

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

L.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Anaheim, CA, Employer**

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**Docket No. 17-0243
Issued: June 20, 2017**

Appearances:
Guillermo Mojarro, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 14, 2016 appellant, through his representative, filed a timely appeal from a June 28, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated July 9, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction over the merits of the claim.

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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issues is whether OWCP properly denied appellant's request for reconsideration of the merits of his claims under 5 U.S.C. § 8128.

FACTUAL HISTORY

On May 17, 2001 appellant, then a 47-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that, on May 16, 2001, while standing on a flatbed truck helping guide a flat sorter onto the truck, he slipped on an oil spot and fell and broke his right hip and right wrist. OWCP accepted his claim for comminuted fracture of the right intertrochanteric region and subtrochanteric area of the right femoral shaft (hip), nondisplaced fracture of the right distal radius, and nondisplaced fracture of the tibial spine and lateral tibial plateau.³ It subsequently expanded the claim to include depressive disorder and internal derangement of the right knee. Appellant stopped work on May 16, 2001 and returned to a full-time limited-duty job on May 2, 2005.⁴

On October 17, 2008 appellant filed a notice of recurrence of disability claim (Form CA-2a) alleging that on May 16, 2008 he experienced a recurrence of symptoms from the original accident and on May 15, 2008 his physician ordered him to stop work. He indicated that after returning to work following the original injury he worked in a limited-duty position.

In a decision dated March 11, 2009, OWCP denied appellant's claim for a recurrence of disability. Appellant requested an oral hearing which was held before an OWCP hearing representative on July 24, 2009. In a decision dated October 21, 2009, an OWCP hearing representative affirmed the March 11, 2009 decision.

On June 24, 2013 appellant filed a claim for compensation (Form CA-7) for total disability for the period October 9, 2009 to January 31, 2013. He submitted a February 7, 2014 operative report from Dr. Stephen Barkow, a Board-certified anesthesiologist, who performed a right L4 and right L5 transforaminal epidural steroid injection and diagnosed lumbar degenerative disc disease, lumbar radiculopathy, and postlaminectomy syndrome.

³ OWCP authorized the following procedures: on May 17, 2001 appellant underwent an open reduction and internal fixation of fracture of the intertrochanteric area and subtrochanteric area of the right femoral shaft and was diagnosed with comminuted fracture, intratrochanteric region and subtrochanteric area of the left femoral shaft, nondisplaced fracture of the distal right radius and fracture of the base of the tibial spine and lateral tibial plateau, nondisplaced; on February 20, 2003 appellant underwent removal of gamma nail and was diagnosed with status post placement of right femoral gamma nail; on December 26, 2001 appellant underwent removal of distal interlocking screw right knee surgery, lateral arthrotomy and was diagnosed with right distal femur painful retained hardware, interlocking screw from intramuscular nail; and on April 6, 2004 appellant underwent an anterior lumbar decompression, partial corpectomy, and fusion and was diagnosed with disc protrusion, discogenic pain, and disc collapse L5-S1.

⁴ Appellant retired on January 31, 2013.

By decision dated February 28, 2014, OWCP denied appellant's claim for compensation for the period October 9, 2009 to January 31, 2013.⁵

On January 31, 2014 appellant requested reconsideration of the March 11, 2009 denial of his recurrence claim. By decision dated May 1, 2014, OWCP denied his request for reconsideration of the October 21, 2009 decision as it was untimely filed and failed to demonstrate clear evidence of error.

In an appeal request form dated March 10, 2014, appellant disagreed with the February 28, 2014 OWCP decision and requested an oral hearing. The hearing was held on October 17, 2014. Appellant testified that he attempted to return to work from May 15, 2008 to January 2013 and was informed by the employing establishment that his job was terminated and that there was no present assignment for him. He asserted that the employing establishment withdrew his limited-duty job.

Appellant was treated by Dr. John B. Dorsey, a Board-certified orthopedist, from June 17 to December 16, 2014. In State of California, Division of Workers' Compensation, primary treating physician's progress reports dated June 17, July 15, October 28, and December 16, 2014, Dr. Dorsey diagnosed right hip arthritis, lumbar disc displacement, and internal derangement of the knee. He indicated that appellant was status post steroid injections on February 7, 2014 and reported significant improvement in pain. Dr. Dorsey noted objective findings of right hip pain and tenderness of the lumbar spine. He prescribed Tramadol for pain and noted that appellant was to remain off work until January 6, 2015.

