

FACTUAL HISTORY

The case has been before the Board previously.² On the most recent prior appeal,³ the Board found that appellant did not establish that her medical condition or wage loss after March 28, 2008 was causally related to her June 11, 2003 work injury. The Board found that the medical opinion evidence submitted to support her claim was of diminished probative value and did not create a conflict on whether she continued to have residuals from the accepted left shoulder/arm strain and cervical strain after March 28, 2008. The Board affirmed OWCP's January 10, 2013 decision denying modification of its earlier decision to terminate compensation for the accepted muscle strains.⁴

Following the Board's decision, OWCP received a December 27, 2013 progress report from Dr. Patrick N. Rhoades, an attending Board-certified physiatrist and specialist in pain medicine, who examined appellant and diagnosed lumbago, low back pain. Appellant was to continue her current medications.

On January 29, 2014 appellant's representative wrote to Dr. Alice Martinson, the Board-certified orthopedic surgeon and second-opinion referral physician, whose opinion formed the basis of OWCP's decision to terminate compensation. Counsel asked Dr. Martinson to reconsider and address her previous opinion, particularly as it related to the notion that appellant's ongoing complaints of pain, fatigue and weakness were a consequence of her metastatic ovarian carcinoma and not the consequence of the injury episode at work. It appears that Dr. Martinson's office returned the letter to appellant's representative with the notation: "Need to refer this to DOL."

On February 13, 2014 appellant's representative wrote to OWCP to ask for assistance in developing the medical evidence by seeking clarification from Dr. Martinson. Counsel advised that she spoke with Dr. Martinson's office and was informed that he very likely would respond to a request from OWCP for a supplemental report. She requested OWCP to ask Dr. Martinson to explain his opinion on metastatic ovarian carcinoma.

In a decision dated February 20, 2014, OWCP denied appellant's January 29, 2014 reconsideration request. It construed her representative's January 29, 2014 letter to Dr. Martinson as a reconsideration request, "as it was clear in its intent to develop additional argument for the repeal of the prior decisions denying compensation and medical benefits." OWCP then determined that appellant's reconsideration request did not meet any of the

² In an October 6, 2009 decision, the Board affirmed OWCP's termination of appellant's compensation and the finding that she had not established residuals or disability causally related to the June 11, 2003 employment injury. *See* Docket No. 09-646 (issued October 6, 2009). The Board, on December 2, 2011, affirmed a January 18, 2011 OWCP decision, finding that appellant did not establish that her medical condition or wage loss after March 28, 2008 was causally related to the employment injury. *See* Docket No. 11-1117 (issued December 2, 2011).

³ Docket No. 13-1315 (issued November 14, 2013).

⁴ On June 11, 2003 appellant, a 51-year-old casual clerk, sustained a traumatic injury in the performance of duty when some carts (metal cages on wheels) were pushed in her direction and one of them struck her left arm, which she extended to push against it. OWCP accepted her claim for left shoulder/arm strain and cervical strain.

standards for obtaining a merit review of her claim. The request did not show that it erroneously applied or interpreted a point of law, and it advanced no point of law or fact not previously considered by OWCP. Further, Dr. Rhoades' December 27, 2013 progress report, submitted in support of appellant's reconsideration request, was cumulative and provided no explanation or well-reasoned opinion as to why the claim should be expanded to accept an additional condition.

On appeal, appellant's representative contends that the ultimate issue continues to be whether appellant's medical condition or wage loss after March 28, 2008 is compensable as causally related to her June 11, 2003 work injury. Counsel reviewed the background of the case and explained that, facing complete injustice and arbitrariness, appellant decided that she had to approach Dr. Martinson directly for medical rationale to support her opinion on cancer, a field outside her specialty. She explained that OWCP's February 20, 2014 decision gave appellant a new set of appeal rights "and we are using them now." Counsel asked the Board to find a conflict in medical opinion.

LEGAL PRECEDENT

OWCP may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."⁵

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by OWCP in the final decision. The application for reconsideration, including all supporting documentation, must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law, (2) advances a relevant legal argument not previously considered by OWCP, or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶

The reconsideration request should identify the decision and specific issues for which reconsideration is being requested.⁷ The word "reconsideration" does not need to be stated in the request for it to be considered valid, but sufficient detail should be provided to discern the decision being contested.⁸

ANALYSIS

The Board has long held that it is error for OWCP to adjudicate a claim or request when there is no claim or request before OWCP to adjudicate. In *Charlie Denman*,⁹ the Bureau of

⁵ 20 C.F.R. § 10.605 (What is reconsideration?).

