

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

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**H.L., Appellant** )  
 )  
**and** )  
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**DEPARTMENT OF AGRICULTURE,** )  
**FOREST SERVICE, Albuquerque, NM,** )  
**Employer** )

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**Docket No. 13-373  
Issued: May 2, 2013**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On December 6, 2012 appellant filed a timely appeal from a July 30, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her reconsideration request. Because more than 180 days elapsed from the most recent merit decision dated January 12, 2012 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.<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 has jurisdiction over the nonmerit decision.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> An appeal of a final adverse OWCP decision issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. § 501.3(e).

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

## **FACTUAL HISTORY**

On September 30, 2011 appellant, then a 24-year-old forestry technician, filed a traumatic injury claim alleging that on July 14, 2011 she sustained an injury or condition as a result of dehydration. Her supervisor noted on the claim form that the injury occurred in the performance of duty.

In July 15, 2011 emergency records, including diagnostic testing, Rapid City Regional Hospital noted a syncope episode and back pain. It was noted that appellant had experienced a single episode of light-headedness and loss of consciousness that lasted approximately 30 seconds. The records indicate that appellant was provided intravenous treatment and magnetic resonance imaging (MRI) scan evaluation of the lumbar spine. Dr. Pradeep K. Amesur, a Board-certified nuclear radiologist, interpreted the July 15, 2011 MRI scan as revealing L5-S1 shallow subligamentous protrusion barely indenting the thecal sac. In a July 19, 2011 visit summary, Dr. Rand L. Schleusener, a Board-certified orthopedic surgeon, noted the reason for appellant's visit was low back pain after walking, carrying heavy paint.

In a December 7, 2011 letter, OWCP noted that appellant's claim was reopened for consideration as the medical bills have exceeded \$1,500.00. Appellant was advised of the deficiencies in her claim and accorded 30 days within which to submit additional factual and medical evidence. No additional information was received.

By decision dated January 12, 2012, OWCP denied appellant's claim on the grounds that fact of injury was not established. It found that evidence did not support that the injury or event(s) occurred as described and there was no medical evidence which established a diagnosed medical condition in connection with the injury or event(s).

On July 9, 2012 appellant requested reconsideration and submitted medical evidence. In her July 9, 2012 statement, she noted that the report from Dr. Terry Hinkson, the emergency room physician at Rapid City Regional Hospital, should cure the deficiencies in her claim.

In a July 9, 2012 report, Dr. Terry D. Hinkson, Board-certified in emergency medicine, indicated that he saw appellant on July 15, 2011 for a syncope episode and back pain following a day of work with the employing establishment in which she had been carrying a back pack weighing 45 pounds in 100-degree weather for more than six hours. He also noted that appellant had been working on steep slopes. Dr. Hinkson indicated that appellant had a previous back injury two years prior and the computerized tomography (CT) scan was negative that day. He also related that other diagnostic tests that day were negative for electrolyte abnormalities as the potential cause of syncope. Dr. Hinkson noted that an MRI scan was ordered and appellant was referred to an orthopedic specialist for the back pain.

By decision dated July 30, 2012, OWCP denied appellant's request for reconsideration. It found that she failed to provide any new evidence or argument to address the issue upon which her claim was denied.

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128 of FECA,<sup>3</sup> OWCP regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>4</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>5</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.

## ANALYSIS

OWCP denied appellant's traumatic injury claim on January 12, 2012 on the grounds that fact of injury was not established. It found that the evidence did not support that the event occurred as described and that there was no medical evidence which established a diagnosed medical condition in connection with the event. As the Board does not have jurisdiction to review the merits of the case, the sole issue on appeal is whether OWCP properly denied her timely filed reconsideration request.

In requesting reconsideration, appellant did not argue that OWCP erroneously interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered. She submitted Dr. Hinkson's July 9, 2012 report. Appellant contended that Dr. Hinkson's July 9, 2012 report cured the factual and medical deficiencies in her claim.

The Board notes that this is relevant and pertinent new evidence which, contrary to OWCP's finding, was not previously considered. The Board's review of the case record does not indicate that Dr. Hinkson previously submitted this report or any other report regarding appellant's July 14, 2012 alleged injury. Thus, Dr. Hinkson's report is new to the record and it was not previously considered by OWCP. He related his treatment of appellant on July 15, 2012 and described her employment activities on July 14, 2012. Dr. Hinkson also related a diagnosis of syncope. The requirements for reopening a case for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge her burden of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.<sup>6</sup> If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.<sup>7</sup> The Board finds that Dr. Hinkson's report is new and that it is relevant

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<sup>3</sup> Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *R.T.*, Docket No. 11-749 (issued December 23, 2011); *see also Billy B. Scoles*, 57 ECAB 258 (2005).

<sup>7</sup> *See Dennis J. Lasanen*, 41 ECAB 933 (1990).

as he does discuss appellant's work activity on July 14, 2012 and he does provide a diagnosis of the condition for which he treated appellant. The case shall be remanded to OWCP to conduct a merit review of the entire record. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

The Board notes that on appeal appellant has submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal.<sup>8</sup> As noted above, this case is not in posture for decision. It is being remanded for a merit review of the claim. Appellant may resubmit this evidence to OWCP for consideration upon further review.

**CONCLUSION**

The Board finds that OWCP improperly denied appellant's application for reconsideration without merit review of the claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 30, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this opinion.

Issued: May 2, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>8</sup> 20 C.F.R. § 501.2(c).