

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

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**I.R., Appellant**

**and**

**U.S. POSTAL SERVICE, NEW YORK PRIOR  
MAIL PROCESSING CENTER, Bethpage, NY,  
Employer**

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**Docket No. 13-2045  
Issued: April 21, 2014**

*Appearances:*  
*Thomas S. Harkins, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 6, 2013 appellant, through her attorney, filed a timely appeal of a May 1 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration. As more than 180 days elapsed from issuance of the most recent merit decision to the filing of this appeal, and pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has no jurisdiction over the merits of the case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> For final adverse OWCP decisions issued prior to November 19, 2008, a claimant has up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2007). For final adverse decisions issued on or after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e) (2009); *R.C.*, Docket No. 10-2371 (issued July 14, 2011).

## **ISSUE**

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

On appeal appellant's attorney asserts that OWCP erred in denying merit review because he submitted relevant medical evidence.

## **FACTUAL HISTORY**

This case has previously been before the Board. In a February 24, 2010 decision, the Board found that OWCP met its burden of proof to terminate appellant's compensation benefits, effective June 8, 2008, based on the opinion of Dr. Robert Israel, a Board-certified orthopedic surgeon and OWCP referral physician. The Board also found that she failed to meet her burden of proof to establish that she had any disability after June 8, 2008 causally related to her June 13, 2001 work injury accepted for a low back strain.<sup>3</sup> In a February 13, 2012 decision, the Board found that appellant submitted insufficient medical evidence with her February 11, 2011 reconsideration request to establish that she continued to be disabled after June 8, 2008 due to the June 13, 2001 employment injury. The Board noted that it did not have jurisdiction over appellant's assertion that the accepted conditions be expanded because the record did not contain a final OWCP decision.<sup>4</sup> On August 13, 2012 the Board denied her petition for reconsideration. The facts of the previous Board decisions are incorporated herein by reference.

On February 4, 2013 appellant's attorney requested reconsideration. He referenced medical evidence previously submitted to the record. Counsel asserted that appellant's benefits had been improperly terminated and that she continued to be disabled due to the June 13, 2001 work injury. He submitted a May 10, 2011 operative report in which Dr. David J. Langer, a Board-certified neurosurgeon, related that appellant had a long history of low back pain since a June 2001 employment injury. Dr. Langer diagnosed L5-S1 instability and an L5-S1 disc herniation. He performed a lumbar fusion at L5-S1.

In a nonmerit decision dated May 1, 2013, OWCP denied appellant's reconsideration request. It found her arguments were similar to those previously presented that were found without merit by the Board and that the medical evidence submitted was not relevant to the issue of causal relationship.

## **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>5</sup> Section 10.608(a) of Title 20 of the Code of Federal Regulations

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<sup>3</sup> Docket No. 09-1229 (issued February 24, 2010).

<sup>4</sup> Docket No. 11-1700 (issued February 13, 2012).

<sup>5</sup> 5 U.S.C. § 8128(a).

(C.F.R.) provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>6</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated May 1, 2013 denying appellant's application for review. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of appellant's claim.<sup>9</sup>

The Board finds that appellant's assertion that OWCP erroneously applied or interpreted the law to be without merit. With her February 2, 2013 reconsideration request, appellant's attorney reiterated arguments that the termination of appellant's benefits was in error and that she continued to be disabled due to the June 13, 2001 employment injury, accepted for low back strain. These arguments had been thoroughly reviewed by the Board in previous decisions dated February 24, 2010 and February 13, 2012.<sup>10</sup> Counsel also referenced medical evidence previously reviewed by OWCP and the Board.<sup>11</sup> Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.<sup>12</sup> Consequently, appellant was not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>13</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted a May 10, 2011 operative report from Dr. Langer that had not been previously

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<sup>6</sup> 20 C.F.R. § 10.608(a).

<sup>7</sup> *Id.* at § 10.608(b)(1) and (2).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *Supra* note 1.

<sup>10</sup> *Supra* notes 3 and 4.

<sup>11</sup> *Id.* The Board notes that no medical evidence was submitted between February 5, 2011 and February 4, 2013. The last report received prior to the February 4, 2013 reconsideration request was a January 31, 2011 report from Dr. Rafael Antonio Rodriguez, an anesthesiologist practicing pain management, reviewed by the Board in its February 13, 2012 decision.

<sup>12</sup> *J.P.*, 58 ECAB 289 (2007).

<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

considered by OWCP or the Board. Dr. Langer, however, merely noted a history that appellant had low back pain since she was injured at work in June 2001 and diagnosed L5-S1 instability and L5-S1 disc herniation. He did not specifically address whether the diagnosed conditions or any disability were caused by the employment injury. The surgical report is of no probative value on the issue of whether appellant has continuing disability due to the accepted low back strain. Appellant, therefore, did not submit relevant and pertinent new evidence not previously considered by OWCP.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, it properly denied her reconsideration request.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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