

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

T.S., Appellant

and

**DEPARTMENT OF JUSTICE, U.S. MARSHALS
SERVICE, Washington, DC, Employer**

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**Docket No. 17-0291
Issued: January 25, 2017**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 21, 2016 appellant filed a timely appeal from a September 14, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated April 4, 2016 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.²

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).

¹ 5 U.S.C. § 8101 *et seq.*

² Appellant submitted medical evidence on appeal that was not of record when OWCP issued its September 14, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Consequently, the Board lacks jurisdiction to review appellant's newly submitted medical evidence. *Id.*

FACTUAL HISTORY

On July 10, 2015 appellant, then a 55-year-old marshal, filed a recurrence claim (Form CA-2a) for medical treatment only under claim number xxxxxx200. He had previously injured his neck and left upper extremity on June 6, 1997, which OWCP accepted for neck sprain and left elbow/forearm contusion. On his Form CA-2a appellant identified July 6, 2015 as the date of recurrence and explained that the pain in his neck, left arm, and hand “came back a day after [he] was moving some boxes around at work.”³ Based on appellant’s description of events, OWCP treated his July 10, 2015 claim as a new traumatic injury.

After further development of the record, OWCP denied appellant’s traumatic injury claim by decision dated November 9, 2015. It initially denied the claim because the medical evidence of record was insufficient to establish causal relationship between appellant’s diagnosed conditions and the accepted July 6, 2015 employment incident. At the time, the medical evidence of record included several diagnostic studies, which revealed, *inter alia*, cervical and lumbar degenerative disc disease. Appellant’s treating physician, Dr. David C. Waters, a Board-certified neurosurgeon, diagnosed left C8 radiculopathy and recommended left C8 nerve root decompression. Dr. Waters noted that appellant had been having intermittent left C8 radiculopathy since 1997 when he was involved in a rear-end collision.

On November 20, 2015 appellant requested a review of the written record by a representative of the Branch of Hearings and Review. He also submitted a November 17, 2015 report and treatment notes from Dr. Waters, who indicated that on July 6, 2015 appellant had a work-related injury -- moving boxes at work -- that aggravated an underlying cervical condition, which produced left arm pain.⁴ Dr. Waters further noted that appellant’s arm pain emanated from the C8 nerve root, which required surgical intervention.

By decision dated April 4, 2016, an OWCP hearing representative affirmed the November 9, 2015 decision. She found that the medical evidence of record, including Dr. Waters’ November 17, 2015 report, did not contain sufficient medical rationale to support that the diagnosed conditions were causally related to the July 6, 2015 injury.

Appellant requested reconsideration on August 30, 2016 based on new medical evidence. He indicated that he attached a May 3, 2016 report from Dr. Waters that more clearly described how appellant’s work activity aggravated his underlying conditions. However, there is no indication that OWCP received the referenced May 3, 2016 report from Dr. Waters.

In a September 14, 2016 decision, OWCP denied appellant’s request for reconsideration. It found that appellant’s request neither raised substantive legal questions nor included new and relevant evidence. As such, appellant’s request was insufficient to warrant further merit review.

³ Appellant continued to work following the July 6, 2015 employment incident.

⁴ Dr. Waters reiterated that appellant initially hurt his neck in 1997, which eventually resolved with conservative therapy. He also mentioned subsequent episodes of neck and/or left arm pain in 2000, 2005, and 2012, which all reportedly resolved following treatment. Dr. Waters further noted that a 2012 cervical magnetic resonance imaging scan showed foraminal narrowing at the C7-T1 level on the left side. He indicated that, following the 2012 episode, appellant remained symptom free until the July 6, 2015 employment incident.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain 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.⁸ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁹

ANALYSIS

Appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. Along with his reconsideration request, appellant indicated that he was submitting a new medical report from Dr. Waters dated May 3, 2016. The Board finds that the record did not contain a May 3, 2016 report from Dr. Waters prior to the issuance of OWCP's September 14, 2016 decision. Therefore, OWCP properly found that appellant failed to submit relevant and pertinent new evidence not previously considered.

The Board finds that OWCP properly denied further review of the merits pursuant to section 10.606(b)(3).

⁵ This section provides in pertinent part: "[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).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.606(b)(3).

⁹ *Id.* at § 10.608(a), (b).

CONCLUSION

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 September 14, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2017
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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