

FACTUAL HISTORY

On November 23, 2012 appellant, then a 43-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a displaced thoracic spinal cord, degenerative disc bulging, acute low back pain, lumbar pelvic muscle spasms and subluxation as a result of his federal employment duties.³ He stated that his work duties resulted in constant bending, reaching and stooping. Appellant further noted that on November 20, 2012 he crouched down to get in the mail truck and felt his lower back give out. He first became aware of his condition on October 6, 2004 and of its relationship to his employment on November 20, 2012. Appellant stopped work and sought medical treatment on November 20, 2012. His supervisor was notified on November 28, 2012.

In a November 28, 2012 worker's injury form, appellant reported that he had previously injured his lower back in a similar manner on September 9, 2011. He further noted a preexisting injury of bilateral plantar fasciitis.

By letter dated November 28, 2012, the employing establishment controverted the claim. It stated that appellant had self-reported a preexisting condition for the past eight years for which he had been under chiropractic care. The employing establishment further noted that he received military disability benefits for a service-related L1-S1 spine condition.

OWCP thereafter received a number of reports from appellant's treating chiropractor, podiatrist, osteopath, family practitioner, orthopedic surgeon and radiologist, which noted appellant's history of foot and back complaints.

In a January 24, 2013 report, Dr. Cynthia M. Bender, Board-certified in physical medicine and rehabilitation, reported that appellant presented with a history of clinical symptoms consistent with lumbar radiculopathy.

In a January 25, 2013 narrative statement, appellant reported that over the last 10 years he suffered from a number of medical conditions including multilevel degenerative disc disease, disc protrusion, intervertebral disc syndrome and plantar fasciitis. He stated that he had undergone treatment but his duties as a rural carrier caused a worsening of his conditions. Specifically, appellant had a severe flare up in his lower back on November 20, 2012 while delivering mail, bending, reaching and stooping, which caused him to file an occupational disease claim.

By decision dated February 7, 2013, OWCP denied appellant's claim finding that the medical evidence failed to establish that his conditions were causally related to his federal employment duties.

³ The Board notes that appellant has one other occupational disease claim and two other traumatic injury claims before OWCP. A February 11, 2001 traumatic injury claim number xxxxxx181, a July 10, 2006 traumatic injury claim number xxxxxx480 and a June 9, 2012 occupational disease claim number xxxxxx203. The record before the Board contains no other information regarding these additional workers' compensation claims.

By letter dated March 15, 2013, appellant requested reconsideration of OWCP's decision. He stated that attached with his appeal request form was an additional medical report dated March 7, 2013 from his physician which established his claim.

Appellant submitted a February 6, 2013 functional capacity evaluation in support of his claim. He also submitted a February 21, 2013 left S1 nerve root injection from Dr. Timothy Crummy, a Board-certified diagnostic radiologist.

On May 7, 2013 appellant submitted a number of medical reports previously of record, as well as a new March 7, 2013 medical report from Dr. Bender.

In the March 7, 2013 report, Dr. Bender diagnosed disc protrusion at L5-S1. She opined that the work incident of November 20, 2012, when appellant squatted down to get a parcel in his truck, caused the subsequent disc protrusion at L5-S1 which caused his radicular pain. Dr. Bender noted that this was a new symptom which she believed was caused by his work.

By decision dated May 7, 2013, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions nor included new and relevant evidence. The decision noted that the file did not contain a March 7, 2013 report.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that 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.⁴ 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.⁵

FECA provides that OWCP shall determine findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as OWCP considers necessary with respect to the claim. Since the Board's jurisdiction of a case is limited to reviewing that evidence which was before OWCP at the time of its final decision, it is necessary that OWCP review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision. The Board has held that this principal applies with equal force when evidence is received by OWCP the same day a final decision is issued.⁶ As the Board's decisions are final as to the subject matter appealed, it is

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

⁶ *Linda Johnson*, 45 ECAB 439 (1994).

critical that OWCP review all newly received evidence relevant to that subject matter prior to the time of issuance of its final decision.⁷

ANALYSIS

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

Appellant requested reconsideration of OWCP's denial of his claim on March 15, 2013. He submitted medical evidence in support of this request, which was received by OWCP on May 7, 2013, the same day that OWCP issued a nonmerit decision denying appellant's request for reconsideration. In its May 7, 2013 denial of appellant's reconsideration request, OWCP noted that he submitted a March 7, 2013 medical report but that the record contained no such report.

As such, the Board finds that the March 7, 2013 medical report related to appellant's claim was received but not reviewed by OWCP prior to its rejection of his request for reconsideration.⁸ 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.⁹ Whether OWCP receives relevant evidence on the date of the decision or several days prior, such evidence must be considered.¹⁰ Because OWCP did not consider the new medical evidence submitted by appellant, the Board cannot review such evidence for the first time on appeal.¹¹

Therefore, in accordance with Board precedent, the case must be remanded for a proper review of the evidence and an appropriate final decision on appellant's request for reconsideration.¹²

CONCLUSION

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

⁷ *William A. Couch*, 45 ECAB 548 (1990) (OWCP did not consider new evidence received four days prior to the date of its decision).

⁸ *L.D.*, Docket No. 07-1293 (issued September 25, 2007).

⁹ *See Yvette N. Davis*, 55 ECAB 475 (2004); *see also supra* notes 6 and 7.

¹⁰ *Willard McKennon*, 51 ECAB 145 (1999).

¹¹ 20 C.F.R. § 501.2(c).

¹² *Supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: March 21, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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