

**United States Department of Labor
Employees' Compensation Appeals Board**

P.R., Appellant

and

**DEPARTMENT OF THE AIR FORCE, AIR
NATIONAL GUARD, Carolina, PR, Employer**

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**Docket No. 17-0837
Issued: August 9, 2017**

Appearances:
Ronald Webster, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 6, 2017 appellant, through counsel, filed a timely appeal from a December 5, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed since the last merit decision of June 1, 2016 to the filing of this appeal, pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

FACTUAL HISTORY

On June 20, 1997 appellant, then a 41-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that he injured his left leg and back in the performance of duty on May 22, 1997. He indicated that he slid off a work stand on a trailer. OWCP accepted the claim for left leg laceration, left first metatarsal fracture, right hip strain, and low back strain.² Appellant stopped working and received compensation on the periodic rolls.

In a report dated October 8, 2013, treating physician Dr. Richard Smith, a Board-certified orthopedic surgeon, provided results on examination and diagnosed cervical spondylosis, chronic pain syndrome, cervical spinal stenosis, lumbago, and muscle spasm. He reported appellant's pain had worsened.

OWCP referred appellant for a second opinion examination by Dr. William Dinenberg, a Board-certified orthopedic surgeon. In a report dated April 23, 2014, Dr. Dinenberg provided a history and results on examination. He opined that appellant's work-related conditions had resolved. Dr. Dinenberg noted that appellant's current disability was related to lumbar degenerative disc disease, with foraminal and spinal stenosis.

By letter dated July 1, 2014, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits. It found that the weight of the medical evidence was represented by Dr. Dinenberg and the conditions diagnosed by Dr. Smith were not established as employment related.

Appellant submitted a September 22, 2014 report from Dr. Smith, who noted that appellant was currently being treated for residuals of the May 22, 1997 employment injury. Dr. Smith opined that appellant had an aggravation of his lumbar disc disease and had chronic back pain and lumbar radiculopathy due to spinal stenosis. He concluded that appellant had an aggravation of his preexisting lumbar condition on May 22, 1997 and his lumbar conditions were employment related.

By decision dated June 11, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 28, 2015. It found that Dr. Dinenberg represented the weight of the medical evidence.

Appellant requested a hearing before a hearing representative with OWCP's Branch of Hearings and Review on June 29, 2015. A hearing was held on March 17, 2016. In a report dated February 25, 2016, Dr. Smith indicated that appellant had been treated since May 1997. He opined that it remained his opinion that appellant was permanently and totally disabled. Dr. Smith reported that appellant's treatment since the injury was related to the accepted work injury.

In a decision dated June 1, 2016, the hearing representative affirmed the June 11, 2015 termination decision. The hearing representative found that Dr. Smith failed to provide medical

² Appellant also has an August 1, 1997 claim accepted for lumbosacral strain. OWCP File No. xxxxxx241. The two claims have been administratively combined, with the current claim serving as the master file number.

rationale, and thus Dr. Dinenberg was the weight of the medical evidence. Therefore, OWCP met its burden of proof to establish that appellant was no longer disabled and did not require medical treatment causally related to the accepted employment injury.

Appellant, through counsel, requested reconsideration on November 16, 2016. Counsel submitted testimony through a deposition dated October 13, 2016 from Dr. Smith's deposition.³ Upon counsels questioning Dr. Smith opined that appellant had aggravated a preexisting lumbar degenerative disc disease on May 22, 1997. He opined that the trauma from falling from a height and landing on the back can put a force onto the anatomic structure of the disc and aggravated it to the point where an asymptomatic condition became symptomatic. Dr. Smith noted that appellant had consistent complaints of pain over time and that his condition had progressed over time. He indicated that imaging studies had shown secondary changes of facet hypertrophy which caused neurologic compression. Dr. Smith indicated that he disagreed with Dr. Dinenberg and felt that appellant's aggravation of degenerative disc disease was employment related.

By decision dated December 5, 2016, OWCP declined to review the merits of the claim. It found that the sworn testimony from Dr. Smith was irrelevant as aggravation of degenerative disc disease was not an accepted condition.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains 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 evidence not previously considered by OWCP."⁵ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁶

ANALYSIS

Appellant requested reconsideration from the June 1, 2016 hearing representative's decision on November 16, 2016. He submitted new evidence in the form of a deposition from Dr. Smith dated October 13, 2016. OWCP found that the evidence was irrelevant because

³ The deposition was signed by a notary public on October 24, 2016, affirming that Dr. Smith had appeared before her on October 13, 2016.

⁴ 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

Dr. Smith discussed aggravation of lumbar degenerative disc disease, which was not an accepted condition.

OWCP had terminated wage-loss compensation and medical benefits effective June 28, 2015. In assessing the medical evidence, it had found that the reports from Dr. Smith were of diminished probative value. The hearing representative indicated that Dr. Smith had not provided medical rationale to support his opinion that appellant was disabled due to an employment-related aggravation of lumbar degenerative disc disease.

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

The October 13, 2016 statements from Dr. Smith address the issue of an employment-related aggravation and continuing disability. He provides additional explanation with respect to his opinion on these issues.⁷ Dr. Smith discusses the mechanism of injury, diagnostic studies, and the continuing treatment. The issue on reconsideration is whether the new evidence is relevant and pertinent to the termination issue and not previously considered by OWCP.⁸

Since OWCP had terminated compensation based in part on a determination that Dr. Smith's opinion on continuing employment-related disability was of diminished probative value, the Board finds that his October 13, 2016 testimony constitutes relevant and pertinent new evidence. The Board finds that appellant has therefore met the requirement of 20 C.F.R. § 10.606(b)(3)(iii) and is entitled to a review of the merits of the claim. The case will accordingly be remanded to OWCP for a merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁷ See *C.H.*, Docket No. 17-0074 (issued March 17, 2017).

⁸ See *X.J.*, Docket No. 15-1776 (issued December 10, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 5, 2016 is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: August 9, 2017
Washington, DC

Christopher J. Godfrey, 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