

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

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**H.W., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE, TINKER  
AIR FORCE BASE, Oklahoma City, OK,  
Employer**

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**Docket No. 12-1400  
Issued: December 20, 2012**

*Appearances:*  
*Glenda Wright, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 24, 2012 appellant, through his attorney, filed a timely appeal from a May 9, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration.<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

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<sup>1</sup> The last merit decision in this case was the April 27, 2011 decision, which denied his occupational disease claim as untimely filed. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days has elapsed between the most recent merit decision dated April 4, 2011 to the filing of this appeal on November 30, 2011 the Board lacks jurisdiction to review the merits of this case.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly denied appellant's February 10, 2012 claim for reconsideration under 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On January 31, 2011 appellant, then a 62-year-old aircraft engine mechanic, filed an occupational disease claim alleging that he sustained right shoulder, left wrist and left elbow conditions as a result of repetitive trauma at work. He stated that he first became aware of his condition and realized it resulted from his employment on October 5, 2010. Appellant indicated that he mailed the claim form on November 1, 2010 but did not receive a per agency addressee. The employing establishment noted that he first reported his condition on February 23, 2011 and that he was first treated on July 5, 1989.

The record also reveals that on October 25, 2010 appellant filed another occupational disease claim alleging that he sustained bilateral hearing loss as a result of his employment. Appellant indicated that he first became aware of his condition and realized it resulted from his employment on May 14, 1992. He explained that he did not file his claim within 30 days because he was not aware of the time limits. The employing establishment indicated that appellant was last exposed to the conditions alleged to have caused the disease or illness on April 14, 2000.<sup>3</sup>

By letter dated March 14, 2011, OWCP informed appellant of the type of evidence needed to support his claim.

In handwritten April 14, 2011 statements, appellant noted that he forwarded OWCP's development letter to his employing establishment and requested their assistance.

In an October 5, 2010 initial treatment report, Dr. John W. Ellis, a Board-certified family practitioner, reviewed appellant's history and noted that he was in good health when he started to work for the employing establishment in 1979. He described a June 22, 1989 back injury at work and 1988 motor vehicle accident and related that in July or August 2009 appellant began to notice tightness in his neck and pain down his right shoulder and arm. Dr. Ellis conducted an examination and recommended he undergo a magnetic resonance imaging (MRI) scan of the right shoulder and a nerve conduction study of the upper extremities.

On April 27, 2011 the employing establishment notified OWCP that appellant was separated from the employing establishment on April 14, 2000.

In a decision dated April 27, 2011, OWCP denied appellant's claim finding that he did not timely file his occupational disease claim.

On February 10, 2012 appellant submitted a handwritten request for reconsideration. He stated that he timely filed his claim on November 4, 2010 but it was stamped as return to sender.

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<sup>3</sup> The record reveals that OWCP denied appellant's hearing loss claim because it was not timely filed.

In a June 30, 2011 report, Dr. Ellis noted appellant's complaints of pain down his right arm into his fingers. Upon examination of appellant's right shoulder, he observed pain in the right side of his neck and tenderness along the right shoulder acromioclavicular (AC) joint and biceps tendon. Examination of the left elbow revealed hypertrophy over the medial epicondyle and mildly positive Tinel's sign over the cubital tunnel. Dr. Ellis diagnosed repetitive trauma causing strains of the right shoulder with right brachial plexus and axillary plexus impingement and repetitive trauma at the left elbow with medial epicondylitis and ulnar nerve impingement. He stated that based upon his examination of appellant and review of the medical records his injuries and impairments as set forth in the diagnosis arose out of and in the course of his employment and that his employment contributed to, aggravated and caused his injuries. Dr. Ellis explained that working as a welder with the lifting and overhead work and constantly using his dominant right upper extremity caused appellant's tendinitis and degenerative arthritis in his right shoulder joint.

In a January 26, 2010 report, Dr. Steven A. Burner, a Board-certified family practitioner, stated that appellant suffered from severe degenerative disc disease and osteoarthritis of the lumbar spine. He related that appellant's condition had become so severe that he was no longer able to work.

Appellant also submitted a handwritten January 10, 2006 medical history and medication summary record from an unknown provider and a June 22, 1989 clinical record regarding a lifting incident at work.

Appellant submitted a copy of a delivery confirmation note indicating that he sent a letter to the employing establishment on November 4, 2010.

By decision dated May 9, 2012, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 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.<sup>4</sup> OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district OWCP.<sup>5</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

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<sup>4</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>5</sup> 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup>

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.<sup>7</sup> A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>9</sup>

### ANALYSIS

The Board has no jurisdiction to review the April 27, 2011 merit decision. The only decision the Board may review is the May 9, 2012 nonmerit decision denying his request for reconsideration. The issue therefore, is whether appellant's request met at least one of the three standards for obtaining merit review.

The Board finds that appellant's February 10, 2012 request for reconsideration did not meet any of the requirements of 20 C.F.R. § 10.606(b).

The underlying issue in this case is the timeliness of appellant's October 25, 2010 and January 31, 2011 occupational disease claims. Appellant last worked at the employing establishment and therefore was last exposed to factors of his federal employment on April 14, 2000. Therefore, he would have to establish that the employing establishment had prior notice of the claims, within three years of April 14, 2000 or that his alleged conditions were latent disabilities, such that he only became aware of the conditions, within three years prior to the filing of the claims.

In support of his request for reconsideration appellant submitted various medical reports regarding treatment for his back and upper extremities. The Board finds that medical evidence regarding the treatment of his alleged conditions does not address his employment exposure or the latent nature of appellant's condition. As such it is not relevant to the issue of timeliness, which was the grounds upon which OWCP denied appellant's claim on April 27, 2011.<sup>10</sup> It is well established that evidence that does not address the particular issue involved constitutes no basis for reopening a case.<sup>11</sup> Similarly, the November 4, 2010 delivery confirmation note is also

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<sup>6</sup> 20 C.F.R. § 10.606(b); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>10</sup> *See* *D.S.*, Docket No. 11-1498 (issued February 15, 2012).

<sup>11</sup> *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

irrelevant as it does not reference whether appellant timely filed his occupational disease claim within three years or whether her supervisor had actual knowledge of the alleged injury within 30 days of the date of injury. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument nor submit relevant medical evidence not previously considered by OWCP. Accordingly, OWCP properly denied appellant's request for reconsideration as he did not meet any of the requirements sufficient to warrant merit review.

On appeal, appellant alleges that he is entitled to merit review because he was granted reconsideration in his other case when he submitted a new medical report by Dr. Ellis. As noted above, however, additional medical evidence is irrelevant to the issue of whether appellant timely filed his occupational disease claim and, thus, is not a basis for warranting merit review. Appellant did not submit any evidence or advance any legal arguments along with his February 10, 2012 request for reconsideration that satisfied any of the criteria necessary to reopen a case for merit review.

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

### **CONCLUSION**

The Board finds that OWCP did not abuse its discretion by denying appellant's February 10, 2012 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board