

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

A.M., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PATROL,
Cape Canaveral, FL, Employer**

**Docket No. 14-125
Issued: March 24, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 30, 2013 appellant filed a timely appeal from the September 9, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for further review of his claim. As more than 180 days elapsed from the last merit decision of March 18, 2013 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (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 denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal appellant contends that OWCP never addressed reports by his neurologist nor his orthopedic surgeon, reports which he stated were submitted to OWCP.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 28, 2012 appellant, then a 34-year-old customs and border patrol officer, filed a traumatic injury claim alleging that, on August 19, 2012, while departing a cruise terminal for the main office, he was involved in a vehicle accident, and sustained injuries to his right and left wrists and hands. He also noted neck and back pain followed with headaches. Appellant did not submit any medical evidence with his claim, but after receiving a request for more information from OWCP, he submitted notes from his visit to the Cape Canaveral Hospital on the date of the accident. These notes included x-ray reports of his thoracolumbar spine and hands and wrists that showed no fracture; nurse's notes and notes wherein Dr. Maurice Chao, an osteopath, listed the primary diagnosis as motor vehicle crash.

By decision dated October 11, 2012, OWCP denied appellant's claim because the medical evidence did not contain a medical diagnosis or a physician's opinion on how the condition was caused or aggravated by his August 19, 2012 accident.

Appellant requested a review of the written record by an OWCP hearing representative. In further support of his claim, he submitted notes from a nurse practitioner and the records from Brevard County Fire rescue regarding its response to the accident.

By decision March 18, 2013, OWCP's hearing representative affirmed the October 11, 2012 decision.

On August 27, 2013 appellant requested reconsideration. He argued that the evidence showed that, as a result of the accident, he suffered herniated discs in his neck, a traumatic brain injury and that he was in need of reconstructive surgery on his left hand. Appellant argued that his claim was denied for factors that were not in his control or power. In support of his request, he resubmitted notes from Cape Canaveral Hospital. Appellant also submitted progress reports from Dr. Timothy Bortz, a chiropractor, dated January 2 to August 7, 2013 and a witness statement by Hasan Tukel, a supervisory customs and border patrol officer, who saw appellant immediately after the accident and listed his observations as to appellant's condition.

By decision dated September 9, 2013, OWCP denied appellant's request for reconsideration without reviewing the merits of his case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² 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.³ To be entitled to a merit review

² 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).

³ 20 C.F.R. § 10.606(b)(2).

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.⁴ 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.⁵

ANALYSIS

OWCP denied appellant's claim as he failed to establish a medical condition causally related to the accepted employment-related motor vehicle accident of August 19, 2012. Appellant requested reconsideration and on September 9, 2013 OWCP denied reconsideration without reviewing the merits of the case. As previously noted, the Board does not have jurisdiction over the merits of the claim and may only address whether appellant's petition for reconsideration was properly denied by OWCP without merit review.⁶

OWCP denied appellant's claim as the medical evidence had not established that he sustained a diagnosed condition causally related to his accepted employment accident. In support of his reconsideration request, appellant resubmitted the notes from Cape Canaveral Hospital with regard to his visit to the emergency department. As these reports are duplicative of reports previously submitted, these reports do not constitute relevant and pertinent new evidence not previously considered by OWCP.⁷ On reconsideration, appellant also submitted progress reports from his chiropractor, Dr. Bortz. The Board has held that a chiropractor is a physician as defined under FECA only to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.⁸ The evidence does not establish that appellant was diagnosed with subluxation based on the results of an x-ray. Accordingly, the Board finds that Dr. Bortz does not qualify as a physician under FECA and his reports therefore cannot be considered competent medical evidence sufficient to require merit review of appellant's claim and are therefore irrelevant. The statement of Mr. Tukul is also not relevant evidence because he is a lay person.⁹ The fact that appellant was in a motor vehicle accident is not in doubt. Appellant's claim was denied due to a lack of sufficient medical evidence and Mr. Tukul's simply offered lay observations with regard to appellant's condition are irrelevant.

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *Id.* at § 501.3(e).

⁷ *See T.M.*, Docket No. 11-1882 (issued March 27, 2012).

⁸ Section 8101(2) of FECA provides as follows: "(2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the Secretary." *See* 5 U.S.C. § 8101(2); *see also Merton J. Sills*, 39 ECAB 572, 575 (1988).

⁹ Lay persons are not competent to render medical opinion. *See C.B.*, Docket No. 13-1805 (issued January 30, 2014); *James A. Long*, 40 ECAB 538, 542 (1989).

On appeal, appellant contends that OWCP never addressed reports from his neurologist or orthopedic surgeon. These reports are not in the record.

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.¹⁰

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 9, 2013 is affirmed.

Issued: March 24, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ See *L.H.*, 59 ECAB 253 (2007).