

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

C.M., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Baltimore, MD, Employer)

Docket No. 13-1028
Issued: September 11, 2013

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 13, 2012 appellant filed a timely appeal from a March 6, 2012 decision of the Office of Workers' Compensation Programs (OWCP), denying his application for reconsideration without merit review.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 March 6, 2012 nonmerit decision. Since more than 180 days has elapsed between the last merit decision on July 13, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. § 501.3(e).

¹ The record contains an undated letter addressed to the Board with a date stamp of July 13, 2012. A copy of the letter was set by facsimile transmission on March 26, 2013, and the appeal was docketed as No. 13-1028.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant further merit review under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 23, 2008 appellant, then a 42-year-old police officer, filed an occupational disease claim (Form CA-2) alleging an aggravation of his left knee condition due to his federal employment. He stated that he worked 12-hour shifts that consisted primarily of standing and walking, and could perform other activities that included running, bending and stooping.

By decision dated January 22, 2009, OWCP denied the claim for compensation. It found that the factual allegations had not been established by the evidence. OWCP found that appellant had not worked 12 hours prior to June 2001 and post assignments had seating available. It also determined that he had been on administrative/sedentary duties from July 2002 to March 2004 and March to August 2007, and off work from October 10, 2007 to December 5, 2008 due to left knee surgery.

In a letter dated February 11, 2009, appellant requested a hearing before an OWCP hearing representative, which was held on June 11, 2009. The evidence submitted included an August 18, 2008 report from Dr. Allan Macht, a Board-certified surgeon, who stated that, based on medical probability with the prolonged walking and standing during that occupation and his running and subduing suspects, there was a causal connection between that occupation and the aggravation of his knee which necessitated two more operations to his knee including total knee replacement surgery.

By decision dated August 26, 2009, the hearing representative affirmed the January 22, 2009 OWCP decision. He accepted that appellant performed some standing and walking, but seating was available and he spent only 10 to 20 percent of the time on his feet. The hearing representative also accepted that the job description for police officer stated that an officer may be required to respond to emergencies and attempt to apprehend offenders, although such activity was not routinely performed. He noted that appellant conducted training classes for new officers, on average approximately one month per year. With respect to medical evidence, the hearing representative found that Dr. Macht's report was not based on an accurate factual background.

In a letter dated August 11, 2010, appellant requested reconsideration. He submitted a July 28, 2010 report from Dr. Neil Novin.

By decision dated July 13, 2011, OWCP reviewed the case on its merits and denied modification. It noted the established factual allegations and found that Dr. Novin's report was not based on an accurate factual background.

On December 9, 2011 appellant requested reconsideration. He resubmitted a copy of the job description for a police officer. Appellant argued that evidence of his work duties confirmed that his left knee condition was causally related to extended work shifts on his feet. He referred

to a 1997 performance evaluation that stated that he performed effectively, and to his job description, which notes the possibility of physical exertion. According to appellant, his training classes were not just for new hires but also for officers of different rank.

By decision dated March 6, 2012, OWCP found that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."⁴ Section 10.608(b) of Title 20 of the Code of Federal Regulations 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.⁵

ANALYSIS

The only issue before the Board is whether appellant's December 9, 2012 application for reconsideration was sufficient to require OWCP to review the merits of his claim for compensation. Appellant did not refer to a specific point of law or otherwise show that OWCP erroneously applied or interpreted a specific point of law. He argued that the evidence showed that his left knee condition was causally related to his work duties. Appellant referred to his job description as requiring physical exertion at times, but OWCP accepted that his job duties included such activities. The underlying issue was whether the attending physicians had an accurate factual background with respect to appellant's work history and the specific activities he routinely performed in his federal employment. Appellant did not provide a new and relevant legal argument on this issue. The reopening of a case is not required where the legal contention has no reasonable color of validity.⁶

With respect to the submission of evidence, the only evidence submitted was the police officer job description. This was previously of record and does not constitute new evidence. Appellant did not submit any new and relevant evidence with respect to the factual or medical issues presented.

³ 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.")

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *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.

⁶ *Elaine M. Borghini*, 57 ECAB 549 (2006); *Annette Louise*, 54 ECAB 783 (2003).

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 evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to review the merits of the claim.

On appeal, appellant discussed his job duties and the merits of his claim for compensation. The Board can review only the evidence that was before OWCP at the time of the March 6, 2012 decision on appeal.⁷ The issue presented was whether appellant's application for reconsideration was sufficient to reopen the case for further merit review. Based on the evidence of record, OWCP properly declined further merit consideration. Appellant may request reconsideration with respect to additional evidence submitted after March 6, 2012.

CONCLUSION

The Board finds that OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 6, 2012 is affirmed.

Issued: September 11, 2013
Washington, DC

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

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

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

⁷ 20 C.F.R. § 501.2(c)(1).