearm sprain, lumbar sprain and intervertebral disc disorder. OWCP paid compensation for total disability and placed appellant on the periodic rolls.

In order to determine appellant's current condition and ascertain whether he still suffered residuals from his accepted conditions, OWCP referred appellant for a second opinion examination with Dr. Randy J. Pollet, Board-certified in orthopedic surgery. In a July 8, 2010 report, Dr. Pollet reviewed the medical history and the statement of accepted facts and stated findings on examination. He stated that, with reasonable medical probability, appellant's accepted lumbar strain/sprain, right elbow strain and forearm strain conditions had resolved. Dr. Pollet advised that he still had minimal impairment and mild residual symptoms in the lumbar spine but opined that most of these symptoms were related to age and were degenerative in nature. He asserted that appellant's lumbar sprain had been treated adequately and surgically with good results. Appellant was asymptomatic as far as the right elbow, right forearm, right shoulder and neck were concerned and his overall physical examination was quite reasonable for his age. Dr. Pollet opined that appellant could return to his regular duty as tolerated.

On January 5, 2011 OWCP issued a notice of proposed termination of compensation to appellant. It found that the weight of the medical evidence, as represented by the opinion of Dr. Pollet, the second opinion physician, established that his accepted right elbow strain, right forearm strain and lumbar sprain/strain conditions had resolved and that he had no residuals from the December 3, 1985 work injury. OWCP allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not submit any additional medical evidence.

By decision dated February 8, 2011, OWCP terminated appellant's compensation, finding that Dr. Pollet's referral opinion represented the weight of the medical evidence.

By letter dated March 14, 2011, appellant requested reconsideration. He asserted that a neurologist could provide a more accurate evaluation than an orthopedic surgeon. Appellant stated that he would forward a medical report from his treating neurologist.

On August 24, 2011 OWCP received a July 25, 2011 report from Dr. Howard M. Lee, Jr., a neurosurgeon. In this report, Dr. Lee provided extensive examination findings and concluded that appellant's condition had deteriorated since 2001 and he remained totally disabled.

By decision dated August 24, 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 stated that appellant had submitted no new and relevant medical evidence.

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</sup> OWCP's regulations provide that 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.<sup>4</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>6</sup>

## ANALYSIS

Appellant requested reconsideration on March 14, 2011, following the termination of his compensation benefits. He noted that a report from his neurologist would be forthcoming. In support of this request for reconsideration, appellant submitted the July 25, 2011 report from Dr. Lee. This report was received by OWCP on August 24, 2011, but OWCP denied appellant's request for reconsideration on that date, specifically noting that it had not received any medical evidence in support of the request for reconsideration.

As the Board's decisions are final with regard to the subject matter appealed, it is crucial that OWCP address all relevant evidence received prior to the issuance of its final decision.<sup>7</sup> OWCP failed to consider relevant evidence it received prior to the issuance of the August 24, 2011 decision. This case will be remanded for a proper review of the evidence and issuance of an appropriate *de novo* final decision.

## CONCLUSION

The Board finds that this case is not in posture for decision.

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<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [her] own motion or on application." 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(b).

<sup>7</sup> See *William A. Couch*, 41 ECAB 548 (1990).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 24, 2011 decision be set aside and the case remanded to Office Workers' Compensation Programs for further proceedings consistent with this opinion.

Issued: June 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