

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

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**B.M., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Pine Knot, KY, Employer**

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**Docket No. 15-1941  
Issued: February 2, 2016**

*Appearances:*  
*Ronald S. Webster, Esq., for the appellant*  
*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 September 28, 2015 appellant, through counsel, filed a timely appeal of an April 1, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from October 2, 2013, the date of the most recent OWCP merit decision, 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 lacks jurisdiction to review the merits of this case.

**ISSUE**

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

On appeal, counsel argues the merits of appellant's claim.

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

## **FACTUAL HISTORY**

On November 29, 2012 appellant, a 36-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that he sustained a lower back injury on November 28, 2012 as a result of turning, twisting, standing, and bending over in the performance of duty.<sup>2</sup> He stated that he had been in training and November 28, 2012 was his first day back at work after his October 23, 2012 employment injury which had been accepted for hand and knee conditions. Appellant indicated that he was walking through grass and bent over to pick up an aluminum can on the ground when he felt a sharp pain run down his leg from his lower back, which made it difficult to straighten back up or even walk. He was on continuation of pay (COP) from November 30, 2012 to January 3, 2013.

An OWCP (Form CA-16), authorization for examination, was issued by the employing establishment on November 29, 2012. Appellant submitted reports dated November 29, 2012 through July 3, 2013 from Annville Medical Clinic. Dr. David Hays, a Board-certified family practitioner, related that appellant advised that he bent over to pick something up on November 28, 2012. He diagnosed low back pain, probably muscle strain, radiculopathy, and sciatica.

By decision dated August 15, 2013, OWCP denied the claim finding that the evidence failed to establish that appellant had sustained an injury in the performance of duty.

On September 6, 2013 appellant requested reconsideration of his claim.

By decision dated October 2, 2013, OWCP denied appellant's claim because the medical evidence was insufficient to establish a causal relationship between his lower back condition and the November 28, 2012 employment incident.

On September 30, 2014 appellant's counsel requested reconsideration. He argued that bending over at work on November 28, 2012 caused an aggravation of appellant's original October 23, 2012 employment injury and the current claim was a continuation or result of that prior injury. Counsel contended that it was OWCP's responsibility to further develop the medical evidence.

By decision dated April 1, 2015, OWCP denied appellant's request for reconsideration of the merits of the claim finding that he had failed to submit pertinent new and relevant evidence, and failed to show that OWCP had erroneously applied or interpreted a point of law not previously considered by OWCP.

## **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

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<sup>2</sup> On July 5, 2013 appellant, through counsel, filed a recurrence claim. He alleged that his lower back pain had been increasing over months of time to the extent that it was a constant ache causing difficulty moving and bending.

an award for or against compensation.<sup>3</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup>

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.<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 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 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 or argument which repeats or duplicates evidence or argument already in the case record<sup>8</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>9</sup>

### ANALYSIS

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

In support of his September 30, 2014 reconsideration request, counsel argued that bending over at work on November 28, 2012 caused an aggravation of appellant's original October 23, 2012 employment injury and the current claim was a continuation or result of that prior injury. He contended that it was OWCP's responsibility to further develop the medical evidence. Counsel's arguments are not relevant to the underlying issue, which was whether the medical evidence was sufficient to establish a causal relationship between appellant's lower back condition and the November 28, 2012 employment incident.<sup>10</sup> Appellant did not submit any new medical evidence. The Board has held that the submission of an argument which does not

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<sup>3</sup> *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).

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

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

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> *See A.L.*, *supra* note 5. *See also Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>9</sup> *Id.* *See also Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>10</sup> The Board notes that it is appellant's burden of proof to establish a causal relationship between the conditions for which compensation is claimed and the employment incident.

address the particular issue involved does not constitute a basis for reopening a case.<sup>11</sup> Therefore, counsel's arguments are insufficient to require OWCP to reopen the claim for consideration of the merits.<sup>12</sup>

The Board finds that appellant failed to meet the requirement for a merit review under section 8128(a) and OWCP properly denied his claim.

On appeal, counsel argues the merits of appellant's claim. The Board noted above that it lacks jurisdiction over OWCP's October 2, 2013 merit decision and therefore is precluded from conducting the merits.

The Board also notes that the employing establishment executed a Form CA-16 on November 29, 2012 authorizing medical treatment. The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim.<sup>13</sup> Although OWCP denied appellant's claim for an injury, it did not address whether he is entitled to reimbursement of medical expenses pursuant to the Form CA-16.

### **CONCLUSION**

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

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<sup>11</sup> See *supra* note 9.

<sup>12</sup> See *L.H.*, 59 ECAB 253 (2007).

<sup>13</sup> See *D.M.*, Docket No. 13-535 (issued June 6, 2013). See also 20 C.F.R. §§ 10.300, 10.304.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 1, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 2, 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