

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

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**J.W., Appellant**

**and**

**U. S. POSTAL SERVICE, POST OFFICE,  
Los Angeles, CA, Employer**

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**Docket No. 14-1011  
Issued: March 25, 2016**

*Case Submitted on the Record*

*Appearances:*

*Donald L. Barnett., for the appellant  
Office of Solicitor, for the Director*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 24, 2014 appellant, through his representative, filed a timely appeal from a September 24, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying reconsideration.<sup>1</sup> The final merit decision of record is dated April 1, 2013. There is no merit decision within 180 days of March 24, 2014, the date appellant filed his appeal

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<sup>1</sup> Appellant's appeal request was postmarked March 24, 2014 and received on March 27, 2014 by the Clerk of the Board. An appeal of final OWCP decisions must be filed within 180 days of the decision. See 20 C.F.R. § 501.3(e). The 180<sup>th</sup> day after the September 24, 2013 decision was Sunday, March 23, 2014. In computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday. 20 C.F.R. 501.2(f)(2). See also *John B. Montoya*, 43 ECAB 1148 (1992). The next business day after March 23, 2014 was Monday, March 24, 2014. The Clerk of the Board did not receive appellant's request for appeal until Thursday, March 27, 2014, which would render the appeal untimely. However, under 20 C.F.R. 501.(f)(1), "[i]f the notice of appeal is sent by United States Mail or commercial carrier and the use of the date of delivery as the date of filing would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of the postmark...." Therefore, the Board will use the date of the postmark, March 24, 2014, as the date of filing in this case.

with the Board. Therefore, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

On appeal appellant's representative asserts that there was "no question that [appellant] suffered an on-the-job injury on April 7, 2011," leading to a bacterial infection and the amputation of his right ring finger.

### **ISSUE**

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

### **FACTUAL HISTORY**

On January 18, 2012 appellant, then a 69-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 7, 2011 he sustained a cut "larger than a scratch" on his right ring finger in the performance of duty. On the reverse of the form, the employing establishment controverted the claim.

In a February 3, 2012 letter, OWCP advised appellant of the additional evidence needed to establish his claim, including a detailed statement of how the injury occurred and a statement from his physician supporting a causal relationship between the injury and work factors.

In response, appellant submitted a February 20, 2012 statement explaining that, while delivering mail on April 7, 2011, he pricked his right ring finger on the top of an open metal mailbox. He "wrapped [his] finger until it stopped bleeding and continued delivering [the] mail." While driving home, appellant experienced systemic weakness and severe swelling of the right hand. His wife then took him to the physician.

In a February 13, 2012 statement, appellant's wife recalled that, after returning home from work on April 7, 2011, appellant had "problems standing and refused to eat dinner." She took him to the physician the following day, who directed emergency room care. After returning home that night, appellant's hand began to swell more. He attributed the swelling to cutting his finger on a mailbox at work. By April 10, 2011, appellant was disoriented, with severe swelling in the right hand. His wife took him to the emergency room, where physicians informed her that his condition was grave. Appellant's wife asserted that she took a letter to appellant's supervisor, advising that appellant was semiconscious and totally incapacitated. She also informed the employing establishment that he "cut his finger on a mailbox while at work. [She] was told by the supervisor that they would be in touch, but they never did contact [her]." After appellant was discharged from rehabilitations, she requested that the employing establishment send her a traumatic injury claim form (Form CA-1). The employing establishment did not respond. One of appellant's coworkers brought appellant's wife a CA-1 form in August 2011. In January 2012, the employing establishment informed appellant that "his CA-1 form and other documents were lost and he needed to come in to complete the form again." Appellant completed a repeat claim form and submitted copies of the August 2011 claim form and related

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

documentation. In a February 29, 2012 letter, he stated that his physician diagnosed an April 7, 2011 finger injury.

In April 14 and 15, 2011 notes, Dr. Paul H. Miller, an attending Board-certified internist, stated that appellant had been admitted to the hospital on April 10, 2011 and remained a patient there. He noted that appellant would be disabled for an undetermined period. In a February 28, 2012 report, Dr. Miller stated that appellant “required hospitalization on April 10, 2011 several days after suffering a laceration to his right hand, which reportedly occurred in the course of his employment. The laceration became infected and he became septic with toxic shock syndrome and cellulitis of the right upper extremity.” Appellant underwent amputation of the right fourth finger and debridement of the right palm. His hospital course was complicated by respiratory failure requiring ventilator support and renal failure requiring hemodialysis. Appellant was discharged to a rehabilitation facility on May 9, 2011, where he spent several weeks. Dr. Miller noted that, despite extensive therapy, appellant remained “severely disabled with extremely limited use of his right hand. [Appellant was] unable to grasp objects with his right hand and has no fine motor skills of the right hand.”

