

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

M.A., Appellant)
and) **Docket No. 18-0395**
U.S. POSTAL SERVICE, POST OFFICE,) **Issued: July 17, 2018**
Harrisburg, PA, Employer)

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 18, 2017 appellant filed a timely appeal from a June 21, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days elapsed from OWCP's most recent merit decision dated April 5, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (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).

¹ Appellant timely requested oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated May 16, 2018, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 18-0395 (issued May 16, 2018).

² 5 U.S.C. § 8101 *et seq.*

On appeal appellant asserts that his occupational disease claim should be accepted.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 26, 2012 appellant, then a 58-year-old mail processing clerk,⁴ filed an occupational disease claim (Form CA-2) alleging that his federal employment duties of feeding and sweeping mail at a delivery bar code sorter caused low back pain.

By decision dated March 5, 2013, OWCP found that the medical evidence submitted was insufficient to establish causal relationship between the claimed back condition and the accepted factors of appellant's federal employment.

On April 1, 2013 appellant timely requested a hearing before an OWCP hearing representative.⁵ By decision dated November 27, 2013, OWCP's hearing representative affirmed the denial of the claim. He found the medical evidence submitted insufficient to establish causal relationship in the claim.

Appellant, through his then counsel, requested reconsideration on May 8, 2014. By decision dated August 6, 2014, OWCP reviewed the merits of his claim, but denied modification, finding that the medical evidence submitted was insufficient to establish causal relationship.

Appellant, through his then counsel, again requested reconsideration on August 29, 2014. He submitted a March 17, 2014 report from Dr. Robert Blake, appellant's attending chiropractor, who noted his review of a "12-2-201" [sic] lumbar spine x-ray.⁶ Dr. Blake diagnosed lumbar disc dissection, subluxation L5, lumbar myalgia, lumbar disc degeneration, left S1 subluxation, and S1 sprain/strain. In a report dated September 11, 2014, he again diagnosed lumbar subluxations.

On October 7, 2014 OWCP referred the case record to Dr. Leonard Kaufman, a Board-certified radiologist, for a second opinion as to whether the December 23, 2012 x-rays showed a subluxation. In a report dated October 21, 2014, Dr. Kaufman indicated that he had reviewed the December 22, 2012 emergency room report, December 23, 2012 x-rays, a May 29, 2013 MRI

³ Docket No. 15-0381 (issued April 3, 2015).

⁴ The record indicates that appellant also worked part time as a chiropractor.

⁵ At that time appellant obtained representation from Stephen J. Dunn, Esq.

⁶ The record includes an emergency department report noting that appellant was seen on December 22 and 23, 2012 where a lumbar spine x-ray was interpreted as showing spondylosis and S1 degenerative changes. An x-ray dated December 23, 2012, demonstrated lower thoracic and lower lumbar spondylosis, and mild S1 joint degenerative changes. A May 29, 2013 magnetic resonance imaging (MRI) scan demonstrated mild multilevel degenerative changes and moderate foraminal stenosis at L5-S1.

scan, and reports from Dr. Blake. He opined that there was no radiographic evidence of subluxation.⁷

By decision dated November 13, 2014, OWCP reviewed the case on its merits, but found the evidence of record insufficient to warrant modification.

On December 10, 2014 appellant, through counsel, appealed to the Board. By decision dated April 3, 2015, the Board affirmed OWCP's November 13, 2014 decision, finding that appellant had not established a back injury causally related to the accepted factors of his federal employment. The Board found that Dr. Blake, a chiropractor, was not considered a physician under FECA, noting that he merely reviewed x-rays taken elsewhere, and that the record contained no rationalized medical opinion evidence sufficient to establish causal relationship between the claimed condition and appellant's job duties.⁸

On January 21, 2016 appellant, through counsel, requested reconsideration and submitted additional evidence. By decision dated April 5, 2016, OWCP reviewed the merits of appellant's claim, but denied modification.⁹

