

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

R.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cataldo, ID, Employer**

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**Docket No. 12-1771
Issued: March 1, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 17, 2012 appellant filed a timely appeal from a February 21, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying reconsideration. Because more than 180 days elapsed from the most recent merit decision dated January 26, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.

ISSUE

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

¹ An appeal of a final adverse OWCP decision issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. § 501.3(e).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 15, 2004 appellant, then a 54-year-old rural carrier, sustained an injury while lifting bundles of telephone books from a cart and moving them to the case area. He experienced low back pain and numbness in his legs. OWCP accepted the claim for a lumbar strain.

On October 27, 2011 OWCP received a request for physical therapy effective October 17 through November 30, 2011. In a November 2, 2011 letter, it informed appellant of the medical information required for a decision on therapy authorization. OWCP requested an updated medical report describing the injury-related medical residuals found on current examination and a medical explanation of the necessity for the requested treatment. Following the receipt of additional information, it denied the request for physical therapy by decision dated January 26, 2012.

In an appeal request form dated February 1, 2012 appellant requested reconsideration. He submitted statements dated December 30, 2011 and February 1, 2012. Appellant noted an initial injury in 1994, claim number xxxxxx387, was accepted for a herniated disc at L5-S1. He stated that it was confusing to him that the injury was changed from a herniated disc at L5-S1 to a lumbar strain.

In a December 27, 2011 medical report, Dr. Christopher Billingslea, an osteopath and Board-certified family practitioner, stated that appellant has a long history of back problems when he was originally injured in the early 1990s. He stated that appellant had ongoing back pain which occasionally became worse and required physical therapy.

By decision dated February 21, 2012, OWCP denied appellant's request for reconsideration on the grounds no substantive legal questions were raised and no new or relevant evidence was submitted to support the physical therapy request.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,³ 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) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ 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.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

³ 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).

⁴ 20 C.F.R. § 10.606(b)(1)-(2).

⁵ *Id.* at § 10.607(a).

ANALYSIS

Appellant disagreed with OWCP's January 26, 2012 decision, which denied his request for physical therapy. The issue is whether his February 1, 2012 request for reconsideration met any of the conditions of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for further review of the merits.

In his February 1, 2012 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He stated in a December 30, 2011 statement that it was confusing why his initial injury in 1994, accepted for a herniated disc at L5-S1, was subsequently changed to a lumbar strain. The Board notes that matters pertaining to the 1994 injury are not presently before the Board.⁶ The present claim before the Board pertains to the 2004 injury.

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but he did not submit any pertinent new and relevant medical evidence in this case. In support of his request for reconsideration, appellant submitted a report dated December 30, 2011 from Dr. Billingslea. This report, while new, is not relevant to the issue of whether physical therapy should be authorized in this case. Although Dr. Billingslea noted that appellant had ongoing back pain which became worse and required physical therapy, he did not explain how the need for therapy was due to the 2004 work injury. Thus, his report is not relevant to the underlying issue.⁷

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant contends that physical therapy should not be denied as all the confusion stems from the fact that he has two claims for the same problem. As noted, the 1994 injury claim is not before the Board on the present appeal. Appellant also submitted evidence on appeal. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision.⁸

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen his case for further review of the merits under section 8128.

⁶ Appellant should contact OWCP if he wishes to pursue matters pertaining to claim number xxxxxx387.

⁷ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000) (evidence which does not address the particular issue involved does not constitute a basis for reopening a case for a merit review).

⁸ *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2013
Washington, DC

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

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

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