⁶ *Id.* at § 10.606 (How does a claimant request reconsideration?).

⁷ Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(a) (October 2011).

⁸ *Id.* at Chapter 2.1602.3.a(2).

⁹ 1 ECAB 105 (1948).

Employees' Compensation, now known as OWCP, purported to reject the employee's claim for compensation on the grounds that the evidence failed to show that his back injury was the result of an accident on July 4, 1945. From an examination of the record, however, the Board was unable to find a claim for compensation. The employee had filed a mere notice of injury, which was not a claim for the purpose of payment of benefits, and was thus not a claim for the purpose of denying benefits. The Board set aside the Bureau's findings as having been prematurely and unnecessarily filed:

“An employee has the right under the law to file a claim for compensation, and he also has the right to produce evidence in support of his claim when filed. Until he files a claim containing a demand for benefits which necessarily must be adjudicated, and until he has had opportunity, after filing claim, to produce such evidence as he may care to submit in support of his claim, any attempted adjudication prior to such claim and opportunity would be inconsistent with proper administrative procedure and not consistent with legal sufficiency of the administrative claim processes.”

The Board extended this principle to applications for review. In *William Eben Moss*,¹⁰ the Bureau denied modification of an earlier decision, and did so upon a purported application for review filed by the claimant on a certain date. The compensation order found that the evidence submitted in support of this application for review was cumulative and repetitious and not sufficient to require modification of the prior decision. The Board noted, however, that the record did not contain an application from the claimant seeking review of the earlier decision. “There is nothing of such nature in the case record to which this order could relate.”¹¹ Since there was no application for review to examine, and since there was no showing that the Director intended to review the case on his own motion, the Board found that the compensation order from which appellant appealed was inherently without meaning and was set aside.

In *Edna C. Thomas*,¹² the Bureau denied the claimant's request for reconsideration on the grounds that the evidence submitted in support thereof was not sufficient to justify further review of her case. The only question on appeal was whether the application was properly denied. The Board found that the Bureau had misconstrued the attorney's letter as a request for a merit determination. The letter was in fact a request for the Bureau to supply relevant information to enable a doctor to formulate an opinion on the question of whether there were any residuals of the accepted work injury. The Board, noting that the attorney could have been more lucid in clarifying his request, set aside the Bureau's decision denying reconsideration as premature.¹³

Appellant's case presents much the same situation. Following the Board's November 14, 2013 merit decision, her representative wrote to OWCP to ask for assistance in developing the medical evidence. Counsel informed OWCP that Dr. Martinson, the orthopedic surgeon and

¹⁰ 2 ECAB 35 (1948).

¹¹ *Id.*

¹² 12 ECAB 130 (1960).

¹³ *Id.* at 132.

referral physician upon whose opinion it had terminated compensation, would very likely supply a supplement report if OWCP requested one.

There is nothing in this letter that can be construed as an application by appellant seeking review of the earlier decision. OWCP identified the January 29, 2014 letter sent by appellant's representative to Dr. Martinson as a request for reconsideration. Counsel wrote to the doctor, and not to OWCP at the address as instructed by the appeal rights attached to OWCP's final decision. The letter simply asked Dr. Martinson to provide clarification of a statement she had earlier made concerning appellant's ovarian cancer.

OWCP received a routine progress report from Dr. Rhoades, the attending physiatrist and specialist in pain medicine, but this evidence did not accompany the letter to Dr. Martinson asking for clarification or the letter to OWCP asking for assistance. It misconstrued this report as evidence submitted in support of appellant's purported reconsideration request.

The Board has examined the record and can find no application for review or request for a merit determination. Appellant attempted to secure additional medical evidence that, once obtained, might support a future application for review. As there was no application for review to adjudicate, the Board will set aside OWCP's February 20, 2014 decision as premature and inconsistent with proper administrative procedure.

On appeal, appellant's representative argues the merits of the case, but as appellant appeals from a nonmerit decision, the Board has no jurisdiction to consider the merits. The only issue before the Board is whether OWCP's nonmerit decision was proper. Counsel does not argue that the purported reconsideration request met at least one of the three standards for obtaining a merit review of the case, nor does she argue that OWCP issued the decision in error in the absence of a reconsideration request or application for review.

CONCLUSION

The Board finds that OWCP prematurely denied a merit review of appellant's case. Appellant did not request reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 22, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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