On April 4, 2017 appellant requested reconsideration.¹⁰ He submitted evidence previously of record,¹¹ excerpts from previous requests for reconsideration, information regarding his light-duty work and Equal Employment Opportunity Commission claim, correspondence from him to the employing establishment, a duty status report (Form CA-17) dated November 26, 2012 with an illegible signature, and publications copied from the internet. A December 9, 2013 employing establishment light-duty work status report signed by Dr. Vagomir P. Vora, an orthopedic surgeon, indicated that appellant could perform light-duty work per a November 29, 2013 FCE.¹² In attached statements, appellant briefly described the history of his claim and included references to OWCP procedures and indicated that he was submitting medical evidence from Dr. David Smith, a chiropractor. No additional evidence was received.

By decision dated June 21, 2017, OWCP denied appellant's April 4, 2017 request for reconsideration of the merits of his claim. It found the evidence submitted irrelevant or immaterial and of no bearing on the issue of whether his claimed condition was causally related to factors of his federal employment.

⁷ In October 2014, appellant obtained representation from Alan J. Shapiro, Esq.

⁸ *Supra* note 3.

⁹ OWCP's April 5, 2016 decision noted that it denied modification of the Board's April 3, 2015 decision. OWCP is not authorized to review Board decisions. Although the April 3, 2015 decision was the last merit decision, the November 13, 2014 OWCP decision is the appropriate subject of possible modification by OWCP.

¹⁰ Appellant indicated that he was no longer represented by Mr. Shapiro and was appearing *pro se*.

¹¹ This consisted of a functional capacity evaluation (FCE) dated November 29, 2013 and the December 23, 2012 x-ray report.

¹² The work capacity evaluation had been submitted previously.

LEGAL PRECEDENT

Under section 8128(a) of FECA,¹³ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”¹⁴

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.¹⁵

ANALYSIS

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

On reconsideration appellant asserted that his claim should have been accepted. His assertion did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered. Thus, appellant is not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(3).¹⁶

The Board also finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request. The underlying issue in this case is whether appellant’s employment duties caused a back condition. As the issue is medical in nature, it can only be resolved through the submission of medical evidence.¹⁷ In his request to OWCP, appellant indicated that he was submitting reports from Dr. Smith, a chiropractor. These reports, however, are not in the record before the Board.

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(3).

¹⁵ *Id.* at § 10.608(b).

¹⁶ *Supra* note 14; *see R.M.*, 59 ECAB 690 (2008).

¹⁷ *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

Medical evidence submitted included an FCE report which had previously been submitted. The Board has held that newly submitted evidence which is only repetitive or duplicative of evidence existing in the record is insufficient to warrant further merit review.¹⁸ A November 26, 2012 duty status report (Form CA-17) contains an illegible signature. As the author of this document cannot be identified as a physician, it does not constitute competent medical evidence and is insufficient to reopen the case for further merit review.¹⁹ OWCP also received an employing establishment light-duty work status report signed by Dr. Vora, however, it did not contain a diagnosis or any opinion on causal relationship and merely indicates that appellant should perform light work in accordance with the FCE. As this report did not address the underlying issue of causal relationship, it did not constitute relevant and pertinent new medical evidence.²⁰

Because appellant did not provide OWCP with any relevant and pertinent new evidence, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).²¹

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, OWCP properly denied his reconsideration request.²²

CONCLUSION

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

¹⁸ See *A.H.*, Docket No. 17-0652 (issued April 25, 2018).

¹⁹ See *M.R.*, Docket No. 14-1836 (issued February 3, 2015).

²⁰ See *B.B.*, Docket No. 17-0769 (issued December 14, 2017).

²¹ 20 C.F.R. § 10.606(b)(3)(iii); see *D.P.*, Docket No. 17-0290 (issued May 14, 2018).

²² *M.A.*, Docket No. 16-1846 (issued October 20, 2017).

ORDER

IT IS HEREBY ORDERED THAT the June 21, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 2018
Washington, DC

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

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

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