

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

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**E.M., Appellant**

**and**

**U.S. POSTAL SERVICE, FORT HAMILTON  
STATION, Brooklyn, NY, Employer**

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**Docket No. 14-284  
Issued: May 27, 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 November 15, 2013 appellant filed a timely appeal from a May 21, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.<sup>1</sup> As more than 180 days elapsed from the last merit decision dated April 4, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, but has jurisdiction over the nonmerit decision.

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<sup>1</sup> Under the Board's *Rules of Procedures*, an appeal must be filed in 180 days from the most recent OWCP decision. One hundred and eight days from May 21, 2013 was November 18, 2013. Since using November 20, 2013, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The appeal was postmarked on November 15, 2013, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly denied appellant's request to reopen his claim for further merit review under 5 U.S.C. § 8128.

## FACTUAL HISTORY

On April 3, 2003 appellant, then a 61-year-old custodian, filed a traumatic injury claim alleging that on March 31, 2003 he injured his lower back in the performance of duty. OWCP accepted his claim for a lumbar strain.

By decision dated April 4, 2012, OWCP granted appellant schedule awards for a two percent permanent impairment of each lower extremity.<sup>3</sup> The period of the awards ran for 11.52 weeks from April 29 to July 18, 2008.

In an appeal request form dated September 7, 2012, received by OWCP on March 11, 2013, appellant requested reconsideration. In an accompanying statement, he related that his herniated disc had worsened and that he experienced radiating pain into both legs. Appellant had to use a can to walk two blocks without stopping.

By decision dated May 21, 2013, OWCP denied appellant's request for reconsideration. It found that he did not submit evidence or raised an argument sufficient to warrant reopening his case for further review of the merits under section 8128 of FECA.

On appeal, appellant contends that he has experienced back problems since 1993. He relates that he has constant pain when walking and has undergone three magnetic resonance imaging scan studies. Appellant submitted copies of medical reports already of record.

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>4</sup> OWCP's regulations provide that 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) submit relevant and pertinent new evidence not previously considered by OWCP.<sup>5</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>6</sup> When a claimant fails to meet one of the above standards, OWCP

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<sup>3</sup> OWCP indicated that it was granting appellant a schedule award for the upper rather than the lower extremities; however, this appears to be a typographical error. The maximum number of weeks of compensation for the loss of a leg is 288 weeks. Two percent of 288 weeks equals 5.76, which when multiplied by 2 equals 11.52 weeks of compensation. OWCP thus properly based the period of the award on a finding of a two percent impairment of each lower extremity.

<sup>4</sup> See *supra* note 2. Section 8128(a) of FECA provides 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."

<sup>5</sup> 20 C.F.R. § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.607(a).

will deny the application for reconsideration without reopening the case for review on the merits.<sup>7</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>8</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>9</sup> While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>10</sup>

### ANALYSIS

OWCP, in its most recent merit decision dated April 4, 2012, granted appellant schedule awards for a two percent impairment of each lower extremity. In a correspondence received March 11, 2013, appellant requested reconsideration.

As noted above, the Board does not have jurisdiction over the April 4, 2012 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his request for reconsideration received March 11, 2013, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He argued that he experienced pain radiating into his legs bilaterally as a result of a herniated disc. The underlying issue in this case is whether appellant submitted sufficient medical evidence to establish that he had more than a two percent permanent impairment to each lower extremity. As this is a medical issue it must be addressed by relevant medical evidence.<sup>11</sup> A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence supporting reconsideration.

On appeal, appellant indicates that his back problems began in 1993. He notes that he has undergone multiple diagnostic studies and experiences pain when walking. A claimant may request an increased schedule award based on evidence of new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.<sup>12</sup> As discussed, however, appellant did not submit any new evidence supporting an increased impairment or raise any argument relevant to the issue of whether he has more than a two percent permanent impairment of each lower extremity. His lay opinion is not

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<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>9</sup> *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>10</sup> *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

<sup>11</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>12</sup> *See Linda T. Brown*, 51 ECAB 115 (1999); *Paul R. Reedy*, 45 ECAB 488 (1994).

relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.<sup>13</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant 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 new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request to reopen his claim for further merit review under 5 U.S.C. § 8128.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 21, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 27, 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

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<sup>13</sup> *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *Gloria J. McPherson*, 51 ECAB 441 (2000).