

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

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C.W., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Philadelphia, PA, Employer )

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**Docket No. 12-677**

**Issued: September 18, 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  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 6, 2012 appellant filed a timely appeal from a December 21, 2011 decision of the Office of Workers' Compensation Programs (OWCP) that denied his request for reconsideration without reviewing the merits of the case. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only over the nonmerit issue in this case. Because more than 180 days elapsed from the issuance of the last merit decision on January 19, 2011 to the filing of this appeal on February 6, 2012, the Board lacks jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that he was denied due process and that the medical evidence establishes that his current spinal condition is related to his federal employment.

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

## **FACTUAL HISTORY**

This case has previously been before the Board. The facts as set forth in the Board's prior decision are hereby incorporated into this decision.<sup>2</sup>

The Board remanded this case to OWCP as it adjudicated an undated letter received on September 9, 2009 as a request for an oral hearing rather than as a request for reconsideration of a November 6, 2000 decision denying appellant's claim of a recurrence of disability or new injury on August 25, 1999.

By decision dated January 18, 2011, OWCP conducted a merit review. It found that appellant failed to establish a recurrence of disability as he did not provide a rationalized medical report from a physician that related the alleged recurrence of August 25, 1999 to the accepted conditions resulting from the July 23, 1992 employment injury.

On October 31, 2011 appellant requested reconsideration of the January 18, 2011 decision. Subsequently, he submitted a December 5, 2011 report by Dr. Randall N. Smith, an attending Board-certified orthopedic surgeon, wherein he opined that appellant had a chronic cervical and lumbar discogenic and myofascial problem with sciatica as a result of the August 25, 1999 work injury. Dr. Smith indicated that further studies were needed.

By decision dated December 21, 2011, OWCP denied reconsideration, finding that the evidence was insufficient to warrant further merit review.

## **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>3</sup> its 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>

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<sup>2</sup> Docket No. 10-484 (issued October 19, 2010). OWCP accepted that on July 23, 1992 appellant, then a 35-year-old maintenance laborer, sustained thoracic and lumbar strain and sprain while in an elevator during the performance of duty.

<sup>3</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the 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 § 10.607(b).

### ANALYSIS

The Board does not have jurisdiction to review the merits of the case. The most recent merit decision was issued by OWCP on January 18, 2011, more than 180 days prior to the appeal in this case. The sole issue on appeal is whether OWCP properly denied his reconsideration request. Appellant's claim had been denied for a recurrence of disability on August 25, 1999.

In requesting reconsideration, appellant did not argue that OWCP erroneously interpreted a specific point of law or advance a relevant legal argument not previously considered. He submitted the December 5, 2011 treatment report of Dr. Smith, who stated generally that appellant had chronic cervical and lumbar discogenic and myofascial problem with sciatica as a result of an August 25, 1999 work injury. This report does not relate an accurate history of the July 23, 1992 employment injury that is the subject of this claim or address causal relationship in terms of the 1992 elevator incident. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>7</sup> Accordingly, appellant has not submitted evidence sufficient to require OWCP to reopen the case for further merit review.<sup>8</sup>

### CONCLUSION

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

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<sup>7</sup> *Edward Mathew Diekemper*, 31 ECAB 224 (1979); *J.K.*, Docket No. 11-1759 (issued February 21, 2012).

<sup>8</sup> Appellant submitted new evidence on appeal. As the Board noted in its April 12, 2012 letter to appellant, the Board may not consider evidence for the first time on appeal that was not before OWCP at the time it issued its final decision in the case. 20 C.F.R. § 501.2(c)(1).

**ORDER**

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

Issued: September 18, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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