

FACTUAL HISTORY

On January 11, 2007 appellant, then a 51-year-old hazardous waste disposer, filed a traumatic injury claim alleging that he sustained injuries on December 19, 2006 when he fell in the performance of duty while descending a stairwell. On February 16, 2007 OWCP accepted the claim for a lumbar sprain.² Appellant returned to work at four hours per day on April 12, 2007 and full-time light duty as of July 23, 2007.

The record notes that appellant retired from federal employment as of December 21, 2007. He continued to submit reports from an attending physician, Dr. Michal McManus, an occupational medicine specialist. On January 11, 2008 Dr. McManus provided a history and results on examination. He stated that appellant had permanent work restrictions and there was no change of condition.

In a report dated January 28, 2009, Dr. Richard Wohns, a neurosurgeon, proposed that appellant undergo lumbar interspinous process decompression (IPD) surgery. By report dated February 9, 2009, an OWCP medical adviser recommended that the surgery should be authorized. The medical adviser opined that appellant had aggravated a preexisting spinal stenosis and/or the lumbosacral spondylosis accepted from the occupational claim.

On March 18, 2009 appellant underwent lumbar surgery performed by Dr. Wohns. He filed a claim for compensation (Form CA-7) dated April 2, 2009 for the period commencing December 21, 2007.

In a report dated April 21, 2009, Dr. McManus noted that appellant had reinjured his back on December 19, 2006 and discussed appellant's treatment. He diagnosed recurrent lumbosacral strain with permanent aggravation of lumbar spinal stenosis. Dr. McManus opined that appellant's lumbar spinal stenosis was recurrently and permanently aggravated by his fall at work on December 19, 2006, and appellant had permanent work restrictions at this time and was unable to return to his date-of-injury job as a hazardous material handler.

By decision dated November 24, 2009, OWCP advised appellant that the claim was accepted for permanent aggravation of lumbar spinal stenosis and he would be entitled to compensation as of March 18, 2009, the date of the lumbar surgery. It denied the claim for compensation from December 21, 2007 to March 17, 2009 on the grounds that the medical evidence was insufficient to establish the claim.

On January 21, 2010 appellant submitted additional reports from Dr. McManus. In a report dated December 10, 2009, Dr. McManus stated that he was responding to the November 24, 2009 OWCP decision. He stated, "[Appellant's] injury of December 19, 2006 resulted in a permanent worsening of his lumbar spinal stenosis. His disability from the period December 21, 2007 through March 17, 2009 is a direct result of his work injury of December 19, 2006." Dr. McManus noted that appellant was not released to full-time work until

² Appellant also filed an occupational claim (Form CA-2) on October 4, 2005 alleging that he sustained injuries causally related to lifting items and loading pallets. OWCP accepted the claim for right thoracic and lumbar neuritis/radiculitis and lumbosacral spondylosis. This claim has been administratively combined with the current file.

July 27, 2007, and there was an attempt to transition appellant from limited or modified duty. He stated that appellant continued to experience recurrent aggravations of his lumbar spinal stenosis with these efforts and was unable to progress to regular/full duty. Dr. McManus concluded that appellant “subsequently required permanent work restrictions. Appellant’s work injury of December 19, 2006 resulted in his need for work restrictions and time loss since his injury and specifically from December 21, 2007 through March 17, 2009.”

By letter dated June 29, 2010, appellant requested reconsideration of his claim. He stated that he felt he was entitled to compensation commencing December 21, 2007 as he was unable to work due to his employment injuries.

By decision dated August 26, 2010, OWCP denied the application for reconsideration. It found the application was insufficient to warrant merit review of the claim for compensation from December 21, 2007 to March 17, 2009.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP’s regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP.⁴ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁵

ANALYSIS

In the August 26, 2010 decision, OWCP found that appellant had not submitted any new and relevant evidence. It did not specifically address the December 10, 2009 report from Dr. McManus. The underlying merit issue in the case was an employment-related disability from December 21, 2007 to March 17, 2009. Prior to the November 24, 2009 merit decision, Dr. McManus had stated that appellant had permanent work restrictions. In the April 21, 2009 report, he stated that appellant had a permanent aggravation of spinal stenosis from the December 19, 2006 employment injury, and was unable to return to work as a hazardous material handler.

The December 10, 2009 report is new evidence that is relevant with respect to the claim for compensation. In this report for the first time, Dr. McManus discussed disability for the specific period claimed from December 21, 2007. He also notes appellant’s work history and provides an opinion that appellant was disabled from December 21, 2007 to March 17, 2009 as a

³ 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

direct result of the employment injury. A claimant need not submit all evidence necessary to discharge his burden of proof; but only evidence that is relevant and pertinent and not previously considered.⁶

The Board accordingly finds that appellant has met the requirement of 20 C.F.R. § 10.606(b)(2)(iii) to submit relevant and pertinent evidence not previously considered by OWCP. Appellant is entitled to a review of the merits of the claim for compensation, and the case will be remanded to OWCP for a merit decision.

CONCLUSION

The Board finds the case must be remanded to OWCP as appellant submitted relevant and pertinent evidence not previously considered by OWCP, and he is entitled to a merit review of his claim for compensation from December 21, 2007 to March 17, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 5, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁶ See *Billy B. Scoles*, 57 ECAB 258 (2005).