

FACTUAL HISTORY

This case has previously been before the Board. In a March 25, 2014 decision, the Board found that appellant did not establish that the conditions of disc protrusion at L5-S1 and a bulging disc at L4-5 were caused or aggravated by his January 4, 2012 employment injury. The Board affirmed an August 7, 2013 OWCP decision.² The findings of facts and conclusions of the previous Board decision are incorporated herein by reference.

On March 6, 2015 appellant, through counsel, requested reconsideration. In a January 7, 2015 report, Dr. Kevin J. Collins, a Board-certified physiatrist, noted a history that appellant injured his back while lifting parcels at work, that magnetic resonance imaging (MRI) scans demonstrated disc bulges and protrusions, and that appellant had lumbar spine surgery. He reported that a recent MRI scan demonstrated enhancing scar tissue and a new herniation above the level of the previous surgery. Dr. Collins described appellant's complaint of constant, severe radiating low back pain, and indicated that appellant had not worked since January 2012. He described physical examination findings and diagnosed failed low back syndrome with ongoing pain. Dr. Collins advised that appellant could not work due to a combination of chronic pain and large doses of pain medication.

By decision dated June 4, 2015, OWCP denied appellant's reconsideration request. It found that the evidence submitted was cumulative and similar to evidence previously of record and was, therefore, insufficient to warrant merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.³ Section 10.608(a) of OWCP's regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards enumerated in section 10.606(b)(3).⁴ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new

² Docket No. 14-48 (issued March 25, 2014). On January 9, 2012 appellant, then a 33-year-old city carrier (transitional employee) filed a traumatic injury claim (Form CA-1) alleging that on January 4, 2012 he injured his low back when he tripped while ascending stairs when delivering mail. He stopped work that day. Following an initial May 24, 2012 denial, on December 14, 2012 an OWCP hearing representative accepted a lumbosacral strain. The hearing representative further found however that appellant did not establish any further lumbar conditions, including disc bulge and protrusion at the L4-5 and L5-S1 levels for which he had undergone surgery on July 25, 2012. On July 2, 2013 appellant, through counsel, requested reconsideration. In a merit decision dated August 7, 2013, OWCP denied modification of the prior decision, finding that the medical evidence submitted was insufficient to establish that disc bulges and protrusions at L4-5 and L5-S1 were causally related to the January 4, 2012 employment injury.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.608(a).

evidence not previously considered by OWCP.⁵ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁶

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated June 4, 2015 which denied appellant's application for review. The merit issue in this case was whether appellant established that herniated lumbar discs at L4-5 and L5-S1 were causally related to a January 4, 2012 employment injury.

The Board finds that, as appellant did not assert that OWCP erroneously applied or interpreted the law or advance a relevant legal argument not previously considered by OWCP, he was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).⁷

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted a January 7, 2015 report from Dr. Collins, described above. Dr. Collins noted the history of injury and that appellant had not worked since January 2012. He described a new physical examination and recent MRI scan findings and diagnosed failed back syndrome with ongoing pain. Dr. Collins concluded that appellant could not work due to a combination of chronic pain and large doses of pain medication.

The Board finds that Dr. Collins' report, which had not previously been reviewed by OWCP, constitutes new, relevant, and pertinent evidence in regard to the matter of whether appellant established that herniated lumbar discs at L4-5 and L5-S1 were causally related to a January 4, 2012 employment injury. It is not necessary that the evidence be sufficient to establish the claim, only that it is new, relevant, and pertinent to the issue presented.⁸

As appellant submitted pertinent evidence on reconsideration that was not previously considered by OWCP, he is entitled to a review of the merits of his claim under section 10.606(b)(3) of OWCP's regulations.⁹ The case shall therefore be remanded to OWCP to consider whether Dr. Collins' January 7, 2015 report, submitted by appellant on reconsideration, is sufficient to require further development. The Board will, therefore, set aside OWCP's June 4, 2015 decision. After this and such further development deemed necessary, OWCP shall issue an appropriate merit decision.

⁵ *Id.* at § 10.606(b)(3).

⁶ *Id.* at § 10.608(b).

⁷ *Id.* at § 10.606(b)(3); *see R.M.*, 59 ECAB 690 (2008).

⁸ *C.L.*, Docket No. 14-1904 (issued May 18, 2015).

⁹ *Supra* note 7.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration pursuant to section 8128(a) of FECA.

ORDER

IT IS HEREBY ORDERED THAT the June 4, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: April 8, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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