



## **FACTUAL HISTORY**

On April 27, 2004 appellant, then a 55-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 6, 2003 he sustained a strained lower back when he was pushing a wire cage full of mail. OWCP accepted the claim for lumbar herniated disc at L5-S1. Appellant returned to work with light-duty restrictions as of March 22, 2006.

On February 5, 2010 appellant filed a claim for compensation (Form CA-7) for leave without pay for the period July 5, 2007 to February 4, 2010, requesting a total of 68 hours of wage-loss compensation as a result of his disability.<sup>3</sup>

Appellant submitted duty status reports (Form CA-17) dated June 13, 2007 to July 23, 2009 from Dr. Amanda C. Zaide, a treating physician, who advised that appellant could return to work under limited duty with restrictions of no lifting over 25 pounds and intermittent standing, walking, sitting, kneeling and twisting.

In school/work notes dated July 5, 2007 to February 3, 2010, Dr. Zaide stated that appellant was unable to work on July 5 and 6, 2007, March 20, 21, 30 and 31, 2008 and February 3, and 4, 2010 due to his medical condition of severe low back pain.

In medical reports dated September 24 and December 3, 2009, Dr. Joseph J. Czerkowski, Board-certified in sports medicine, reported that appellant had a long history of chronic low back pain. He noted a disc herniation at L5-S1 in 2004 as well as underlying degenerative disease. Upon physical examination, Dr. Czerkowski diagnosed L5-S1 chronic disc herniation with temporary exacerbation and lumbar spondylosis with disc herniation. He recommended that appellant continue on light duty with permanent restrictions and be treated with physical therapy.

Physical therapy notes from Heartland Rehabilitation Services dated October 15 to November 19, 2009 were submitted documenting appellant's treatment for his lumbar disc displacement.

By letter dated February 12, 2010, OWCP requested that appellant submit additional medical evidence to establish his claim for disability for the period July 5, 2007 to February 4, 2010.

In a February 24, 2010 medical report, Dr. Czerkowski opined that appellant's disc protrusion at L4-5 probably had central and bilateral foraminal stenosis which was worsening. He recommended a magnetic resonance imaging (MRI) scan and released appellant to work on a modified basis.

In a March 10, 2010 diagnostic report, Dr. David Ludwig, a Board-certified diagnostic radiologist, reported that appellant's lumbar MRI scan showed disc space narrowing, disc

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<sup>3</sup> In a February 6, 2010 time analysis (Form CA-7a), appellant requested wage-loss compensation for July 5 to 6, 2007, February 15 and March 20, 21, 2008, December 30 and 31, 2008, February 3 and 4, 2010. He requested four hours of leave without pay for a doctor's visit on February 15, 2008 and eight hours of leave without pay for each of the remaining dates. The Board notes that, by letter dated September 13, 2011, appellant requested that OWCP remove his request for leave without pay for his four-hour doctor's visit on February 15, 2008.

desiccation and broad-based disc protrusion at L4-5 creating mild-to-moderate bilateral neural foraminal stenosis.

By decision dated April 1, 2010, OWCP denied appellant's claim for disability for the period July 5, 2007 to February 4, 2010.

On April 13, 2010 appellant requested review of the written record before the Branch of Hearings and Review. He stated that Dr. Zaide's off-work notes were sufficient to establish his compensation for disability.

In support of his request, appellant submitted treatment notes from Oak Hill Family Care Center dated July 5, 2007, March 20 to December 30, 2008 and February 3, 2010. His physician noted that he suffered from chronic low back pain and radiculopathy and needed an off-work note.

In a May 12, 2010 medical report, Dr. Liberto Colombo, a doctor of osteopathic medicine, reported that appellant continued to suffer from back pain and diagnosed lumbosacral herniated disc. He recommended that appellant resume work with restrictions.

By decision dated September 20, 2010, the Branch of Hearings and Review affirmed the April 1, 2010 OWCP decision denying appellant's claim for disability for the period July 5, 2007 to February 4, 2010.

By letter dated September 13, 2011, appellant requested reconsideration of OWCP's decision and stated that he was enclosing patient notes from his physician which would support his claim for disability.

Appellant resubmitted physical therapy progress notes and treatment notes dated July 5, 2007, March 20 to December 30, 2008 and February 3, 2010 from Oak Hill Family Care Center already of record. He also submitted a number of physical therapy progress notes from the Back Institute dated May 12, 2004 to August 16, 2011 documenting his treatment.

In a December 8, 2010 medical report, Dr. Gerard M. Gerling, a Board-certified neurologist, reported that appellant complained of pain in his back starting seven years ago and was on light-duty status. He noted that MRI scans showed degenerative spondylosis of the lumbar spine compatible with his age but no evidence of an injury. Upon physical examination, Dr. Gerling reported that appellant had no neurologic deficits.

