

FACTUAL HISTORY

This case has previously been before the Board. On June 8, 1999 appellant, then a 50-year-old mail handler, filed a traumatic injury claim alleging that on that date he injured his left knee in the performance of duty. OWCP accepted the claim for left knee and leg sprain, a tear of the left medial meniscus and internal derangement of the left knee.

By decision dated January 31, 2000, OWCP granted appellant a schedule award for a two percent permanent impairment of the left leg. On April 6, 2000 an OWCP hearing representative determined that the case was not in posture for a hearing and remanded the case for further development of the medical evidence. In a decision dated July 12, 2000, OWCP granted appellant a schedule award for an additional 25 percent permanent impairment of the left lower extremity. By decision dated May 14, 2002, it denied modification of its July 12, 2000 schedule award determination.

On September 23, 2010 OWCP accepted that appellant sustained a recurrence of a left knee medial meniscal tear and authorized surgical repair.

In a decision dated September 21, 2011, OWCP denied appellant's request for an increased schedule award. Appellant appealed to the Board. In an order dated June 25, 2012, the Board set aside the September 21, 2011 decision.² The Board determined that the September 21, 2011 decision was not properly issued as a copy was not sent to appellant's authorized representative.

By decision dated September 12, 2012, OWCP found that appellant had not established that he was entitled to an increased schedule award.

On September 24, 2012 appellant requested an oral hearing before an OWCP hearing representative. By letter dated January 11, 2013, OWCP advised appellant and his attorney that a telephone hearing would be held on February 14, 2013.

In a letter dated January 29, 2013, appellant's attorney contended that OWCP did not postmark its January 11, 2013 letter scheduling the hearing until January 18, 2013. He had retained the envelope. Counsel argued that he did not have sufficient notice to fly to appellant's location and assist with the telephone hearing because of scheduling conflicts. He requested that OWCP postpone the hearing and provide 30-days' notice before the next scheduled hearing pursuant to 20 C.F.R. § 10.617(b).

The record contains a copy of an envelope accompanying the January 11, 2013 notification of the scheduled hearing. The envelope is postmarked January 18, 2013.

A telephone hearing was held on February 14, 2013. At the hearing, appellant indicated that his attorney was unable to be present but had informed him to proceed with the hearing on his own.

² *Order Remanding Case*, Docket No. 12-174 (issued June 25, 2012).

On March 11, 2013 appellant submitted a copy of an envelope located above the notification of the scheduled hearing addressed to his representative. The postmark date was not legible.

By decision dated April 22, 2013, an OWCP hearing representative affirmed the September 12, 2012 decision. She noted that OWCP did not receive a copy of the envelope accompanying the January 11, 2013 notice of hearing until after the hearing. The hearing representative determined that the postmark of the envelope was illegible and thus insufficient to show that appellant and his attorney did not receive timely notice of the hearing.

On August 16, 2013 appellant requested reconsideration. In a decision dated September 6, 2013, OWCP denied his request for reconsideration as he had not raised an argument or submitted evidence sufficient to warrant reopening his case for further merit review under section 8128.

By letter dated November 11, 2013, appellant, through his attorney, again requested reconsideration. He enclosed a copy of the envelope accompanying the January 11, 2013 letter proving the date of the scheduled hearing. The envelope has a postmark date of January 18, 2013. Counsel argued that the postmark established that he did not receive the 30-day notice required by OWCP's procedures prior to a scheduled hearing.

In a decision dated February 7, 2014, OWCP denied appellant's request to reopen his case for further merit review under section 8128. It found that counsel's argument that he failed to timely receive notice of hearing was repetitive and that the envelope was substantially similar to documentation already of record and considered by the hearing representative in the April 22, 2013 decision.

On appeal appellant's attorney contends that OWCP did not postmark its January 11, 2013 letter notifying him of the hearing scheduled for February 14, 2013, until January 18, 2013 and that consequently he did not receive the requisite 30-day notice prior to the hearing. He argues that providing a legible copy of the postmark to OWCP constitutes new and relevant evidence sufficient to warrant reopening a case for further merit review under section 8128.

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 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 To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year

³ 5 U.S.C. § 8101 *et seq.* 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."

⁴ 20 C.F.R. § 10.606(b)(3).

of the date of that decision.⁵ 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.⁶

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.⁷ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.⁸ If OWCP should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.⁹

A claimant who has received a final adverse decision by OWCP may obtain a hearing by writing the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.¹⁰ Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before the scheduled date.¹¹

ANALYSIS

By decision dated September 12, 2012, OWCP denied appellant's claim for an increased schedule award. On September 24, 2012 appellant requested an oral hearing. In a notice dated January 11, 2013, OWCP advised that a telephone hearing would be held on February 14, 2013. On January 29, 2013 appellant's attorney argued that he had not received the requisite 30-day notice prior to the hearing, and thus would be unable to attend. He requested that the hearing be postponed. Counsel provided a copy of an envelope accompanying the January 11, 2013 hearing notification; however, the postmark was illegible. In a decision dated April 22, 2013, an OWCP hearing representative affirmed the September 12, 2012 decision. She found that appellant's attorney had not supported his contention that he did not receive timely notification of the hearing as the postmark on the envelope he submitted subsequent to the hearing was not legible.

On November 11, 2013 counsel requested reconsideration.¹² He argued that he had not timely received notice of the scheduled hearing and enclosed a copy of the envelope

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *Donald T. Pippin*, 53 ECAB 631 (2003).

⁸ *Id.*

⁹ *See Annette Louise*, 53 ECAB 783 (2003).

¹⁰ 20 C.F.R. § 10.616(a).

¹¹ *Id.* at 10.617(b).

¹² Appellant requested reconsideration on August 16, 2013, which OWCP denied in a decision dated September 6, 2013 as he had not raised any argument or submitted any evidence in support of his reconsideration request.

accompanying the January 11, 2013 notice of hearing which shows a postmark date of January 18, 2013. OWCP denied appellant's request for reconsideration after finding that the argument raised was repetitive and the evidence submitted substantially similar to evidence previously considered. However, counsel submitted a legible envelope demonstrating that the January 11, 2013 letter was postmarked outside the 30-day requisite notice for the hearing. While the record already contained a copy of the envelope showing a postmark date of January 18, 2013, this evidence was not previously considered by OWCP. The hearing representative found that the only copy of the envelope accompanying the January 11, 2013 notification of hearing submitted was the illegible copy provided by appellant's attorney after the hearing. Consequently, the copy of the envelope with the legible postmark is relevant to the question of whether OWCP properly complied with its procedural requirements in scheduling the telephone hearing and not previously considered.¹³

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered.¹⁴ As the envelope clearly showing the postmark date of the January 18, 2013 notification of hearing constituted pertinent new and relevant evidence not previously considered, the Board finds that OWCP improperly denied his request for review of the merits of the claim. The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue a merit decision on the claim.

CONCLUSION

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

¹³ See *supra* note 11.

¹⁴ See *Donald T. Pippin, supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2014 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: October 3, 2014
Washington, DC

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

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

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