In an October 12, 2011 letter, Dr. Vic A. Osborne, an attending Board-certified orthopedic surgeon, stated that appellant had been disabled for work since April 10, 2011 and would be unable to return to work until February 12, 2012 at the earliest.

By decision dated March 6, 2012, OWCP denied the claim on the grounds that appellant did not provide a factual statement describing how the claimed injury occurred or medical evidence diagnosing an injury. By second decision dated March 6, 2012, it denied continuation of pay on the grounds that he did not report the injury “on a form approved by OWCP within 30 days following the injury.”

Appellant requested an oral hearing. He submitted copies of his and his wife’s statements and Dr. Miller’s February 28, 2012 report. Appellant also submitted the first page of a CA-1 form dated August 22, 2011. In a January 11, 2012 report, Dr. Deepthi Jayasekara, an attending physician Board-certified in internal medicine and infectious disease, diagnosed right hand necrotizing fasciitis with group A streptococcus with cellulitis, status post toxic shock syndrome, scarring and reduced mobility of the right hand. He opined that he was “quite certain that [appellant’s] infection was related to a ... work-related injury that he received on the right hand as described to me.”

In a February 14, 2012 letter, an employing establishment supervisor stated that in “April 2011 [he] received a call from [appellant] informing me that he was ill and would not be at work. The following week [he] was told [appellant] was in the hospital and I did not know the nature of his illness and was never told that this was an on the job injury by [appellant] or his wife whom [he] spoke to often about his condition.” The supervisor contended both that there was no medical evidence and that, if there were, it would not support an occupational injury because it would have been reviewed by upper management.

In a February 20, 2012 report, Dr. Osborne noted continued pain and stiffness in the right hand following amputation of the right ring finger following severe infection with gangrene. He

diagnosed permanent contractures of the remaining fingers of the right hand with severe weakness.

By decision dated May 18, 2012, an OWCP hearing representative reviewed the written record and remanded the case to OWCP on the grounds that OWCP did not fully consider all evidence submitted prior to the March 6, 2012 decision.

In an August 15, 2012 letter, OWCP requested that appellant submit copies of his hospital notes. Appellant was afforded 30 days to submit this information.

In April 10, 2011 emergency room reports, Dr. Samuel J. Thurber, an attending physician Board-certified in emergency medicine, noted that appellant presented with urosepsis, systemic weakness, and a swollen right hand of approximately four days' duration. Appellant last saw his attending physician on April 10, 2011. Dr. Thurber diagnosed cellulitis of the right hand and urosepsis.

In an April 10, 2011 report, Dr. Miller noted that appellant was hospitalized after a "two-day history of weakness, fever, pain, and swelling in the right upper extremity." Appellant had a history of "hypertension, chronic atrial fibrillation, chronic kidney disease, and gout." Dr. Miller diagnosed cellulitis of the right upper extremity, septic shock, hypertension, chronic atrial fibrillation, stage 3 chronic kidney disease, and gout. On April 11, 2012 Dr. Osborne amputated appellant's right ring finger and debrided the right palm. As appellant was in critical condition with organ failure, Dr. Osborne performed the procedure under local anesthesia.

By decision dated September 17, 2012, OWCP denied appellant's claim on the grounds that fact of injury was not established. It found that the hospital notes did not describe the mechanism of injury.

In October 12 and 13, 2012 letters, appellant requested an oral hearing, scheduled for February 12, 2013. As he did not call in at the time of the hearing, OWCP advised that it would instead review the written record. Appellant submitted additional hospital reports.

In an April 10, 2011 report, Dr. Nasima Begum, an attending physician Board-certified in internal medicine and infectious disease, noted an infected cut with discoloration on appellant's right fourth finger. As he was disoriented due to sepsis and organ failure, appellant could not explain precisely how he cut his finger. Dr. Begum diagnosed right "fourth finger small cut with cellulitis, spread up to the arm, forearm, chest wall, suspect highly of pyogenes streptococcus related."

On April 10, 2011 Dr. Osborne described a small cut on the dorsum of appellant's right ring finger, proximal to the base of the fingernail. He diagnosed "[s]epticemia with probable strep infection, most likely emanating from trivial abrasion to right ring finger."

