

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Irving, TX, Employer**

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**Docket No. 15-1273
Issued: July 21, 2016**

Appearances:

Debra Hauser, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

COLLEEN DUFFY KIKO, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2015 appellant, through counsel, filed a timely appeal from a February 18, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision of February 21, 2014 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

ISSUE

The issue is whether OWCP properly denied appellant's November 20, 2014 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was previously before the Board.³ By order dated March 10, 2015, the Board granted counsel's request to withdraw the appeal. The relevant facts are set forth below.

On September 24, 2013 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a lumbar disc injury and right knee internal derangement when he stepped off a curb and felt immediate pain to his right knee and lower back. He reported that he first became aware of his condition and realized it resulted from his employment on January 17, 2012. Appellant's supervisor noted on the claim form that appellant's employment had been terminated on January 17, 2012.

In a letter dated November 19, 2013, the employing establishment controverted appellant's claim alleging that the claim was fraudulent. It stated that he was trying to refile a previous claim that had been denied with different dates. The employing establishment provided a July 11, 2013 OWCP decision which denied appellant's November 25, 2011 traumatic injury claim.

On December 2, 2013 OWCP advised appellant that no evidence had been submitted to establish his occupational disease claim. It requested that he provide a detailed description of the employment factors he believed contributed to his condition and complete the attached questionnaire. OWCP also requested medical evidence to establish that he sustained a diagnosed condition causally related to his employment.

Appellant, through counsel, responded to OWCP's development letter in a December 31, 2013 statement. He alleged that he still experienced right knee and lower back pain from an earlier November 25, 2011 injury. Appellant explained that on January 17, 2012 he was put on a new route when he slipped off a curb and felt a sharp pain in his right knee and back. He believed that his November 25, 2011 injury was worsened by the January 17, 2012 injury. Appellant also discussed his mail route and his duties as a letter carrier.

In a December 18, 2013 report, Dr. Mahe T. Nadeem, Board-certified in physical medicine and rehabilitation, noted that on January 17, 2012 appellant claimed to be delivering mail when he slipped while stepping off the curb. He related that appellant caught himself but twisted his right knee and hyperextended his lower back, which aggravated a preexisting lumbar and right knee work-related injury of November 25, 2011. Dr. Nadeem opined that the January 17, 2012 event resulted in an aggravation of a preexisting lumbar and right knee injury. He diagnosed lumbar disc injury, right knee internal derangement, right knee meniscal tear, and bilateral lumbar radiculopathy.

OWCP denied appellant's occupational disease claim in a decision dated February 21, 2014. It accepted that he worked as a letter carrier for the employing establishment but found that the medical evidence failed to establish a diagnosed condition as a result of his employment. OWCP determined that the medical evidence submitted was incomplete and did not provide a complete history of appellant's claimed injury.

³ Docket No. 15-182 (issued March 10, 2015).

The record contains a memorandum of telephone call (Form CA-110) dated February 28, 2014 where OWCP indicated that it informed counsel that “the medical was not imaged in conjunction with the correct documents.” It noted that the claims examiner would revisit the decision and the medical evidence.

Another memorandum of telephone call (Form CA-110) dated March 18, 2014 noted that OWCP had not yet reviewed the medical evidence in appellant’s case file. Appellant’s counsel was advised that the claims examiner would call back after the medical evidence was reviewed.

According to a memorandum of telephone call (Form CA-110) dated May 22, 2014, counsel wanted to speak with a manager about the status of appellant’s case. She stated that there was medical evidence that was not considered before OWCP issued its decision.

In a memorandum of telephone call (Form CA-110) dated August 6, 2014, OWCP’s claims examiner advised counsel that the entire case file, along with the medical evidence, was reviewed and determined that the evidence did not support the injury. The claims examiner explained that there was no bridging medical evidence of file. She noted that the only medical submitted was Dr. Nadeem’s December 18, 2013 report and there was no prior medical evidence surrounding the alleged date of injury.

On November 20, 2014 OWCP received appellant’s reconsideration request. Counsel contended that appellant satisfied the fact of injury and causal relationship prongs of his claim. She stated that appellant provided a thorough medical narrative report that established medical fact of injury and causal relationship. Counsel reported that shortly after the January 17, 2012 injury, he was examined by Dr. Nadeem, who diagnosed right knee internal derangement and lumbar disc injury and advised appellant to follow-up with his attending physician. She pointed out that magnetic resonance imaging (MRI) scan reports of the lumbar spine revealed disc bulge and minor facet sclerosis and that the right knee MRI scan showed a marginal tear within the posterior horn of the lateral and medial menisci. Counsel contended that Dr. Nadeem provided an accurate history of appellant’s injury, medical diagnosis, and opinion on causal relationship. She pointed out that OWCP did not have Dr. Nadeem’s entire report before it rendered its February 21, 2014 decision and requested that OWCP review the entire medical report before it rendered its decision.

By decision dated February 18, 2015, OWCP denied appellant’s request for reconsideration finding that his request did not meet any of the requirements for further merit review pursuant to 5 U.S.C. § 8128(a). It determined that the evidence submitted was irrelevant to the medical issue of appellant’s claim.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.⁴ OWCP’s regulations provide that OWCP may

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

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 Office.⁵

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.⁶

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.⁷ 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.⁸ 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.⁹

ANALYSIS

The Board finds that OWCP erroneously denied further merit review of appellant's case. As previously noted, in order to require OWCP to open a case for merit review, appellant must show that OWCP erroneously applied or interpreted a specific point of law; advance a new relevant legal argument not previously considered by OWCP; or submit relevant and pertinent new evidence not previously considered by OWCP.¹⁰ The Board finds that appellant has advanced a new legal argument that warrants further merit review under 5 U.S.C. § 8128.

In support of his reconsideration request, counsel alleged that appellant sustained a back and right knee condition as a result of his duties as a letter carrier. She discussed the history of injury and contended that Dr. Nadeem's December 18, 2013 report provided a medical diagnosis and opinion on causal relationship. Counsel further noted that OWCP had not properly scanned Dr. Nadeem's complete medical report with appellant's claim before OWCP issued its February 21, 2014 denial decision and requested that OWCP review the entire case file before it rendered a new decision. The Board finds that counsel's contention that OWCP misfiled and never considered all of Dr. Nadeem's December 18, 2013 medical report before the February 21, 2014 decision was issued constituted a new, relevant legal argument. The case record contains a February 28, 2014 telephone call memorandum which indicated that "the medical [evidence] was

⁵ 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).

⁶ 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).

⁷ 20 C.F.R. § 10.607(a).

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

⁹ *Id.* at § 10.608(b)(3); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *Supra* note 5.

not imaged in conjunction with the correct documents.” Furthermore, OWCP noted in its February 21, 2014 decision that it received an “incomplete medical from Dr. Mahe T. Nadeem dated December 31, 2013.” As appellant’s counsel has advanced a new, relevant legal argument that is supported by the evidence of record, the Board finds that OWCP erroneously denied merit review of appellant’s case in its February 19, 2015 decision.

The case will be remanded for OWCP to further consider the merits of appellant’s claim under 5 U.S.C. § 8128.¹¹

CONCLUSION

The Board finds that OWCP improperly denied appellant’s November 20, 2014 request for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2015 decision of the Office of Workers’ Compensation Programs is set aside and remanded pursuant to this decision.

Issued: July 21, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees’ Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees’ Compensation Appeals Board

¹¹ James A. Haynes, Alternate Judge, participated in the decision but was no longer a member of the Board effective November 16, 2015.