

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

A.O., Appellant	)	
	)	
and	)	<b>Docket No. 20-0360</b>
	)	<b>Issued: November 5, 2020</b>
DEPARTMENT OF TRANSPORTATION,	)	
U.S. MERCHANT MARINE ACADEMY,	)	
Kings Point, NY, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On December 3, 2019 appellant filed a timely appeal from a November 7, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> The most recent merit decision in this case was an October 10, 2018 Board decision.<sup>2</sup> As there was no merit decision issued by OWCP within 180 from the filing of this appeal, pursuant to the Federal Employees'

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<sup>1</sup> Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated November 2, 2020, 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. 19-0665 (issued November 2, 2020). The Board's *Rules of Procedure* provides that an appeal in which a request for oral argument is denied by the Board will proceed to a decision based on the case record and the pleadings submitted. 20 C.F.R. § 501.5(b).

<sup>2</sup> The decision of the Board became final after 30 days of issuance, and is not subject to further review. 20 C.F.R. § 501.6(d).

Compensation Act (FECA)<sup>3</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>4</sup>

### **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).

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 1, 2017 appellant, then a 59-year-old security officer, filed an occupational disease claim (Form CA-2) alleging that exposure to toxic substances at the site of the World Trade Center ("Ground Zero") shortly after the September 11, 2001 terrorist attacks caused a malignant neoplasm of the right choroid. He noted that he was first diagnosed with cancer on November 25, 2014 by Dr. Paul T. Finger, a Board-certified ophthalmologist.

Appellant was separated from employment, effective August 30, 2008. OWCP paid his wage-loss compensation and medical benefits on the periodic rolls under OWCP File No. xxxxxx614, for injuries sustained on December 3, 2004 while arresting a suspect.

In statements dated June 14, 2017, appellant asserted that it was his duty to report to Ground Zero immediately after the September 11, 2001 attacks. He provided an undated employing establishment award to unspecified personnel for their actions from September 11 to 19, 2001. Appellant also provided his official position description, and medical literature regarding cancer diagnoses following exposures to various toxins at Ground Zero.

The employing establishment provided several supervisory statements contending that appellant did not participate in official operations at Ground Zero following the September 11, 2001 attacks.

By decision dated August 10, 2017, OWCP denied appellant's claim, finding that fact of injury had not been established.

On August 22, 2017 appellant requested reconsideration. He submitted statements dated from September 21 to November 10, 2017 contending that he was officially authorized to visit

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that, following the issuance of the November 7, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>5</sup> Docket No. 18-0558 (issued October 10, 2018), *petition for reconsideration denied*, Docket No. 18-0558 (issued August 12, 2019); *Order Dismissing Appeal*, Docket No. 18-0355 (issued January 31, 2018).

One Police Plaza following the September 11, 2001 attacks as part of assigned intelligence gathering activities. Appellant asserted that the employing establishment officials who controverted his claim were not in his chain of command. He alleged that he frequently communicated with state and federal law enforcement officials as part of his official duties, and that he was in charge of communicating with the governor's office to establish a federally staffed security perimeter for the employing establishment following the September 11, 2001 attacks.

Appellant also provided an April 6, 2016 affidavit from K.V., an emergency management technician, who recalled that during a telephone call on September 11, 2001, appellant advised that he was at Ground Zero. In a September 22, 2015 affidavit, M.M., appellant's former partner in the New York Police Department (NYPD), recalled that on several occasions between September 15 and October 30, 2001, appellant met him at Ground Zero "in his capacity as police chief of a federal agency."

The employing establishment provided additional supervisory statements. Supervisor J.J. contended in a September 6, 2017 statement that appellant would have had to have been on an official participation record sheet of personnel authorized to be part of any of the trips to Ground Zero, which he could not confirm. Supervisor E.W. provided a September 12, 2017 statement emphasizing that he had no recollection that appellant was a part of any official waterborne or on-site support activities. In a letter dated September 13, 2017, the employing establishment contended that there were no records, which indicated that appellant participated in any official activities at or near Ground Zero. Human Resources Specialist R.V. noted in an October 16, 2017 e-mail that appellant was not assigned to gather or share intelligence with any law enforcement agency after the September 11, 2001 attacks.