In a March 29, 2011 medical report, Dr. Ronak Patel, a doctor of osteopathic medicine, reported that appellant complained of continuous lower back pain which began on October 6, 2003. He noted that appellant was working at the employing establishment in 2003 when he injured his back after pushing a large and heavy container. Dr. Patel diagnosed lumbar degenerative disc disease, lumbar disc desiccation and lumbar foraminal stenosis, recommending epidural steroid injections.

In a May 6, 2011 medical report, Dr. L.D. Atkinson, Board-certified in occupational medicine, reported that appellant injured his back on October 6, 2003 when he was pushing a case full of mail that was approximately 600 pounds. Appellant complained of continued and

constant lower back pain. Upon review of appellant's diagnostic tests, Dr. Atkinson diagnosed degenerative disc disease of the lumbar spine and degenerative osteoarthritis of the lumbar spine. He further noted that appellant had a history of herniated L5-S1 disc, presumably from the October 6, 2003 work-related injury, which had been resorbed. Dr. Atkinson opined that appellant's symptoms were not a result of his herniated disc problem because the injury occurred seven years ago before his symptoms ever started. He concluded that appellant's degenerative osteoarthritis and degenerative disc disease were the cause of his continued low back pain and radicular symptoms, advising that his work-related injury should be closed out.

In medical reports dated May 12 and August 15, 2011, Dr. Alberto Castiel, Board-certified in family medicine, reported that appellant had a 10-year history of low back pain and noted an October 6, 2003 work-related injury when he was pushing a 600-pound wire cage. He diagnosed degenerative disc disease, spondylosis, lumbago with radiculopathies and degenerative joint disease. Dr. Castiel opined that appellant was most likely suffering from degenerative changes associated with the work-related injury.

By decision dated September 20, 2011, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence. It noted that the only evidence submitted were duplicate copies of treatment notes from Oak Hill Family Care Center dated July 5, 2007, March 20 to December 30, 2008 and February 3, 2010 and appellant's September 13, 2011 narrative statement.

### **LEGAL PRECEDENT**

To reopen a case for merit review under section 8128(a), the evidence or argument submitted by 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> Section 10.608(b) of OWCP regulations provide that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

### **ANALYSIS**

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

In its September 20, 2011 denial of appellant's reconsideration request, OWCP noted that the only evidence submitted were duplicate copies of treatment notes from Oak Hill Family Care Center dated July 5, 2007, March 20 to December 30, 2008 and February 3, 2010 and his September 13, 2011 narrative statement. However, the record reflects that OWCP received new medical evidence from appellant prior to the issuance of its September 20, 2011 decision denying his request for reconsideration.

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<sup>4</sup> *D.K.*, 59 ECAB 141 (2007).

<sup>5</sup> *K.H.*, 59 ECAB 495 (2008).

OWCP properly noted that appellant submitted treatment notes from Oak Hill Family Care Center dated July 5, 2007, March 20 to December 30, 2008 and February 3, 2010 already of record. However, in support of his reconsideration request, appellant also submitted new evidence in the form of a December 8, 2010 report from Dr. Gerling, a March 29, 2011 report from Dr. Patel, a May 6, 2011 report from Dr. Atkinson, medical reports dated May 12 and August 15, 2011 from Dr. Castiel, as well as physical therapy progress notes dated May 12, 2004 to August 16, 2011. OWCP did not note receipt or consideration of the above-listed medical reports.

The underlying issue presented is whether appellant was disabled during the period July 5, 2007 to February 4, 2010. The additional medical reports he submitted with his September 13, 2011 reconsideration request did address his continuing status, commencing on the date of injury.

The Board finds that OWCP, in its September 20, 2011 decision, did not review the above-listed medical reports which were received prior to the issuance of the September 20, 2011 decision. As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.<sup>6</sup> Because OWCP did not consider the new medical evidence submitted by appellant, the Board cannot review such evidence for the first time on appeal.<sup>7</sup>

For these reasons, the case will be remanded to OWCP to enable it to properly consider all of the evidence submitted at the time of the September 20, 2011 decision. Following such further development as OWCP deems necessary, it shall issue an appropriate decision on the claim.

### **CONCLUSION**

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

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<sup>6</sup> See *Yvette N. Davis*, 55 ECAB 475 (2004); see also *William A. Couch*, 41 ECAB 548 (1990) (OWCP did not consider new evidence received four days prior to the date of its decision); see *Linda Johnson*, 45 ECAB 439 (1994).

<sup>7</sup> 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 20, 2011 decision be set aside and the case remanded to the Office Workers' Compensation Programs for further proceedings consistent with this opinion.

Issued: September 10, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board