

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

F.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Dearborn, MI, Employer**

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**Docket No. 13-2080
Issued: February 6, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 11, 2013 appellant filed a timely appeal of a July 18, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the July 18, 2013 nonmerit decision. Since more than 180 days has elapsed between the last merit decision on May 17, 2012 and 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).²

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant a review of the merits of the claim for compensation.

¹ 5 U.S.C. § 8101 *et seq.*

² The record also contains a schedule award decision dated August 15, 2013. Appellant did not request review of this decision and the record indicates that he is pursuing other appeal rights with respect to that decision.

FACTUAL HISTORY

On May 18, 1996 appellant, then a 35-year-old letter carrier, filed an occupational claim (Form CA-2) alleging that he sustained a back injury causally related to his federal employment.³ He referred to job duties that included: lifting, bending, twisting and stooping. On August 26, 1996 OWCP accepted the claim for temporary aggravation of herniated lumbar discs at L4-5 and L5-S1. Appellant returned to work in a light-duty position on October 24, 1996.

By decision dated May 27, 1997, OWCP determined that appellant's earnings in the light-duty position fairly and reasonably represented his wage-earning capacity. It found that he was not entitled to wage-loss compensation as he had no loss of wage-earning capacity.

Appellant continued to work in a light-duty position until he stopped working on April 5, 2010. He filed a claim for a recurrence of disability (Form CA-2a) commencing April 5, 2010. In a report dated April 7, 2010, the attending orthopedic surgeon, Dr. Shlomo Mandel, provided results on examination and indicated that appellant reported increased back pain.

By decision dated August 3, 2010, OWCP denied the claim for a recurrence of disability. It found the medical evidence was insufficient to establish the claim. In a decision dated January 19, 2011, an OWCP hearing representative affirmed the August 3, 2010 decision. By decisions dated April 20, 2011 and May 17, 2012, OWCP reviewed the merits of the claim and denied modification.

On April 23, 2013 appellant requested reconsideration of his claim. He stated that he had tried to continue working but Dr. Mandel agreed after a functional capacity evaluation that he could not work. Appellant resubmitted medical evidence from Dr. Mandel regarding his treatment. With respect to new evidence, he submitted an August 1, 2008 report from Dr. Mandel providing results on examination. Dr. Mandel indicated that appellant was still experiencing low back pain with right leg radiation and a number of treatment options had been discussed. Appellant also submitted an August 4, 1997 note from Dr. Susan Van Dellen, an osteopath, providing results on examination and diagnosing chronic low back pain. In a report dated June 17, 2010, Dr. Stephen Bartol, a Board-certified orthopedic surgeon, indicated that appellant had been referred by Dr. Mandel for chronic back pain. He indicated that appellant reported increased pain approximately three months earlier. Dr. Bartol provided results on examination and diagnosed multilevel degenerative disc disease without neurological deficit or radiculopathy. He concluded that nonsurgical treatment was recommended.

By decision dated July 18, 2013, OWCP determined that the request for reconsideration was insufficient to warrant merit review. It found that the evidence submitted was cumulative or irrelevant to the issue presented.

³ Appellant reported on the claim form that he first became aware of the condition on September 28, 1985. The record indicated that he had filed a traumatic injury claim for a back injury on that date, which was developed as an occupational disease or illness claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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 new evidence not previously considered by OWCP."⁵ 20 C.F.R. § 10.608(b) 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.⁶

ANALYSIS

In the application for reconsideration filed on August 23, 2013, appellant did not discuss a specific point of law or advance a new legal argument. He stated that he felt he could no longer continue working based on his medical condition. The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP.

Appellant did submit additional evidence with his application for reconsideration, but most of the evidence had previously been submitted prior to the last merit decision on May 17, 2012. Evidence that was previously submitted and reviewed by OWCP does not meet the requirement of submitting relevant and pertinent evidence not previously considered by OWCP.

With respect to new evidence, appellant did submit a June 17, 2010 report from Dr. Bartol. This report does not provide any new and relevant evidence to the underlying medical issue regarding an employment-related disability commencing April 5, 2010. Dr. Bartol does not discuss the work stoppage on April 5, 2010 and he only refers generally to a progression of back pain approximately three months earlier. The previously submitted reports from Dr. Mandel had discussed appellant's increased pain symptoms and a report dated May 25, 2010 from Dr. Phillip Kuriakose submitted on June 8, 2010 also discussed an increase in pain. The Board finds that Dr. Bartol's report did not provide any new, relevant and pertinent evidence with respect to the medical issue.

The reports dated August 4, 1997 from Dr. Van Dellen and August 1, 2008 from Dr. Mandel do not provide any relevant evidence regarding appellant's employment-related condition on April 5, 2010. The Board accordingly finds that appellant did not submit relevant and pertinent evidence not previously considered by OWCP.

⁴ 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").

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

Appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). The application for reconsideration 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 submit relevant and pertinent evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to reopen the case for review of the merits.

On appeal, appellant stated that he continued to have problems after his work injury and he had hoped to continue working. As noted above, the only issue presented on appeal was whether appellant's application for reconsideration was sufficient to require a review of the merits of his claim for a recurrence of disability. For the reasons noted, the Board finds the application for reconsideration was not sufficient to require merit review.

CONCLUSION

The Board finds that OWCP properly determined that appellant's April 23, 2013 application for reconsideration was insufficient to warrant merit review of the claim for compensation.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 18, 2013 is affirmed.

Issued: February 6, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board