

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

J.P., Appellant

and

**DEPARTMENT OF THE ARMY, TOOELE
ARMY DEPOT, Tooele, UT, Employer**

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**Docket No. 16-1594
Issued: December 22, 2016**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 26, 2016 appellant filed a timely appeal from a March 1, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision dated March 18, 2015 to 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 lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 16, 2001 appellant then a 61-year-old staff duty officer, filed a traumatic injury claim (Form CA-1) for a May 11, 2001 injury. He alleged that his left leg gave out and he fell,

¹ 5 U.S.C. § 8101 *et seq.*

twisting his back. OWCP accepted the claim on November 6, 2001 for aggravation of degenerative disc disease. Appellant received wage-loss compensation for total disability on the periodic rolls as of June 16, 2002. OWCP has administratively combined three claims.²

Appellant sought continued treatment at pain clinics throughout the years wherein he was examined and treated by nurse practitioners. In a report dated January 2, 2013, Whitney M. Bancroft, a nurse practitioner, reported that appellant was seen for a follow-up visit for moderate low back pain. She related that appellant was frustrated that OWCP had not responded to his requests for transfer of medical care closer to his home. Diagnoses of lumbago and degenerative lumbar/lumbosacral intervertebral disc were noted.

By letter dated February 11, 2013, OWCP advised appellant that periodic medical reports were required in all cases in which compensation was being paid. Appellant was requested to submit a comprehensive narrative medical report from his treating physician within 30 days. OWCP did not receive a response.

OWCP referred appellant for a second opinion examination by Dr. Aubrey Swartz, a Board-certified orthopedic surgeon. In a report dated April 22, 2013, Dr. Swartz provided a history and results on examination. He opined that there were no objective medical findings to support that appellant continued to have residuals of a May 11, 2001 employment injury.

On June 20, 2013 OWCP issued a notice of proposed termination that appellant's compensation for wage-loss and medical benefits from the May 11, 2001 employment injury would be terminated based on the medical evidence of record. It indicated that the weight of the evidence was represented by Dr. Swartz. OWCP allotted appellant 30 days within which to submit evidence to support continuing disability or residuals. Appellant did not respond with the time allotted.

By decision dated February 12, 2014, OWCP terminated compensation for wage-loss and medical benefits. It found that Dr. Swartz represented the weight of the medical evidence.

On December 18, 2014 appellant requested reconsideration. He wrote that he did not feel that Dr. Swartz gave him a proper examination. Appellant submitted a November 25, 2014 report from Dr. Patrick Green, a Board-certified family practitioner. Dr. Green reported that appellant had been seen since January 1, 2013 for a chronic low back condition. He indicated

² The record indicates that appellant, then a 52-year-old mechanic helper, filed an occupational disease claim (Form CA-2) on December 22, 1992, alleging a lumbar condition as a result of lifting and bending in his federal employment. (OWCP File No. xxxxxx826) OWCP accepted the claim on March 19, 1993 for permanent aggravation of lumbar degenerative disc disease. Appellant began receiving wage-loss compensation. OWCP issued a May 19, 1998 decision finding that an overpayment of compensation in the amount of \$714.42 had occurred with respect to life insurance premium deductions. Following an appeal, the Board affirmed the May 19, 1998 overpayment decision. Docket No. 99-1789 (issued July 13, 2001). By decision dated June 4, 1999, OWCP found that appellant had been reemployed as a clerk effective October 30, 1998, and his compensation was reduced to reflect his wage-earning capacity. Appellant continues to receive compensation based on loss of wage-earning capacity under this claim.

Appellant filed a traumatic injury claim (Form CA-1) for a back injury on October 18, 1999. (OWCP File No. xxxxxx461) OWCP accepted the claim for muscle spasm.

that appellant had sustained a work injury in 1990 and his condition had worsened over time due to recurrent injuries. Dr. Green noted that a current magnetic resonance imaging (MRI) scan showed degenerative disc disease at L4-5 and L5-S1, with significant facet joint arthritis and foramina narrowing with impingement of transiting nerves. The case files indicate that on December 18, 2014 OWCP also received a report dated August 13, 2014 from Dr. Lauren Zollinger, a radiologist, discussing MRI scan results.³ Dr. Zollinger diagnosed discogenic edema at multiple levels, most severe at L3-4, and degenerative disc disease and facet hypertrophy resulting in neural foraminal stenosis, most significant at L5-S1.

By decision dated March 18, 2015, OWCP reviewed the merits of the claim and denied modification. It reviewed the April 22, 2013 report from Dr. Swartz and again found it represented the weight of the medical evidence. OWCP noted that appellant had not submitted rationalized medical evidence refuting the opinion of Dr. Swartz. It noted the report of Dr. Green discussed MRI scan results, but found it had not received “this imaging report.”

On March 19, 2016 appellant again requested reconsideration. He submitted a DVD containing the actual August 13, 2014 MRI scan results. Appellant also submitted an October 7, 2014 report from a nurse practitioner. In a note dated January 9, 2016, he wrote that he was told by the nurse practitioner that his back was one of the worst he had ever seen.

By decision dated March 1, 2016, OWCP declined to review the merits of the claim. It found the evidence submitted was insufficient to warrant merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP’s regulations provides 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)(3) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

In the present case, the last merit decision was dated March 18, 2015. This decision denied modification of the termination of compensation effective February 12, 2014. OWCP

³ The report was placed in the case file for the claim filed in 1992, which is considered a master file (xxxxxx826)

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).

found the opinion of the second opinion physician, Dr. Swartz, represented the weight of the medical evidence. To require OWCP to reopen the case for review of the merits of the claim pursuant to 5 U.S.C. § 8128(a), appellant must meet one of the requirements on 20 C.F.R. § 10.606(b)(3).

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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. He merely argued that a nurse practitioner had noted the severity of his back condition.

As to the submission of relevant and pertinent new evidence not previously considered by OWCP, the Board finds that appellant failed to meet this requirement. The evidence submitted on reconsideration was a DVD of the August 13, 2014 lumber MRI scan. The results of the MRI scan had been discussed by Dr. Green in his November 25, 2014 report, which was before OWCP at the time of the March 18, 2015 decision. The submission of the DVD was apparently in response to a reference in the March 18, 2015 decision that the MRI scan “imaging report” had not been received,⁷ but the MRI scan itself is not relevant and pertinent new evidence as to the medical issue of causal relationship presented. The underlying issue was whether appellant continued to have a back condition on or after February 12, 2014 causally related to an employment injury. Dr. Green had previously discussed the August 13, 2014 MRI scan results. To be new and relevant, the medical evidence must discuss the issue of causal relationship between appellant’s condition or disability and the employment injury.⁸ The DVD of the August 13, 2014 MRI scan is not relevant to the issue of causal relationship because it does not provide any information with respect to the relationship of any findings to federal employment. The evidence, therefore, is insufficient to require merit review of the claim.⁹

The Board accordingly finds that appellant was not entitled to a merit review of the claim. 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 by OWCP. Pursuant to 20 C.F.R. § 10.606(b)(3), OWCP properly denied merit review.

On appeal, appellant indicates that he still has significant back problems and he did not feel Dr. Swartz was truthful about his back condition. However, as noted above, the issue on appeal is not the merits of the termination of compensation decision. The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3) that would require OWCP to review the merits of the claim. For the reasons discussed, appellant was not entitled to a review of the merits of the claim in this case.

⁷ The Board notes that an August 13, 2014 MRI scan narrative report from a radiologist had been received, but was placed in the 1992 claim file.

⁸ *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

⁹ *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 1, 2016 is affirmed.

Issued: December 22, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board