

FACTUAL HISTORY

On October 7, 2012 appellant, then a 54-year-old safety and occupational health specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained a lower back injury on September 24, 2012 as a result of bending and stooping to enter ships in the performance of duty.

By decision dated December 10, 2012, OWCP denied the claim on the basis that appellant had failed to establish fact of injury.²

On April 12, 2013 appellant, through his representative, requested reconsideration and submitted reports dated September 17, 2012 through March 20, 2013 from Dr. Ennis. In a February 26, 2013 report, Dr. Ennis stated that appellant injured his back at work on September 24, 2012. On March 20, 2013 he stated that appellant's pain was so intense that he developed a blood clot in the leg that broke off and went to his lungs. Appellant was admitted to the hospital on January 29, 2013 and required an infusion of a clot busting drug to treat his pulmonary symptoms. Dr. Ennis reported that the attending physician at the hospital, Dr. John Hutchinson, a Board-certified pulmonologist, stated that the pulmonary embolism (PE) was a direct result of appellant's back injury. In a February 2, 2013 report, Dr. Hutchinson indicated that appellant had been under his care in the intensive care unit for a large pulmonary embolus. He opined that this was related to appellant's recent sedentary lifestyle due to his back injury.

By decision dated April 29, 2013, OWCP modified the December 10, 2012 decision to find that appellant established the September 24, 2012 incident. It denied the claim on the basis that the medical evidence failed to establish the causal relationship between his low back condition and the accepted incident.

On June 5, 2013 appellant, through his representative, requested reconsideration. He submitted a narrative statement and a May 31, 2013 report from Dr. Ennis, who reiterated the history of appellant's condition. Dr. Ennis opined that appellant "injured his back while negotiating a partially blocked watertight door during an inspection on September 24, 2012, exactly as [appellant] described ... and his symptoms support the accident as described."

By decision dated August 16, 2013, OWCP denied modification of the April 29, 2013 decision.

On October 10, 2013 appellant, through his representative, requested reconsideration. He resubmitted the February 2, 2013 report from Dr. Hutchinson. Appellant also submitted an August 30, 2013 report from Dr. Ennis, an attending family practitioner, who stated that appellant's injury was caused while passing through a partially occluded watertight doorway during an inspection aboard a ship on September 24, 2012. The doorway was blocked by an array of cables, wires, hoses and vents. Appellant stooped to place one foot through the hatch

² On December 11, 2012 appellant, through his representative, requested an oral hearing before an OWCP hearing representative. In an April 12, 2013 letter, appellant filed a petition to withdraw his request for an oral hearing. By decision dated April 24, 2013, an OWCP hearing representative accepted appellant's request for withdrawal of the hearing.

and twisted his torso while trying to find a hand-hold. This was accomplished while ducking his head and bringing his other foot through the doorway. Dr. Ennis indicated that these combined movements placed tremendous strain on appellant's low back. Appellant reported an intensely sharp, searing pain in his low back just before he was able to get all the way through the doorway, which Dr. Ennis found was consistent with the magnetic resonance imaging (MRI) scan findings: a large disc extrusion at L3-4, and smaller other lumbar disc extrusion, all of which were impinging upon the nerves leading to his legs. He diagnosed lumbar spinal stenosis with neural claudication from L3-4 disc herniation and indicated that "the disc herniation was paracentral into the spinal column, unlike most disc herniations that are posterior going away from the spinal column" and the disc herniation created a narrowing of the spinal canal. Dr. Ennis explained that what was being "misconstrued [was] that the back injury did not directly cause the blood clot, but the pain associated with the injury made [appellant] not want to move" and his "lack of movement allowed blood to pool and a clot to form in his leg." The clot broke and traveled to his lungs which caused appellant to pass out and require hospitalization. Dr. Ennis opined that "[h]ad there been no back injury, there would have been no blood clot, no PE and no hospitalization."

By decision dated February 10, 2014, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence or show that OWCP erroneously applied or interpreted a point of law not previously considered.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.³ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁴

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.⁵ 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.⁶ 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.⁷

³ *Supra* note 1. 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).

⁴ *See Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁵ 20 C.F.R. § 10.606(b)(3). *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

ANALYSIS

In support of his October 10, 2013 reconsideration request, appellant submitted a new medical report dated August 30, 2013 from Dr. Ennis who stated that appellant's injury was caused while passing through a partially occluded watertight doorway during an inspection aboard a ship on September 24, 2012. The doorway was blocked by an array of cables, wires, hoses and vents requiring appellant to stop and place one foot through the hatch, then twist his torso and reach through the doorway to find a hand-hold or try to stand after shifting his upper body through the doorway. Dr. Ennis stated that these combined movements placed tremendous strain on appellant's lower back. Appellant reported an intensely sharp, searing pain in his low back before he was able to get all the way through the doorway; a pain that Dr. Ennis found was consistent with the diagnostic findings of a large disc extrusion at L3-4, and smaller other lumbar disc extrusion, which impinged upon the nerves leading to his legs. He diagnosed lumbar spinal stenosis with neural claudication from L3-4 disc herniation and stated that "the disc herniation was paracentral into the spinal column, unlike most disc herniations that are posterior going away from the spinal column" and the disc herniation created a narrowing of the spinal canal. Dr. Ennis advised that the back injury did not directly cause the blood clot, but the pain associated with the injury made appellant not want to move. This lack of movement allowed blood to pool and a clot to form in his leg. Dr. Ennis stated that "[h]ad there been no back injury, there would have been no blood clot, no PE and no hospitalization."

The Board notes that Dr. Ennis addressed the grounds upon which OWCP denied appellant's claim. The report pertains to the issue of causal relationship between appellant's back condition and the September 24, 2012 employment incident. The Board finds that Dr. Ennis' August 30, 2013 report constituted relevant and pertinent new evidence not previously considered by OWCP. As it meets one of the standards for obtaining a merit review of his case, the Board finds that OWCP improperly denied appellant's request.

The Board will set aside OWCP's February 10, 2014 decision denying appellant's request for reconsideration and remand the case for a merit review. After such further development of the evidence as might be necessary, OWCP shall issue an appropriate decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: July 21, 2014
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