

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

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G.P., Appellant )

and )

DEPARTMENT OF STATE, FOREIGN )  
SERVICE, NEAR EASTERN AFFAIRS -- )  
OVERSEAS, Washington, DC, Employer )

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**Docket No. 14-601  
Issued: June 19, 2014**

*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 January 16, 2014 appellant filed a timely appeal from a July 26, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying his request for merit review of the claim. As more than 180 days have elapsed from the last merit decision dated December 14, 2012 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for further review on the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 17, 2010 appellant then a 55-year-old information management specialist deployed to Iraq, filed a traumatic injury claim. On August 16, 2010 he was outside by the generators when the Phalanx missile defense system began firing, and he heard a loud explosion nearby and ran for cover. Appellant tripped while running and fell to the ground and felt severe pain in his lower back. On September 13, 2010 he returned to the United States. On October 9, 2010 appellant had an x-ray of the lumbar spine which showed fractures at L2 and L3.

On October 21, 2010 OWCP accepted appellant's claim for a sprain of the lumbar region. On April 16, 2012 it accepted a compression fracture at L2-3 and the Kyphoplasty surgical procedure at L2-3, performed on October 14, 2010 by Dr. Patrick J. Murray, a treating Board-certified orthopedic surgeon.

Appellant also claimed compensation for a compression fracture T11-12 and for surgery to treat this condition. On November 7, 2010 Dr. Robb Hoehlein, a Board-certified radiologist, noted a new T12 compression fracture and variegated marrow pattern consistent with appellant's multiple myeloma. In a December 8, 2010 report, Dr. George L. Cohan, an OWCP medical adviser, opined that the compression fractures at T11 and T12 were not related to the injury of August 16, 2010. He noted that the claimant had a serious bone marrow and bone disease that could cause vertebral fractures and that his fractures were related to the disease. Appellant also submitted treatment notes by a physician's assistant who worked for Dr. Murray. On December 9, 2010 he underwent a balloon Kyphoplasty for T11, T12 and L1. Dr. Michael S. Olin, a Board-certified neurosurgeon, who provided a second opinion for OWCP, advised that the medical records did not support that the new compression fractures of T11 and 12 were related to the accepted fall in August 2010.

By decision dated April 16, 2012, OWCP denied coverage for the Kyphoplasty procedure at T11 and T12. It found that the thoracic spine fractures were not causally related to the accepted work injury.

Appellant requested an oral hearing before an OWCP hearing representative. In an October 3, 2011 report, Dr. Murray opined that appellant sustained pathological compression fractures secondary to the injury sustained in the course of his employment in Iraq. He first met appellant on October 14, 2010 and subsequent investigation demonstrated the presence of compression fractures at L2 and L3. In December, appellant developed further compression fractures of T11, T12 and L1. In an October 24, 2012 report, Dr. Murray agreed with Dr. Olin, who opined that the Kyphoplasty surgical procedure performed at T11 and T12 was necessitated not as a result of appellant's injury in Iraq, but as a result of the myeloma disease process. While he agreed with Dr. Olin, it could also be argued that there was an increased incidence of compression fractures in the diseased bone secondary to Kyphoplasty alone. Dr. Murray also stated that the most common fracture which occurred following balloon Kyphoplasty was at the adjacent level. In appellant's case, this was not only at L1 but at T11 and T12 as well. Dr. Murray noted that it could be argued that had appellant not fallen in the course of his employment, his disease might well have been diagnosed not due to the compression fracture but due to the anemia which he was suffering when he arrived home. By decision dated December 14, 2012, the hearing representative affirmed the April 16, 2012 decision.

By letter dated April 24, 2013, appellant requested reconsideration of the December 14, 2012 decision. He resubmitted an April 26, 2011 note by the physician's assistant for Dr. Murray, countersigned by Dr. Murray. The physician's assistant noted that on October 14, 2010 appellant had a diagnosis of vertebral compression fracture at L2 and L3 and on October 14, 2010, underwent a Kyphoplasty at L2 and L3. At a follow-up appointment, a compression fracture at L1, T11 and T12 was observed and he underwent a Kyphoplasty at L1, T12 and T11 on December 9, 2010. The report stated, "Please accept and review our records from our office regarding his condition that stems from when he first fell and fractured his spine in Iraq." On February 28, 2013 Dr. Murray discussed appellant's injury and the delay in obtaining an x-ray. He noted that appellant's acute back pain began after the fall. Although Dr. Murray was not 100 percent certain that the compression fractures were caused by appellant's fall, it was reasonable to speculate that the fall caused his symptoms of acute back pain, which he experienced immediately after the fall. He noted that one could speculate that had an adequate investigation begun between August and October 2010, appellant's diagnosis of multiple myeloma might have been made sooner. Had appellant received treatment for his multiple myeloma sooner, the fractures of T11, T12 and L1 might not have occurred. Dr. Murray noted that appellant was undoubtedly suffering from multiple myeloma when he fell in August.

By decision dated July 26, 2013, OWCP denied further reconsideration.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>2</sup> OWCP's 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

### **ANALYSIS**

OWCP accepted appellant's claim for compression fractures at L2 and L3 and approved the surgery. It denied appellant's claim for compression fractures at T11 and T12, and denied surgery to treat this condition in a decision dated April 16, 2012. This determination was affirmed by the hearing representative, a decision which was affirmed by an OWCP hearing

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<sup>2</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[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 U.S.C. § 8128(a).

<sup>3</sup> 20 C.F.R. § 10.606(b)(3).

<sup>4</sup> *Id.* at § 10.607(a).

<sup>5</sup> *Id.* at § 10.608(b).

representative on December 14, 2012. As noted, the Board does not have jurisdiction over the merits of the claim and may only address whether appellant's request for reconsideration was properly denied without merit review.<sup>6</sup>

Appellant requested reconsideration and submitted a copy of a report by Dr. Murray's physician's assistant. The report was previously of record but did not have Dr. Murray's countersignature until it was submitted on reconsideration.<sup>7</sup> Appellant also submitted a note by Dr. Murray dated February 28, 2013. Dr. Murray discussed his treatment of appellant's injuries and discussed the progression of appellant's myeloma. However, the newly submitted report is repetitive of Dr. Murray's prior reports. The Board has held that evidence which is duplicative or repetitive of evidence existing in the record is not sufficient to warrant further merit review.<sup>8</sup> As this evidence is repetitive of Dr. Murray's earlier reports, it does not constitute relevant and pertinent new medical evidence and is insufficient to require OWCP to reopen appellant's case for further review of the merits.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, has not advanced a relevant legal argument not previously considered by OWCP, and has not submitted relevant and pertinent new evidence not previously considered by OWCP. Accordingly, the Board finds that he did not meet any of the necessary requirements and is not entitled to further merit review.<sup>9</sup>

### CONCLUSION

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

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<sup>6</sup> *Id.* at § 501.3(e).

<sup>7</sup> The Board has held that such persons as physician's assistants and physical therapists are not competent to render a medical opinion under FECA. *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individual such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

<sup>8</sup> *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *L.H.*, 59 ECAB 253 (2007); *Jennifer A. Guillary*, 57 ECAB 485 (2005).

<sup>9</sup> *See L.H.*, 59 ECAB 253 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 26, 2013 is affirmed.

Issued: June 19, 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