Dr. Hung Che, an attending physician Board-certified in internal medicine, critical care medicine, and pulmonary disease, provided an April 20, 2011 report and April 22, 2011 progress note describing a history of cut to right ring finger that became gangrenous and required amputation of the digit. He stated that appellant "had a cut on the right hand [three] days prior to admission" then "developed redness and swelling on the right hand that extended to the right

chest wall on admission and septic shock at that time and subsequent blood culture grew streptococcus pyogenes organism.”<sup>3</sup>

In a February 11, 2013 report, Dr. Miller noted that appellant “required hospitalization on April 10, 2011, several days after suffering a laceration to his right hand, which [he] reports occurred in the course of his employment. This laceration became infected and [appellant] became septic with toxic shock syndrome and cellulitis of the right upper extremity. Treatment required prolonged hospitalization and eventually required amputation of his right fourth finger. This has resulted in permanent disability secondary to major impairment in the use of [appellant’s] right hand.”

By decision dated and finalized April 1, 2013, an OWCP hearing representative affirmed in part and modified in part OWCP’s September 17, 2012 decision. He found that appellant established that he sustained a laceration of the right ring finger in the performance of duty on April 7, 2011 as alleged. The hearing representative noted that there was no evidence to the contrary and that the employing establishment misstated the facts. He found, however, that the medical record was insufficient to establish causal relationship as appellant’s physicians, including those attending appellant in the hospital, did not describe the accepted April 7, 2011 incident in which he pricked or cut his finger on a mailbox. The hearing representative noted that OWCP received “the April 11, 2011 operative report and other hospital records of [appellant’s] admission. April 10, 2011 notes diagnosed right hand cellulitis. The records did not provide a specific history that on April 7, 2011 [appellant] pricked his right ring finger on a mailbox while delivering mail. The reports noted onset of symptoms on April 10, 2011.” The hearing representative also noted Dr. Begum’s remark that appellant was disoriented and could not provide a precise injury history.

In a September 2, 2013 letter, appellant’s representative requested reconsideration. He argued that there was no longer a question regarding causal relationship as OWCP accepted the April 7, 2011 injury as factual. Appellant’s representative noted that several physicians of record, including Dr. Begum, Dr. Che, Dr. Miller, and Dr. Osborne, explained in detail that the cut on appellant’s right fourth finger became infected with streptococcus pyogenes, causing cellulitis and gangrene that necessitated amputation of the digit. He asserted that these reports were of sufficient probative quality to warrant an acceptance of the claim. Appellant’s representative submitted copies of Dr. Begum’s, Dr. Che’s, and Dr. Osborne’s April 2011 reports that were previously of record.

By decision dated September 24, 2013, OWCP denied reconsideration on the grounds that the evidence submitted was repetitious. It stated that the “evidence reviewed in support of [the] reconsideration request includes medical reports and hospitalization records” dated from April 10, 2011 to February 11, 2013. OWCP also stated that the evidence was “repetitious and consist[e]d of copies of documentation that was previously considered in the contested decision.”

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<sup>3</sup> Appellant also submitted an April 11, 2011 nephrology consult, a May 6, 2011 rehabilitation consultation, and May 9, 2011 discharge summary.

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>4</sup> section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show 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> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>6</sup>

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>7</sup> The claimant need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>8</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>9</sup>

## ANALYSIS

The Board has reviewed the case record and finds that OWCP properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 5128(a).

Appellant's representative requested reconsideration in a September 2, 2013 letter. In the application for reconsideration, he did not raise the issue nor show that OWCP erroneously applied or interpreted a specific point of law. Appellant's representative asserted that there was "no question that [appellant] suffered an on-the-job injury on April 7, 2011." The underlying issue is whether appellant has met his burden of proof to establish a traumatic injury and specifically whether he had submitted sufficient medical evidence to establish a causal relationship between his hand injury and duties of his federal employment. OWCP did not directly address his statement in its September 24, 2013 decision as it was the ultimate issue in this case and had been addressed throughout the life of his claim. The Board finds that this general argument has been considered by OWCP in its previous decisions of record.

Additionally, appellant's representative submitted copies of the reports of Dr. Nasima, the attending physician Board-certified in internal medicine and infectious disease, Dr. Hung, the attending physician Board-certified in internal medicine, critical care and pulmonary disease, and

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<sup>4</sup> 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.606(b)(2).

<sup>6</sup> *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

<sup>7</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>8</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>9</sup> *Annette Louise*, 54 ECAB 783 (2003).

Dr. Osborne, the attending Board-certified orthopedic surgeon, who amputated appellant's right ring finger on April 11, 2011. The Board finds that the submitted medical reports were duplicative of medical evidence previously entered into the record.

As appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2): show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent evidence not previously considered by OWCP, pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to reopen the case for review of the merits.

### **CONCLUSION**

The Board finds that OWCP did not abuse its discretion by refusing to reopen appellant's case for further consideration of the merits.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 24, 2013 is affirmed.<sup>10</sup>

Issued: March 25, 2016  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>10</sup> James A. Haynes, Alternate Judge, participated in the original decision, but was no longer a member of the Board effective November 16, 2015.