

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

R.P., Appellant

and

**DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS, Salem, OR,
Employer**

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**Docket No. 13-1215
Issued: September 4, 2013**

Appearances:
Brett E. Blumstein, Esq., for the appellant
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 April 22, 2013 appellant filed a timely appeal from a February 6, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from the last merit decision dated November 30, 2011 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.²

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for reconsideration of his claim under 5 U.S.C. § 8128.

¹ 5 U.S.C. § 8101 *et seq.*

² For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

FACTUAL HISTORY

On February 15, 2011 appellant, then a 35-year-old letter carrier, filed a claim for benefits alleging that he injured his lower back while picking up a box on February 8, 2011.

By letter to appellant dated March 23, 2011, OWCP advised him that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked him to submit a comprehensive medical report from his treating physician describing his symptoms and a medical opinion explaining the cause of any diagnosed condition.

In a report dated February 8, 2011, Dr. Martha S. Roellig, Board-certified in emergency medicine, stated that appellant had “acute on chronic” back pain. She advised that he had experienced chronic low back pain since 2003 and recommended that he undergo x-ray testing and a magnetic resonance imaging (MRI) scan. Dr. Roellig related that appellant felt sharp back pain on that date when he bent over and stood back up. Appellant experienced chronic radiation to his right leg to the knee level. Dr. Roellig advised that he had experienced similar episodes on multiple occasions. On examination, she noted diffuse tenderness over appellant’s lumbar paraspinal muscles on both sides, with no muscle spasms and no bony point tenderness. Dr. Roellig prescribed medication, further evaluation and management of his chronic low back pain. She diagnosed back pain.

In an April 1, 2011 report, Dr. Sean L. Steward, a Board-certified family practitioner, stated that appellant had complaints of back pain and experienced a slight twinge in his back while he was picking something up off the floor the prior day. Appellant also experienced some tightening in his low back during the evening and, that morning, reported being unable to get out of bed without assistance. Dr. Steward stated that appellant had no numbness or tingling and was able to spontaneously move all of his extremities on command. He diagnosed chronic back pain.

In a February 10, 2011 report, Dr. Tom L. Flaming, an osteopath, stated that appellant had experienced an onset of lower back pain while he was bending to pick up a box two days prior to his examination. He asserted that his problem was persistent and was worsening. Dr. Flaming advised that appellant’s back pain was constant, sharp, shooting and throbbing and radiated to the right calf; his symptoms were aggravated by bending and included numbness, spasms, tenderness and tingling in the legs. He noted that appellant had originally injured his back in 2002 and reinjured it in 2010. On examination, Dr. Flaming noted tenderness in the lumbar spine and mild pain with motion. He diagnosed chronic low back pain.

Appellant underwent an MRI scan of the lumbar spine on March 31, 2011. It noted degenerative disc changes at the L4-5 and L5-S1 levels. The test also showed mild lateral recess stenosis and foraminal narrowing on the left side at the L5-S1 level and an annular fissure with no stenosis.

In a report dated April 6, 2011, Dr. Flaming stated that appellant had been experiencing a worsening of his back pain. He reiterated that appellant’s original back injury occurred in 2002 or 2003, when a student dropped a table as he was ascending some stairs and appellant fell back and experienced a “crunch” in his lower back. Appellant also sustained aggravations of his back

injury while lifting a bucket on May 16, 2010 and while lifting a box on February 8, 2011. Dr. Flaming stated that appellant was currently working despite having continuous back pain. Appellant worked as a recreational technician, a job which allowed him to frequently change positions. Dr. Flaming advised that, while appellant could work as a bus driver, he was not able to change tires weighing 70 pounds as he was unable to lift that much weight. He reiterated the diagnosis of chronic low back pain, the onset of which occurred due to a traumatic incident at work two months prior.

By decision dated April 29, 2011, OWCP denied appellant's claim, finding that he failed to submit sufficient medical evidence to establish the causal relation of a low back injury on February 8, 2011.

On May 9, 2011 appellant requested an oral hearing, which was held on September 13, 2011.

In a report dated May 3, 2011, received by OWCP on May 9, 2011, Dr. Jeffrey S. Humphrey, an osteopath and an associate of Dr. Flaming, stated that appellant experienced persistent, aching low back pain for eight years. He stated that the symptoms were aggravated by daily activities. Dr. Humphrey diagnosed chronic low back pain.

In a report dated June 30, 2011, Dr. Flaming reiterated his previous findings and conclusions. He stated that, after four months without significant improvement, appellant's prognosis was poor for a full recovery.

By decision dated November 30, 2011, OWCP's hearing representative affirmed the April 29, 2011 decision.

In a November 15, 2012 report, Dr. Flaming related that he had been treating appellant for four years. He reiterated that appellant initially had complaints of back pain in May 2010, and had sustained a second back injury in February 2011. Dr. Flaming stated that appellant had a history of having back pain for several years, although this was chronic and was not necessarily associated with any injury or accident. He advised that he had diagnosed low back pain and sprain in the lumbar region, with his current diagnoses of low back pain and sprain in the lumbar region precipitated by the injury of February 2011, when there was a significant worsening of appellant's symptoms.

By letter dated November 15, 2012, appellant's attorney requested reconsideration. He stated that Dr. Flaming's November 15, 2012 report presented clear diagnoses of low back pain and lumbar sprain due to appellant's work injury; he argued that this constituted uncontroverted medical evidence establishing disability, which required further development of the medical evidence. Counsel contended that OWCP was required to further development of the record by sending him to a second opinion examiner.

By decision dated February 6, 2013, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by OWCP or by submitting relevant and pertinent evidence not previously considered by OWCP.³ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁴

ANALYSIS

The Board finds that this case is not in posture for decision. Appellant requested reconsideration on November 15, 2012 and contended that Dr. Flaming's November 15, 2012 report, which provided a diagnosis of low back sprain and opined that appellant had experienced a significant worsening of his symptoms because of his work injury, constituted new, relevant medical evidence which warranted a merit review by OWCP, who denied merit review, finding that Dr. Flaming's report was not new and relevant as it did not establish fact of injury.

The Board finds that the November 15, 2012 report from Dr. Flaming did constitute new and relevant medical evidence. While Dr. Flaming had only noted back pain in his previous reports, but had not provided a medical diagnosis of appellant's condition, in the November 15, 2012 report, he did provide a diagnosis of low back sprain. He also described this diagnosed condition as a work injury.

The requirements for reopening a case for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his or her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.⁵ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁶ As Dr. Flaming has now provided a diagnosis of appellant's condition and has offered an opinion regarding the cause of the condition, which is new and relevant evidence, the case shall be remanded to OWCP to conduct a merit review of the entire record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.606(b). See generally 5 U.S.C. § 8128(a).

⁴ *Howard A. Williams*, 45 ECAB 853 (1994).

⁵ *R.T.*, Docket No. 11-749 (issued December 23, 2011); see also *Billy B. Scoles*, 57 ECAB 258 (2005).

⁶ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

ORDER

IT IS HEREBY ORDERED THAT the February 6, 2013 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further development consistent with this opinion.

Issued: September 4, 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