

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

G.B., Appellant

and

**DEPARTMENT OF THE ARMY, DEFENSE
COMMISSARY AGENCY, Fort Sill, OK,
Employer**

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**Docket No. 19-1545
Issued: April 20, 2021**

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

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 15, 2019 appellant filed a timely appeal from a June 17, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed since OWCP's last merit decision, dated June 17, 2013, 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 to review 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 The Board notes that appellant submitted additional evidence on appeal. 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.*

FACTUAL HISTORY

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

On April 28, 1978 appellant, then a 39-year-old store worker, filed a traumatic injury claim (Form CA-1) alleging that on April 26, 1978 he injured his head and shoulder when he was struck by a metal door while bailing cardboard.⁴ He stopped work on the date of injury and returned to full-duty work on April 27, 1978. OWCP assigned the claim File No. xxxxxx587 and accepted it for contusion of the left shoulder and scalp hematoma.

On October 16, 1984 and May 13, 2004 appellant filed notices of recurrence (Form CA-2a) claiming that he sustained a recurrence of disability on March 3 and April 26, 1980 due to his accepted April 26, 1978 employment injury.

OWCP thereafter received evidence, including an April 26, 1978 request for examination and/or treatment (Form CA-16) in which the employing establishment authorized appellant to seek medical care for his head and left shoulder injuries.

By decision dated July 19, 2004, OWCP denied appellant's claim for a recurrence of disability causally related to his accepted April 28, 1978 employment injury. On July 29, 2004 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Following a hearing, held on May 25, 2005, by decision dated August 10, 2005, OWCP's hearing representative affirmed the July 19, 2004 decision.

OWCP subsequently received medical evidence, including an April 14, 1980 medical report by Dr. Steven Rowlan, a Board-certified orthopedic surgeon, who diagnosed benign lesion in the sacrum.

On December 23, 2005 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review of the August 10, 2005 decision. In a decision issued on January 24, 2006, OWCP denied appellant's request for review of the written record finding that, since he had already received an oral hearing, he was not entitled to a second hearing as a matter of right, whether an oral hearing or a review of the written record, on the same issue.

³ Docket No. 06-1337 (issued December 11, 2006), *petition for recon. denied*, Docket No. 06-1337 (issued June 15, 2007); *Order Dismissing Appeal*, Docket No. 07-2155 (issued April 16, 2008); Docket No. 09-0047 (issued February 20, 2009); *Order Remanding Case*, Docket No. 09-0018 (issued March 5, 2009); Docket No. 10-0634 (issued February 16, 2011); Docket No. 12-1515 (issued November 2, 2012); *Order Dismissing Appeal*, Docket No. 14-0738 (issued May 6, 2014); *Order Dismissing Appeal* in Docket No. 15-202 and *Dismissing Petition for Reconsideration* in Docket No. 14-738, Docket Nos. 15-202 and 14-738 (issued May 21, 2015); Docket No. 16-0319 (issued April 6, 2016); *Order Dismissing Appeal*, Docket No. 16-0633 (issued December 2, 2016); Docket No. 16-1884 (issued January 17, 2017); Docket No. 17-0516 (issued May 3, 2017); *Order Dismissing Appeal*, Docket No. 17-1433 (issued October 10, 2017); and Docket No. 18-1629 (issued April 15, 2019).

⁴ Appellant has a prior claim under OWCP File No. xxxxxx397, for a September 23, 1975 traumatic injury. OWCP accepted that claim for right lumbar muscle strain.

On April 26, 2006 appellant appealed to the Board. By decision dated December 11, 2006, the Board affirmed the August 10, 2005 and January 24, 2006 decisions.⁵ In a June 15, 2007 order, the Board denied appellant's petition for reconsideration of its December 11, 2006 decision.⁶ On August 20, 2007 appellant appealed both OWCP's January 24, 2006 decision and the Board's December 11, 2006 decision to the Board. By order dated April 16, 2008, the Board dismissed appellant's appeal, finding that neither the statute nor regulations provide a right to appeal a Board decision dated December 11, 2006 which affirmed the January 24, 2006 OWCP decision.⁷ The Board noted that it had previously denied his petition for reconsideration of its December 11, 2006 decision.

Appellant requested reconsideration on several occasions and, by decisions dated July 15, 2008, August 13, 2009, and January 22 and August 16, 2010, April 27, 2012, and October 28, 2015, OWCP denied his requests for reconsideration, finding that they were untimely filed and failed to demonstrate clear evidence of error.

By decisions dated February 20, 2009, February 16, 2011, November 2, 2012, and April 6, 2016, the Board affirmed OWCP's decisions, finding that appellant's requests for reconsideration were untimely filed and failed to demonstrate clear evidence of error.⁸ In a decision issued on June 17, 2013, OWCP denied modification of its prior decision denying appellant's recurrence claim.⁹

Appellant thereafter filed additional appeals to the Board. In orders issued on December 2, 2016¹⁰ and January 17,¹¹ May 3,¹² and October 10, 2017,¹³ the Board dismissed appellant's appeals, finding that OWCP had not issued a final adverse decision within the prior 180 days over which the Board could properly exercise jurisdiction.

