

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

I.C., claiming as widow of B.C., Appellant)

and)

DEPARTMENT OF THE ARMY,)
INSTALLATION MANAGEMENT)
COMMAND, Fort Huachuca, AZ, Employer)

Docket No. 13-1419
Issued: October 23, 2013

Appearances:
Howard L. Graham, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 28, 2013 appellant, through her attorney, timely filed an appeal of a March 14, 2013 nonmerit decision denying her request for reconsideration of the merits of her claim. As more than 180 days elapsed from the date of the last merit decision of February 15, 2012 to the filing of the current appeal on May 28, 2013, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board only has jurisdiction over the nonmerits of this case.

ISSUE

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

On appeal, counsel contends that OWCP refused to review the case on the merits despite the new legal argument advancing a point of law not previously considered, specifically, that

¹ 5 U.S.C. § 8101 *et seq.*

OWCP's medical adviser created a conflict in opinion with the employee's autopsy report and the case should have been sent to a referee physician under 5 U.S.C. § 8123.

FACTUAL HISTORY

The employee, a police officer, died on August 18, 2011 at the age of 29 after he collapsed while performing a physical agility test and was taken to the hospital. The death certificate listed the natural cause of death as acute gastrointestinal bleeding. Appellant, the employee's wife, filed a claim for survivor's benefits (Form CA-5) on August 19, 2011 alleging that the physical agility test caused the employee's death.

By decision dated November 7, 2011, OWCP denied the claim finding that the evidence of record was not sufficient to establish that the employee's death was causally related to factors of his federal employment.

On November 14, 2011 appellant, through her attorney, requested reconsideration. She submitted hospital records dated August 18, 2011 and an August 19, 2011 autopsy report from Dr. Guery Flores, a Board-certified forensic pathologist, who opined that the employee died suddenly due to cardiac arrest secondary to acute gastrointestinal bleeding. Dr. Flores stated that the employee was "obese and was doing physical training and was also medicated with phentermine, factors which may have been contributory to his death."

In a November 14, 2011 report, Dr. Ellen Pickey, an OWCP medical adviser, reviewed the medical evidence of record, along with a statement of accepted facts. She found no basis for a causal relationship between the employee's death and factors of his federal employment.

On December 27, 2011 Dr. Raye Bellinger, a Board-certified cardiologist, indicated that according to the autopsy, the employee died of acute upper gastrointestinal bleeding. He opined that "the physical agility test was incidental to [the employee's] upper [gastrointestinal] GI bleed."

By decision dated February 15, 2012, OWCP denied modification of the November 7, 2011 decision.

On February 5, 2013 appellant, through counsel, requested reconsideration. Counsel argued that Dr. Pickey created a conflict in opinion with the employee's autopsy report and the case should have been referred to an impartial physician under 5 U.S.C. § 8123.

By decision dated March 14, 2013, OWCP denied appellant's request for reconsideration of the merits, finding that she did not submit pertinent new and relevant evidence or show that OWCP erroneously applied or interpreted a point of law not previously considered. It acknowledged the arguments raised to support the request but noted that Dr. Pickey's report and autopsy report were previously reviewed. The weight of the medical evidence rested with Dr. Pickey and thus an impartial medical examination was not necessary.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of OWCP's decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review

an award for or against compensation.² OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).³

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP 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.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 on the merits.⁶

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁷ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁸

ANALYSIS

The Board finds that appellant did not submit pertinent new and relevant evidence or show that OWCP erroneously applied or interpreted a point of law not previously considered. In support of her February 5, 2013 reconsideration request, appellant submitted a legal brief from counsel, who argued that the opinion of Dr. Pickey created a conflict with the employee's autopsy report. Therefore, the case should have been sent to a referee physician under 5 U.S.C. § 8123. The Board finds that the submission of this argument did not require reopening appellant's case for merit review. In its March 14, 2013 decision, OWCP acknowledged the arguments supporting the request and noted that it had previously reviewed OWCP's medical adviser's report and the autopsy report. It explained that an independent medical examination was not necessary as there was no conflict in the medical opinion based on the evidence of record considered in its February 15, 2012 decision. The Board finds that appellant has not advanced a relevant legal argument not previously considered by OWCP.

Appellant has neither submitted relevant and pertinent new evidence nor shown that OWCP erroneously applied or interpreted a point of law not previously considered nor advanced

² 5 U.S.C. § 8101 *et seq.* Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

³ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁴ 20 C.F.R. § 10.606(b)(2). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ See *A.L.*, *supra* note 4. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

⁸ *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

a relevant legal argument not previously considered. The Board finds that she did not meet the regulatory requirements and is not entitled to further merit review.⁹ Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, counsel contends that OWCP refused to review the case on the merits despite the new legal argument advancing a point of law not previously considered, specifically, that Dr. Pickey created a conflict with the employee's autopsy report and, therefore, the case should have been sent to a referee physician under 5 U.S.C. § 8123. The Board finds that this is the same argument made before OWCP which was previously addressed. For the reasons stated above, the Board finds that OWCP properly, denied reconsideration.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2013
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

⁹ See *L.H.*, 59 ECAB 253 (2007).