

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

G.T., Appellant	)	
	)	
and	)	Docket No. 18-1506
	)	Issued: April 24, 2019
DEPARTMENT OF THE NAVY, PUGENT	)	
SOUND NAVAL SHIPYARD, Bremerton, WA,	)	
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 August 1, 2018 appellant filed a timely appeal from an April 3, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from OWCP's last merit decision, dated July 31, 2017, 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 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).

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

## **FACTUAL HISTORY**

On March 10, 2017 appellant, then a 68-year-old sheet metal mechanic, filed an occupational disease claim (Form CA-2) alleging that he sustained increasing back pain over time following a fall that occurred on May 2, 2016 while in the performance of duty. He indicated that he was diagnosed with spondylolisthesis in the lumbar region and he underwent surgery on September 2, 2016. Appellant reported that he returned to work on November 10, 2016 and was placed on light duty.

In a development letter dated March 17, 2017, OWCP related that the medical and factual evidence received to date was insufficient to establish his claim. Appellant was advised that he should submit a physician's report which provided a diagnosis of his lumbar condition and a rationalized medical opinion regarding causal relationship. OWCP attached a factual questionnaire for his completion. Appellant was afforded 30 days to submit the requested factual and medical evidence.

The employing establishment controverted the claim on April 25, 2017 indicating that appellant had not provided a physician's opinion supported by medical rationale explaining how his employment duties caused, contributed to, or aggravated his medical condition.

Appellant provided an undated statement, received by OWCP on May 1, 2017. He explained that on May 2, 2016 he was walking and felt a sharp pain in his lower back that caused both legs to go numb causing him to fall in the street. Appellant reported that, since that incident, he experienced the same pain and numbness and had fallen in front of his supervisors and coworkers. He relayed that he believed working on hard surfaces and handling sheet metal for over 26 years in the sheet metal shop and on the waterfront, which required kneeling, bending, lifting in awkward positions, and in tight spaces to complete his job assignments, had caused his back condition.

Dr. A. Alex Mohit, a Board-certified neurosurgeon, performed lumbar surgery on September 2, 2016 and diagnosed spondylolisthesis in the lumbar region.

In a November 10, 2016 report, Dr. Bruce Christen, Board-certified in occupational medicine, indicated that appellant had a nonoccupational condition involving ongoing back pain/neuropathy which required him to have fusion surgery at L4-L5-S1 on September 2, 2016. He noted that appellant indicated that he no longer had radiculopathy.

By decision dated May 19, 2017, OWCP denied appellant's claim, finding that the medical evidence submitted did not establish a medical diagnosis causally related to his employment factors.

In a May 25, 2017 report, Dr. Mohit opined that appellant's diagnosed lumbar region spondylolisthesis was directly related to his work duties. He explained that appellant had lumbar back surgery with L2-S1 laminectomy and L4-S1 fusion with posterior instrumented stabilization on September 2, 2016. Dr. Mohit noted that appellant continued with pain in the sciatic joint, both legs and ankles, which caused falls before and after surgery. He recommended that appellant avoid

standing for prolonged hours on hard surfaces, heavy lifting, operating of equipment, or climbing up or down ladders. Dr. Mohit opined that appellant should be considered for medical retirement.

On June 19, 2017 appellant requested reconsideration.

By decision dated June 28, 2017, OWCP modified the May 19, 2017 decision. It found that the medical evidence submitted was insufficient to establish that the medical condition was causally related to accepted work events.

On July 20, 2017 appellant requested reconsideration.

In an undated report received on July 20, 2017, Dr. Mohit explained that appellant's employment duties required heavy lifting of sheet metal, standing on hard surfaces for prolonged hours, kneeling, stooping, and lifting sheet metal in awkward positions and in confined spaces. He opined that "[t]his type of work causes a significant amount of strain on [appellant's] back and overall body." As a result, appellant underwent a lumbar fusion surgery on September 2, 2016. Dr. Mohit explained that appellant reported continued sacroiliac joint pain and pain radiating down both legs and ankles which caused appellant to fall before and after surgery. He recommended that appellant avoid standing for prolonged hours on hard surfaces, no heavy lifting, or climbing up or down ladders. Dr. Mohit opined that appellant should be considered for medical retirement.

By decision dated July 31, 2017, OWCP denied modification of its prior decision. It explained that Dr. Mohit had not provided a well-reasoned opinion as to how appellant's specific duties caused or aggravated the diagnosis of spondylolisthesis.

On August 8, 2017 appellant requested reconsideration. He provided a copy of Dr. Mohit's previously reviewed undated report.

By decision dated September 28, 2017, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was cumulative and substantially similar to evidence or documentation previously considered.

On March 21, 2018 appellant requested reconsideration.

In a March 19, 2018 report, Dr. Mohit opined that it was his medical opinion that appellant's duties at work required that he lift sheet metal in awkward positions in confined spaces. He explained that this type of work caused a significant amount of strain on appellant's back and overall body. Dr. Mohit noted that, due to appellant's back issues, he underwent an L2-S1 laminectomy with L4-S1 posterior spinal fusion on September 2, 2016. He also noted that appellant underwent a right sacroiliac joint fusion on July 24, 2017. Dr. Mohit noted that appellant had complaints of continued sacroiliac joint pain, pain radiating down both legs and ankles, and numbness in his leg which caused him to have near falls. He explained that these were residual symptoms after surgical intervention that might improve with physical therapy. Dr. Mohit recommended that appellant avoid standing for prolonged hours on hard surfaces and no heavy lifting or climbing up or down ladders, as these could aggravate symptoms and potentially cause harm.

By decision dated April 3, 2018, OWCP denied appellant's request for reconsideration with conducting a merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>2</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>3</sup> 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.<sup>4</sup>

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>5</sup> 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.<sup>6</sup>

### **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).

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law or advance a new and relevant legal argument not previously considered by OWCP. Consequently, he was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant has not submitted relevant and pertinent new evidence in support of his request for reconsideration under 20 C.F.R. § 10.606(b)(3). The Board notes that the underlying issue in this case is whether he established that he sustained a lumbar condition causally related to accepted factors of his federal employment as a sheet metal mechanic.

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<sup>2</sup> 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).

<sup>3</sup> 20 C.F.R. § 10.607.

<sup>4</sup> *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 its 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. *Id.* at Chapter 2.1602.4b.

<sup>5</sup> *Id.* at § 10.606(b)(3).

<sup>6</sup> *Id.* at § 10.608(a), (b); *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *see also E.R.*, Docket No. 09-1655 (issued March 18, 2010).

That is the medical issue which, on reconsideration, must be addressed by relevant medical evidence not previously considered.<sup>7</sup>

On reconsideration OWCP received a copy of Dr. Mohit's undated report received on July 20, 2017 which was not new and a new report from him dated March 19, 2018. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>8</sup> The undated report was duplicative of a prior submission and the March 19, 2018 report was cumulative and substantially similar to Dr. Mohit's previous reports. The March 19, 2018 report while new, still did not provide additional rationale on the issue of causal relationship. Evidence which does not address the particular issue under consideration does not constitute a basis for reopening a case.<sup>9</sup> Thus, appellant is also not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **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).

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<sup>7</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>8</sup> See *L.R.*, Docket No. 18-0400 (issued August 24, 2018).

<sup>9</sup> *H.H.*, Docket No. 18-1660 (issued March 14, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2019  
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