⁵ Docket No. 06-1337, *supra* note 3.

⁶ *Order Denying Petition for Reconsideration*, Docket No. 06-1337, *supra* note 3.

⁷ Docket No. 07-2155, *supra* note 3.

⁸ Docket No. 09-0047; Docket No. 10-0634; Docket No. 12-1515; Docket No. 16-0319, *supra* note 3.

⁹ On February 6, 2014 appellant appealed a purported December 19, 2013 OWCP decision. The Clerk of the Appellate Boards docketed the appeal as No. 14-0738. The Board dismissed the appeal on May 6, 2014 as the appeal was not timely filed. Docket No. 14-738 (issued May 6, 2014). On November 6, 2014 appellant appealed a purported May 6, 2014 OWCP decision. The Clerk of the Appellate Boards docketed the appeal as No. 15-202. On May 21, 2015 the Board issued an *Order Dismissing Appeal* in Docket No. 15-202 and an *Order Denying Petition for Reconsideration* in Docket No. 14-738, finding that there was no final adverse OWCP decision in which it could assume jurisdiction and appellant did not file a timely petition for reconsideration in appeal No. 14-738. *See* Docket Nos. 15-0202 and 14-0738 (issued May 21, 2015).

¹⁰ Docket No. 16-0633; Docket No. 16-1884; Docket No. 17-0516; Docket No. 17-1443, *supra* note 3.

¹¹ Docket No. 16-1884, *supra* note 3.

¹² Docket No. 17-0516, *supra* note 3.

¹³ Docket No. 17-1433, *supra* note 3.

On February 13, 2018 appellant continued to request reconsideration. OWCP, by decision dated May 14, 2018, again denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

On August 6, 2018 appellant again appealed to the Board. By decision dated April 15, 2019, the Board affirmed the May 14, 2018 OWCP decision.

On May 20, 2019 appellant again requested reconsideration. In support of his reconsideration request, he submitted a letter dated May 5, 2019 in which he contended that contrary to OWCP's finding that his prior requests for reconsideration were not timely filed, they were timely filed.

In a separate letter of even date, appellant's daughter contended that appellant had continuing residuals of his accepted employment injury.

Appellant resubmitted the April 26, 1978 Form CA-16, Dr. Rowlan's April 14, 1980 report, a letter dated October 20, 2008 from OWCP.

OWCP, in a June 17, 2019 decision, denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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.¹⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.¹⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁷ If the request is timely, but fails to meet at least one of the

¹⁴ 5 U.S.C. § 8128(a); *see T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

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

¹⁶ *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.

¹⁷ *Id.* at § 10.608(a); *see F.V.*, Docket No. 18-0230 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁸

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).

In his May 20, 2019 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He also did not advance a relevant legal argument not previously considered by OWCP. In a May 5, 2019 letter, appellant claimed that contrary to OWCP's decisions, his prior requests for reconsiderations were timely filed. He, however, presented no new argument, rather he reiterated the same argument previously addressed by OWCP in its prior decisions denying his requests for reconsideration as untimely filed. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record and the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁹ Because this argument has been previously considered, it was insufficient to require OWCP to conduct a merit review of appellant's claim. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request under 20 C.F.R. § 10.606(b)(3). OWCP previously denied his claim because the medical evidence of record was insufficient to establish that he sustained a recurrence of disability beginning March 3, 1980 causally related to his accepted April 26, 1978 employment injury. That is a medical issue which must be addressed by relevant and pertinent new medical evidence.²⁰ Appellant submitted a May 5, 2019 letter from his daughter who asserted that appellant continued to suffer from residuals of his accepted employment injury. However, the statement of a lay person is not competent evidence on the issue of causal relationship.²¹ Thus, it is insufficient to constitute a basis for reopening the case.

Appellant resubmitted an April 26, 1978 Form CA-16, Dr. Rowlan's April 14, 1980 report, and a letter dated October 20, 2008 from OWCP. This evidence was previously of record and considered by OWCP. As noted, evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.²² Because appellant's request for reconsideration did not include relevant and pertinent new

¹⁸ *Id.* at § 10.608(b); *see B.S.*, Docket No. 20-0761 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁹ *See Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *J.L.*, Docket No. 19-0586 (issued August 9, 2019); *S.B.*, Docket No. 18-1535 (issued April 3, 2019); *M.N.*, Docket No. 16-1410 (issued June 28, 2017).

²⁰ *See T.V.*, Docket No. 19-1504 (issued January 23, 2020); *S.P.*, Docket No. 18-1419 (issued February 27, 2019); *L.F.*, Docket No. 17-0243 (issued June 20, 2017); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

²¹ *See S.M.*, Docket No. 18-1158 (issued January 16, 2019); *R.M.*, Docket No. 08-2084 (issued April 7, 2009); *James A. Long*, 40 ECAB 538 (1989).

²² *Supra* note 19.

evidence not previously considered he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).²³

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).

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²³ 20 C.F.R. § 10.606(b)(3)(iii); *see M.C.*, Docket No. 18-0841 (issued September 13, 2019); *D.P.*, Docket No. 17-0290 (issued May 14, 2018).