By decision dated November 21, 2017, OWCP denied modification of its prior decision.<sup>6</sup>

In a letter dated and received by OWCP on November 28, 2017, appellant requested an oral hearing or a review of the written record by OWCP's Branch of Hearings and Review. He submitted a September 25, 2001 U.S. Marshals Service special deputation, which appointed him to patrol roadways in and adjacent to the employing establishment. Appellant also provided documentation of his law enforcement training.

By decision dated January 11, 2018, OWCP denied appellant's request for an oral hearing as he had previously requested reconsideration. After exercising discretion, it further denied the request, finding that the issue could be equally well addressed through a request for reconsideration before OWCP's district office. Appellant appealed to the Board.

By decision dated October 10, 2018,<sup>7</sup> the Board affirmed OWCP's November 21, 2017 and January 11, 2018 decisions, finding that the factual evidence of record was insufficient to

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<sup>6</sup> On December 11, 2017 appellant filed an appeal from the November 21, 2017 decision. By order dated January 31, 2018, the Board dismissed the appeal at appellant's request. *Order Dismissing Appeal*, Docket No. 18-0355 (issued January 31, 2018).

<sup>7</sup> *Supra* note 5. On October 24, 2018 appellant filed a petition for reconsideration. By order dated August 12, 2019, the Board denied the petition for reconsideration as no error of law or fact had been cited warranting further consideration by the Board. *Order Denying Petition for Reconsideration* Docket No. 18-0558 (issued August 12, 2019).

establish that appellant was present at the site of the World Trade Center attacks while in the performance of duty. The Board further found that OWCP properly denied appellant's request for an oral hearing.

On October 10, 2019 appellant requested reconsideration. He submitted a February 12, 2018 statement contending that he reported to Ground Zero on September 11, 2001 as a first responder under an emergency legal provision. Appellant contended that OWCP should extend FECA benefits to him as the Governor of New York had extended sick leave to 9/11 first responders in February 2018.

Appellant also provided a copy of his official position description, training and award certificates, and reports from a chiropractor and a physical therapist addressing conditions accepted under OWCP File No. xxxxxx614.

The employing establishment responded by October 29, 2019 statement, contending that there was no evidence establishing that appellant was present at Ground Zero in the performance of duty. It also provided statements dated February 15 and 16, 2018 reiterating that appellant was not authorized to travel to Ground Zero.

By decision dated November 7, 2019, OWCP denied appellant's request for reconsideration.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>8</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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>9</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>10</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>11</sup> If the request is timely, but fails to meet at least one

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<sup>8</sup> 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

<sup>9</sup> 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>10</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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.

<sup>11</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>12</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 has not asserted that OWCP erroneously applied or interpreted a specific point of law or advanced a new and relevant legal argument not previously considered. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

With his October 10, 2019 request for reconsideration, appellant provided a February 12, 2018 statement asserting that he had reported to Ground Zero in the performance of duty. Appellant also submitted training and award certificates, and reports addressing conditions accepted under OWCP File No. xxxxxx614. This evidence is irrelevant to the factual issue of whether appellant traveled to Ground Zero in the performance of duty. The Board notes that the submission of evidence that does not address the particular underlying issue involved does not constitute a basis for reopening a case.<sup>13</sup> Appellant also submitted a copy of his official position description, which was previously of record as of June 20, 2017 and considered by the Board in its October 10, 2018 decision. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>14</sup>

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>15</sup>

On appeal appellant contends that his official position description established his authority to travel to Ground Zero. As explained above, cumulative evidence is insufficient to warrant a review of the merits of the claim.

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<sup>12</sup> *Id.* at § 10.608(b); *L.C.*, Docket No. 18-0787 (issued September 26, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>13</sup> *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>14</sup> *L.C.*, *id.*; *J.B.*, Docket No. 18-1531 (issued April 11, 2019); *see L.R.*, Docket No. 18-0400 (issued August 24, 2018); *Candace A. Karkoff*, 56 ECAB 622 (2005).

<sup>15</sup> *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *see A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

**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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 7, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2020  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board