

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

P.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

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**Docket No. 12-1819
Issued: February 22, 2013**

Appearances:
Michael David, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 4, 2012 appellant, through his representative, filed a timely appeal of a June 4, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Since more than 180 days has elapsed between the last merit decision on January 28, 2011 and the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim 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 determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim pursuant to 5 U.S.C. 8128(a).

FACTUAL HISTORY

On February 6, 1989 appellant, then a 32-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on that date when he turned while carrying

¹ 5 U.S.C. § 8101 *et seq.*

his mail pouch. OWCP accepted the claim for a lumbar sprain. The record indicates that appellant had a separate claim for injuries in a motor vehicle accident on July 10, 2006 which was accepted for cervical and lumbar sprains, mild cerebral concussion and multiple contusions.²

Appellant returned to a light-duty position. On November 18, 2010 he filed a claim for compensation (Form CA-7) commencing April 24, 2010. The time analysis CA-7a forms submitted indicated that, as of April 26, 2010, appellant began working variable part-time hours and claimed compensation for hours not worked. The forms stated, "No work provided."

By letter dated November 30, 2010, OWCP stated that the available evidence indicated that appellant had worked intermittently due to the National Reassessment Process (NRP). It requested additional factual and medical evidence.

In a decision dated January 28, 2011, OWCP denied the claim for compensation commencing April 24, 2010. It stated that appellant's work hours were reduced pursuant to NRP and there was no medical evidence to establish the claim for compensation.

On December 12, 2011 appellant requested reconsideration of the claim. In a letter dated December 8, 2011, appellant's representative stated that OWCP's denial of the claim was based on its belief that appellant's lack of work was pursuant to a reduction-in-force (RIF). The representative argued that there had been no RIF at the employing establishment, citing the definition of a RIF as provided by the employing establishment labor agreement. The letter stated the evidence regarding appellant's "duties before NRP," as well as a 2006 work restriction medical report (OWCP5c) and a duty status report CA-17 form dated October 16, 2009 were being submitted.³ The evidence submitted included light-duty job offers from 1995, 2005, 2007 and 2009.

Appellant submitted a statement dated December 9, 2009 discussing his light-duty job assignments. In a July 15, 2010 note, he stated that his job duties were not the same on a daily basis. Appellant also submitted portions of the employing establishment labor agreement with respect to RIFs.

By decision dated June 4, 2012, OWCP determined that the request for reconsideration was insufficient to warrant a merit review of the claim. It found that appellant had not met the requirements for a merit review of the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by

² The claims have been administratively combined, with the 1986 claim designated as the master file.

³ There is no indication that medical evidence was submitted with the reconsideration request. The record contains an October 16, 2009 CA-17 form from a family practitioner in the master file that was received on January 4, 2011 and an OWCP 5c form dated February 22, 2006 that was received on December 20, 2010.

⁴ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

submitting a written application for reconsideration that sets forth arguments and contains evidence that either: “(1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent evidence not previously considered by OWCP.”⁵ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

The merit decision in the case was dated January 28, 2011 and denied appellant’s claim for intermittent hours of wage loss commencing on or about April 26, 2010. The issue presented before the Board is whether his application for reconsideration met one of the standards of 20 C.F.R. § 10.606(b)(2) to require OWCP to review the merits of the claim for compensation.

As noted above, an application for reconsideration that shows that OWCP erroneously applied or interpreted a specific point of law, or advances a relevant legal argument not previously considered by OWCP, will require a merit review. In this regard, appellant asserts that OWCP had denied the claim because it believed that he had been subject to a RIF. Appellant argued that he had not been subject to a RIF and, therefore, OWCP had erred in denying the claim.

The January 28, 2011 OWCP decision does not make a finding that appellant was subject to a RIF or deny the claim on that basis.⁷ It stated that the evidence indicated that his hours had been reduced pursuant to NRP and the claim was denied because the medical evidence was insufficient to establish the claim. Appellant did not discuss NRP procedures or show that a specific point of law was erroneously applied or interpreted. The argument as to a RIF is not relevant to the issue as there is no indication that OWCP based its decision on a determination with respect to a RIF. Where the legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.⁸

The denial of the claim for compensation commencing April 26, 2010 was based on a review of the medical evidence. In this regard appellant did not submit any new and relevant evidence. The December 8, 2011 letter referred to the submission of medical evidence, but there is no indication that additional medical evidence was submitted. The evidence noted was previously of record. The Board finds that appellant did not submit relevant and pertinent evidence not previously considered by OWCP.

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994). In the present case, the “merits” of the claim would be the termination of compensation effective October 13, 2011.

⁷ As noted in OWCP’s procedures, a true RIF applies to both employees performing full duty as well as employees working light duty. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (October 2009).

⁸ *See Norman W. Hanson*, 40 ECAB 1160 (1989).

The application for reconsideration 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 provide relevant and pertinent evidence not previously considered by OWCP. The Board accordingly finds that OWCP properly denied merit review of the case.

On appeal, appellant again states that there was no RIF at the employing establishment. He noted that the employing establishment had started NRP and it took light-duty work away from employees. As noted above, the only issue before the Board was whether appellant's application for reconsideration has met any of the requirements of 20 C.F.R. § 10.606(b)(2). The argument as to a RIF was raised by appellant in the application for reconsideration and for the reasons noted above, is not sufficient to warrant a merit review of the claim for compensation.

CONCLUSION

The Board finds that appellant's application for reconsideration was not sufficient to warrant a merit review of the claim for compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 4, 2012 is affirmed.

Issued: February 22, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board