

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

T.L., Appellant

and

**U.S. POSTAL SERVICE, PARKLAWN
STATION, Milwaukee, WI, Employer**

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**Docket No. 16-0536
Issued: July 6, 2016**

Appearances:
Colleen Bero-Lehmann, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 28, 2016 appellant, through counsel, filed a timely appeal from an August 5, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated July 27, 2012, 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 the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 1, 2010 appellant, then a 46-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 31, 2010 he sustained a stress-related condition in

¹ 5 U.S.C. § 8101 *et seq.*

the performance of duty. He stopped work on August 31, 2010. OWCP assigned the case file number xxxxxx825, which is the current claim.

In a statement dated November 5, 2010, appellant related that on August 31, 2010 his supervisor told him to deliver a package in violation of the work restrictions he had from another injury. Due to the supervisor's actions, appellant claimed he experienced a flashback to a prior, accepted assault. There was no actual assault on August 31, 2010, a fact acknowledged by appellant.

By decision dated July 27, 2012, OWCP denied appellant's claim finding that he had not established any compensable work factor on August 31, 2010. It noted that appellant had advised the employing establishment that he was robbed on August 31, 2010, but subsequently admitted that he had lied about the robbery. OWCP advised appellant that a fear of future injury was not compensable under FECA.

On July 23, 2013 appellant, through counsel, requested reconsideration. In a statement dated July 19, 2013, she clarified that OWCP had previously accepted post-traumatic stress disorder (PTSD) under file numbers xxxxxx904 and xxxxxx771. Counsel related that appellant had been attacked while delivering his route on April 27, 2001. As a result of the attack, appellant underwent "surgery to remove a severely damaged testicle." Later, in June 2001 he was "caught in the middle of a gun fight while he was on his route" and in March 2002 he was robbed at gunpoint on his route. An impartial medical examiner evaluated him under another file number and found that he could only perform indoor duties. On August 31, 2010 appellant's supervisor instructed him to leave the building to deliver a package which was outside of his restrictions. Counsel related, "Once outside, [he] had a full blown flashback and panic attack. The flashback was so vivid, [he] was under the impression that he had actually been robbed again." Appellant initially filed a recurrence of disability under the original claim number, but an OWCP hearing representative found that the events of August 31, 2010 constituted a claim for a new injury. Counsel argued that when appellant experienced the flashback on August 31, 2010 he was performing his assigned work duties and thus had established a compensable work factor. She asserted that the work assignment of delivering mail outside resulted in appellant's flashback and aggravation of PTSD. Counsel argued that the reaction did not constitute a fear of future injury as found by OWCP.

In support of appellant's request for reconsideration, he submitted a transcript from a February 9, 2012 hearing held in file number xxxxxx771. He also submitted a May 23, 2012 OWCP hearing representative decision issued under file number xxxxxx771. In that decision, the hearing representative affirmed a September 28, 2011 decision finding that appellant had no residuals of his April 27, 2001 work injury, accepted for trauma to the right testicle with hemorrhage as the result of an assault. Counsel noted that OWCP had also accepted that appellant sustained a major depressive disorder and an acute reaction to stress under xxxxxx904. She noted that the hearing representative had discussed appellant's claim for a new injury in the current file number, xxxxxx825. Counsel said the hearing representative had instructed OWCP to review and consolidate all the emotional condition claims. After any necessary development, the hearing representative advised OWCP to determine whether his claim under file number xxxxxx771 should be expanded to include PTSD and adjudicate his stress claim under file number xxxxxx825.

By decision dated August 5, 2015, OWCP denied counsel's request for reconsideration finding the evidence or argument was insufficient to warrant reopening his case for further review of the merits under section 8128(a).

On appeal appellant's counsel describes the history of assaults on April 27, 2001, March 6, 2002, and June 2011 delivering mail. She notes that he was beaten in the April 27, 2001 assault and lost a testicle. Beginning in 2002 appellant was restricted from performing work outdoors. Counsel relates that, "On August 31, 2010 [his] supervisors, knowing full well that [he] was under indoor work restrictions, ordered [him] to deliver a package outside. As expected, [appellant] experienced a flashback to a previous physical assault that he suffered at work on his [employing establishment] route." He believed that he had again been assaulted because of his flashback. She argues that OWCP erred in denying appellant's claim based on its finding that it constituted a fear of reinjury. Counsel discussed evidence submitted under other file numbers and reviewed the supporting medical evidence. She noted that an emotional reaction to performing job duties was compensable. Counsel advised that if OWCP found that the August 31, 2010 incident was not compensable he should receive compensation for a recurrence of disability due to his April 27, 2001 and March 6, 2002 employment injuries.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,² OWCP's 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.³ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁴ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁵

ANALYSIS

The Board finds that the case is not in posture for decision. By decision dated July 27, 2012, OWCP denied appellant's traumatic injury claim finding he had failed to establish a compensable factor of employment occurring on August 31, 2010. On July 23, 2013 OWCP received his request for reconsideration. Appellant's request was timely filed as it was received within one year of OWCP's merit decision.⁶

² *Id.* Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

³ 20 C.F.R. § 10.606(b)(3).

⁴ *Id.* at § 10.607(a).

⁵ *Id.* at § 10.608(b).

⁶ *See supra* note 3.

On reconsideration appellant's counsel asserted that he sustained an emotional condition because the employing establishment instructed him to work outside of his restrictions. She maintained that he experienced a flashback to prior work-related assaults in 2001 and 2002 because he was ordered to deliver mail in violation of the limitations provided by an impartial medical examiner in a prior claim file. Counsel also asserted that a condition that arises during the performance of regular or specially assigned work duties is compensable under FECA. She argued that appellant's flashback on August 31, 2010 did not constitute a fear of future injury as found by OWCP. Counsel submitted a May 23, 2012 decision by an OWCP hearing representative issued in another file number that instructed OWCP to consolidate all of appellant's stress-related claims and to adjudicate the current claim for a new injury on August 31, 2010. She argued that failure to consolidate the claims under a master file was also an error.

In its August 5, 2015 decision denying appellant's request for reconsideration, OWCP determined that the evidence submitted had not warranted a review of the merits, under 20 C.F.R. § 10.606(b)(3). The Board finds, however, that counsel for appellant raised relevant legal arguments not previously addressed by OWCP in her request for reconsideration filed on July 23, 2013. As such, appellant has been improperly denied a review of the merits of his claim. The case shall therefore be remanded for consideration of the legal arguments.

On remand, OWCP should combine the case records prior to a review of the merits of the claim and thereafter issue an appropriate merit decision.⁷

CONCLUSION

The Board finds that the case is not in posture for decision.

⁷ Additionally, as noted, on reconsideration appellant's counsel submitted an OWCP hearing representative decision dated September 28, 2011 issued under file number, xxxxxx771, instructing that claim files be combined. The hearing representative instructed OWCP to combine his stress-related case records and adjudicate the current claim for a new injury under the current file number. OWCP, however, did not combine the case records prior to adjudicating his claim for the alleged August 31, 2010 employment injury and therefore the factual and medical evidence pertaining to appellant's prior accepted injuries conditions is not contained in the case record. OWCP procedures provide that cases should be combined when correct adjudication of the issues depends on frequent cross-reference between files. Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance & Management*, Chapter 2.400.8(c) (February 2000).

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: July 6, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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