

FACTUAL HISTORY

Appellant, a 50-year-old temporary tractor operator, injured his lower back on April 12, 1991 when he jumped from a tractor. He filed a claim for traumatic injury (Form CA-1) on April 15, 1991, which OWCP accepted for lumbar sprain with radiculopathy.

In a report dated May 20, 1991, it was indicated that appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine, the results of which showed that he had degenerative disc disease at L3-4, L4-5, and L5-S1.

Appellant has not worked since September 19, 1991. OWCP commenced payment of compensation for temporary total disability and placed him on the periodic rolls effective September 19, 1991.

In a letter to OWCP dated July 28, 1999, appellant requested that his claim be expanded to include neck, left shoulder, left hand, left knee, and left leg conditions.

In a report dated August 12, 1999, Dr. Robert S. Viener, a Board-certified orthopedic surgeon, stated that appellant underwent an MRI scan for his neck and shoulder, in addition to electromyogram (EMG) and nerve conduction velocity (NCV) studies of the upper and lower extremities. He advised that the results of these diagnostic tests were consistent with degenerative change at multiple levels of the cervical spine in addition to rotator cuff tear in his left shoulder. The EMG study was consistent with carpal tunnel syndrome on the left and possible tarsal tunnel syndrome on the left. Dr. Viener recommended that appellant undergo left carpal tunnel release surgery and epidural injections to his lower back.

To determine whether appellant was still disabled and still had residuals from his accepted condition, OWCP referred him to Dr. John B. Cohen, a Board-certified orthopedic surgeon for a second opinion examination. In an August 27, 1999 report, Dr. Cohen stated that appellant's degenerative lumbar disc disease, as shown by MRI scan, was not causally related to the April 12, 1991 work injury. He opined that appellant could work light-duty full time in regard to his left shoulder rotator cuff condition. Dr. Cohen stated that appellant's claimed cervical spine, carpal tunnel, left tarsal tunnel, and left shoulder conditions were not medically related to the April 12, 1991 injury.

OWCP found that a conflict existed between the opinions of Drs. Viener and Cohen as to whether appellant's claimed conditions were causally related to the April 12, 1991 employment injury. It referred appellant to Dr. Melinda Gardner, Board-certified in orthopedic surgery, for a referee medical examination. In a report dated January 12, 2000, Dr. Gardner found that his claimed conditions of cervical degenerative disc disease, carpal tunnel syndrome, left rotator cuff tear, and left tarsal tunnel syndrome were not causally related to the April 12, 1991 employment injury. She opined that appellant could work limited duty for eight hours per day.

By decision dated February 22, 2000, OWCP denied expansion of the claim for the conditions of cervical spine degenerative changes, left carpal tunnel syndrome, left tarsal tunnel syndrome, and left rotator cuff tear.

In a report dated September 23, 2008, Dr. Viener diagnosed a herniated disc at L5-S1 based on the May 20, 1991 MRI scan. He stated that appellant also had lumbar radiculopathy at L5 on the left side, in addition to lumbar stenosis. Dr. Viener opined that appellant continued to be totally disabled secondary to the April 12, 1991 employment injury. He asserted that the findings from his current examination, x-ray tests and his previous MRI scan and EMG/NCV tests confirmed his diagnosis and opinion.

To determine whether appellant still had residuals from his accepted April 12, 1991 work injury and whether his claimed lumbar degenerative disc disease was causally related to the April 1991 injury, he was referred to Dr. Robert F. Draper, Board-certified in orthopedic surgeon for a second opinion examination. In a November 16, 2012 report, after stating findings on examination and reviewing the medical history and the statement of accepted facts, Dr. Draper concluded that appellant's lumbar and cervical degenerative disc disease were preexisting and were not causally related to the April 12, 1991 work injury. He opined that appellant did not have any additional pathology in the lumbar spine. Dr. Draper advised that appellant sustained a lumbosacral strain in 1991, which should have lasted six months at most. He asserted that appellant's continued lower back problems were not due to the 1991 low back strain, but were attributable to the degenerative disc disease and spinal stenosis at L3-4, L4-5, and L5-S1, as documented in the May 20, 1991 lumbar MRI scan. Dr. Draper opined that the etiology of appellant's present conditions was due to his nonwork-related lumbar degenerative disc disease at multiple levels, and his spinal stenosis. He advised that his accepted conditions of lumbosacral strain and radiculopathy would not prevent him from working; he would be capable of returning to work for eight hours per day with restrictions of no lifting more than 20 pounds occasionally and 10 pounds frequently; no standing for more than two hours; and no sitting for more than six hours.

On April 22, 2013 OWCP denied expansion of the claim for a left knee condition.

OWCP issued a notice of proposed termination of compensation to appellant on May 30, 2013. It found that the weight of the medical evidence, as represented by Dr. Draper's referral report, established that appellant was no longer disabled due to his accepted April 12, 1991 injury.

By decision dated July 2, 2013, OWCP terminated appellant's compensation for medical benefits, finding that Dr. Draper's referral opinion represented the weight of the medical evidence.

On July 25, 2013 appellant requested an oral hearing, which was held on December 9, 2013.

By decision dated February 3, 2014, an OWCP hearing representative affirmed the July 2, 2013 termination decision.

By letter dated April 13, 2014, appellant requested reconsideration of the February 3, 2014 termination decision.

