

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

K.D., Appellant)
)
)
and) **Docket No. 13-1127**
) **Issued: August 14, 2013**
)
DEPARTMENT OF THE TREASURY,)
BUREAU OF ENGRAVING, Washington, DC,)
Employer)

Appearances:

Alan J. Shapiro, Esq., for the appellant
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 April 9, 2013 appellant, through his attorney, filed a timely appeal from a March 18, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Because more than 180 days has elapsed between the last merit decision dated July 11, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the March 18, 2013 nonmerit decision.

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 26, 2011 appellant, then a 40-year-old carpenter, filed an occupational disease claim alleging that on November 18, 2005 he first realized that left medial epicondylitis, left, cubital carpal tunnel syndrome with pain and left hand and elbow numbness were due to his job duties of swinging a hammer. On the back of the form, the employing establishment stated that appellant first informed his supervisor of his condition on October 26, 2011.

In support of his claim, appellant submitted medical evidence reports during the period November 18, 2005 through October 19, 2011 from Dr. Lawrence I. Silverberg, a treating Board-certified family medicine practitioner, diagnosing left medial epicondylitis with mild cubital tunnel syndrome and noting an injury date of approximately April 2005 in a May 24, 2006 report. In a November 18, 2005 report, Dr. Silverberg reported a history of injury which involved appellant lifting a heavy box at work the previous Friday when he felt a tear.

Appellant also submitted an October 19, 2011 attending physician's report from Dr. Kristin Nesbitt, an attending Board-certified orthopedic surgeon, diagnosing medial epicondylitis of the elbow and ulnar nerve lesion. Dr. Nesbitt checked "yes" to the question of whether this condition had been caused or aggravated by employment duties with no explanation. Under history of injury, she related that appellant works as a carpenter, which involves repeated use of arms and hands.

By letter dated November 25, 2011, OWCP informed appellant as to the five elements for establishing a claim under FECA and informed him that the evidence was insufficient to establish that he had timely provided notification of his injury. Appellant was advised as to the medical and factual evidence required to support his claim. No evidence was received.

By decision dated December 27, 2011, OWCP denied appellant's claim on the grounds that the evidence was insufficient to establish that his claim had been timely filed.

Subsequent to the denial of his claim, OWCP received medical evidence as set forth below.

On December 9, 2011 Dr. Nesbitt reported that appellant was first seen on November 18, 2005 for elbow pain. Appellant related that he had medial elbow pain since lifting a heavy box at work when he felt a tear. Diagnoses included left medial epicondylitis with left cubital tunnel syndrome. In concluding, Dr. Nesbitt attributed appellant's condition to his 2005 injury with continuing aggravation by the repetitive and lifting work duties.

On January 3, 2012 appellant requested reconsideration.

In a letter dated January 24, 2012, counsel requested a telephonic hearing before an OWCP hearing representative. A hearing was held on April 20, 2012 at which appellant testified and was represented by counsel. During his testimony, appellant attributed his condition to an injury sustained in November 2005. He stated that he went to the health unit on November 10, 2005 and reported the injury to George Otis, his supervisor. Appellant stated that he used the date of November 18, 2005 on the claim form because that was the date he was first diagnosed

with an elbow condition. Lastly, he testified that he lost no time from work due to his elbow condition.

Following the hearing, OWCP received a copy of a November 10, 2005 injury form and November 15, 2005 progress notes stating that appellant felt a pain in his left elbow after lifting some heavy lifting. The form report noted the name of an acting supervisor, Mr. Otis and a checkmark indicating an aggravation of a previously claimed injury.

By decision dated July 11, 2012, OWCP's hearing representative affirmed the denial of his claim on the grounds that it was not timely filed. She found that the claim was a traumatic injury claim rather than an occupational disease claim based on appellant's testimony. In concluding, the hearing representative found appellant failed to comply with the timeliness requirements of 5 U.S.C. § 8122(a) as the record contained no factual documentation regarding the November 10, 2005 incident or whether appellant's supervisor or employing establishment had actual knowledge of the incident or injury on November 10, 2005.

On December 19, 2012 counsel requested reconsideration and submitted a November 16, 2012 report from Dr. Nesbitt in support of his request. Dr. Nesbitt related that appellant had been treated on November 18, 2005 for an injury he had sustained at work while lifting a heavy box. Diagnoses included medial epicondylitis. Dr. Nesbitt provided physical findings and opined that appellant's work duties aggravated his symptoms. In concluding, she opined that appellant sustained an employment injury on November 18, 2005. She opined that appellant's left medial epicondylitis and cubital tunnel syndrome are aggravated by the repetitive nature of his work duties.

By decision dated March 18, 2013, OWCP denied reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by OWCP.³ 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.⁴ 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.⁵

² *Id.* at §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

³ 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁴ *Id.* at § 10.607(a). *See S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁵ *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

ANALYSIS

Appellant's December 19, 2012 request for reconsideration did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by OWCP. The Board finds that appellant is not entitled to a review of the merits of his claim based on the first and second requirements under section 10.606(b)(3).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. Dr. Nesbitt opined in a November 16, 2012 report that appellant sustained a work injury on November 18, 2005 and that his left medial epicondylitis and left cubital tunnel conditions had been aggravated by his employment duties. This report does not pertain to the issue of whether he timely filed a claim for a traumatic injury under 5 U.S.C. § 8122 of FECA. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁶

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his December 19, 2012 request for reconsideration.⁷

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

⁶ *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *R.M.*, 59 ECAB 690 (2008); *D'Wayne Avila*, 57 ECAB 642 (2006).

⁷ *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *Candace A. Karkoff*, 56 ECAB 622 (2005) (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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 18, 2013 is affirmed.

Issued: August 14, 2013
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