In an April 16, 2014 report, Dr. Eric G. Dawson, a specialist in orthopedic surgery, stated that the results of a lumbar MRI scan taken six months previously showed that appellant had

lumbar disc protrusion or herniated nucleus pulposus at the L5-S1 paramedian level. He advised that appellant had multiple signs of osteoarthritic changes at multiples levels, including the discs, and the facets; the tests showed that he also had spondylolysis and spondylolisthesis. Dr. Dawson advised that appellant had continuing disc problems at multiple joints, particularly at the L3-4, L4-5, and L5-S1 levels. He asserted that these findings displayed an accelerated curve of degenerative changes in the lumbar spine and disc.

By decision dated April 27, 2014, OWCP denied appellant's request for reconsideration, finding that it neither raised substantive legal questions, nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

In a May 9, 2014 report, Dr. Dawson essentially reiterated his previous findings and conclusions.

By letter dated May 13, 2014, appellant again requested reconsideration. He submitted reports dated June 5 and July 17, 2014 from Dr. Dawson in which he essentially reiterated his previous findings and conclusions.

By decision dated September 23, 2014, OWCP denied appellant's request for reconsideration, finding that it neither raised substantive legal questions, nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

By letter dated January 16, 2015, received by OWCP on January 21, 2015 appellant's counsel at the time requested reconsideration. He submitted reports dated October 29 and December 3, 2014, and January 17, 2015 from Dr. Dawson in which he essentially reiterated his previous findings and conclusions.

In his December 3, 2014 report, Dr. Dawson stated that it had been "essentially proven" by the MRI scan results and nerve studies that appellant had lumbar disc and nerve impingement. He noted that there was sufficient concern regarding appellant's lower back condition that Dr. Viener scheduled appellant for an MRI scan on May 20, 1991 one month subsequent to his April 12, 1991 injury, which showed a herniated nucleus pulposus at L5-S1 with possible free fragment. Dr. Dawson also noted that medical records showed that by 1993 appellant had sustained a chronic lumbar sprain with lumbar radiculopathy; he opined that this was significant given that appellant had not sustained any additional lumbar injuries. He concluded that based on these findings the accepted condition was not correct at the time and his symptoms were incorrectly attributed to a preexisting, degenerative condition, when in fact they were indicative of conditions that were much more extensive.

In his January 17, 2015 report, Dr. Dawson reiterated that appellant's medical reports and records described his lumbar conditions as a herniated nucleus pulposus and lumbar disc and nerve impingement with radiculopathy. He advised that although his medical reports and diagnostic records contemporaneous with appellant's original 1991 injury were lacking, he believed that they would have documented that the conditions appellant has today were "indisputably" the same conditions he sustained in his April 12, 1991 workplace fall. Dr. Dawson reiterated that appellant sustained a very significant back injury -- more than a strain or sprain -- the seriousness of which became obvious within a month with the May 20, 1991 MRI

scan. He stated that appellant had sustained a mechanical injury of the disc and nerve impingement which occurred on April 12, 1991 and continues to this day.

By letter dated February 5, 2015, appellant's counsel stated that he had erred in his previous letter by referring to the date of May 3, 2012 as the date of OWCP's proposed notice of termination and as the date of the decision for which he was requesting reconsideration. Counsel clarified that he was requesting reconsideration of OWCP's most recent merit decision, which was issued on February 3, 2014. He asserted that the request was timely as it was received by OWCP on January 20, 2015.

By decision dated February 12, 2015, OWCP denied appellant's request for reconsideration finding appellant's request for reconsideration was untimely and failed to demonstrate clear evidence of error. It stated: "The basis for this decision is that your legal representative states in his letter dated February 5, 2015 that he is requesting reconsideration ... regarding [the] proposed notice of [termination] dated May 30, 2013."

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act¹ does not entitle an employee to a review of an OWCP decision as a matter of right.² This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).³ As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ The Board has found that the imposition of

¹ 5 U.S.C. § 8128(a).

² *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989); *petition for recon., denied*, 41 ECAB 458 (1990).

³ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by: (1) showing that OWCP erroneously applied or interpreted a point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁴ *Id.* at § 10.607(a).

this one-year time limitation does not constitute an abuse of the discretionary authority granted by OWCP granted under 5 U.S.C. § 8128(a).⁵

ANALYSIS

OWCP improperly determined in this case that appellant failed to file a timely application for review. The last merit decision in this case was dated February 3, 2014. Appellant's request for reconsideration was received by OWCP on January 21, 2015.

In the February 3, 2014 decision, an OWCP hearing representative affirmed OWCP's July 2, 2013 termination decision. The appeal rights accompanying that decision advised appellant that he could request reconsideration with OWCP within one year of the decision, if the request was received by OWCP within one year of the decision, or file an appeal with the Board within 180 days. Counsel clearly requested reconsideration in his January 16, 2015 letter, received on January 21, 2015, but inadvertently referred to OWCP's initial notice of proposed termination as the decision for which he was requesting reconsideration in the letter; however, he clarified in his February 5, 2015 follow-up letter that he was requesting reconsideration of the February 3, 2014 merit decision of the OWCP hearing representative. As the January 21, 2015 letter was received within one year of that decision, the request therefore cannot be found untimely pursuant to sections 10.607(a) and 10.606(b)(3) of OWCP's regulations.⁶ The clear evidence of error standard utilized by OWCP in its February 12, 2015 decision is appropriate only for untimely reconsideration requests.⁷ The case will be remanded for OWCP to further review appellant's January 21, 2015 reconsideration request in accordance with its regulations and procedures.

CONCLUSION

The Board finds that OWCP erred in finding appellant's January 21, 2015 reconsideration request untimely filed.

⁵ See cases cited *supra* note 2.

⁶ See 20 C.F.R. § 10.607(b)(3) and *supra* note 4.

⁷ See *R.M.*, Docket No. 14-625 (issued July 29, 2014).

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: August 12, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board