Appellant was treated by Dr. Samuel H. Albert, a Board-certified psychiatrist, from March 7 to June 13, 2014. His diagnoses included depressive disorder and psychosocial stressors with severe occupational and social difficulties. Dr. Albert noted that appellant was not capable of performing his usual and customary job, or any other job, due to his employment-related conditions. He indicated that appellant's emotional reactions to his assigned tasks were the direct cause of his medical conditions and he did not possess the mental capacity to work within job situations or at other gainful employment. Dr. Albert noted a definite relationship in time and sequence of the events that occurred while appellant was performing his assigned duties at the employing establishment and the onset of the symptoms of his current diagnoses. He found that appellant's current symptoms and diagnosed conditions were causally related to his employment. Dr. Albert provided behavioral and cognitive psychotherapy, supportive psychotherapy, and medications. He indicated that when discussing the concept of a return to the work situation and a visit to the former site of employment appellant became extremely agitated. Dr. Albert noted no improvement in appellant's psychiatric symptoms and he continued to be significantly depressed. He opined that appellant's job-related accepted conditions were the cause of his total disability.

In a decision dated January 2, 2015, OWCP's hearing representative affirmed the February 28, 2014 decision denying appellant's recurrence claim for the period October 9, 2009 to January 31, 2013. The hearing representative found that the evidence of record did not

⁵ OWCP subsequently developed this claim as one for a recurrence of disability. It noted that appellant had not worked since May 16, 2008.

support the withdrawal of the restricted-duty position by management. Rather, the evidence indicated that Dr. Albert removed appellant from his restricted-duty position.

On April 10, 2015 appellant requested reconsideration of the May 1, 2014 decision. He submitted both an appeal request form and a one-page letter noting the request. On April 23, 2015 OWCP denied this request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

Also on April 10, 2015 appellant requested reconsideration of the January 2, 2015 decision. He submitted both an appeal request form and a one-page letter noting the request.

Appellant submitted treating physician's progress reports from Dr. Dorsey dated January 6, March 24, and April 21, 2015, who diagnosed intertrochanteric closed fracture, subtrochanteric closed fracture, and closed fracture of the upper end of the tibia. He noted subjective complaints of low back, right hip, right knee and right wrist pain and objective findings of right hip pain and tenderness of the lumbar spine. Dr. Dorsey advised that appellant was off work until February 3, 2015. In progress notes dated January 6 to February 24, 2015, he indicated that appellant presented with low back, right knee, and right wrist pain, but reported significant relief with a new medication.

Appellant was treated by Dr. Albert on October 28, 2013 and August 22 and October 22, 2014. Dr. Albert noted diagnoses and opined that appellant was incapable of performing any job, with or without restrictions, due to his work-related conditions. He indicated that appellant continued to exhibit symptoms of the accepted conditions and was totally temporary disabled. Dr. Albert noted a definite relationship in time and in sequence with respect to the events that occurred while appellant was performing assigned duties at the employing establishment and the onset of the symptoms of his current diagnoses. He found causal relationship between appellant's work conditions and his current symptoms and total disability.

In a decision dated July 9, 2015, OWCP denied modification of the January 2, 2015 hearing representative's decision.

In a letter dated March 30, 2016, appellant requested reconsideration of the July 9, 2015 decision. He asserted that OWCP committed an error of law when it failed to consider new evidence submitted on April 10, 2015 prior to issuing its decision.

In a primary treating physician's progress reports dated July 14 to October 20, 2015, Dr. Dorsey noted appellant's subjective complaints of right knee pain and right hip pain. He noted objective findings of an antalgic gait and that the right leg was 1 and 5/8 inches shorter than the left leg. Dr. Dorsey diagnosed introchanteric closed fracture, subtrochanteric closed fracture and closed fracture of the upper end of the tibia. He noted that appellant declined arthroplasty surgery. Dr. Dorsey advised that appellant was to stay off work until November 20, 2015. In primary treating physician's progress reports dated November 17 and December 15, 2015 and January 12, February 16, March 22, and April 19, 2016, Dr. Dorsey noted appellant's subjective complaints of right knee pain, pain with increased walking and standing over 15 minutes, lumbar spine pain increased with activities of daily living, right hip pain, his right leg was 1 and 5/8 inches shorter than the left leg and he wore orthopedic shoes

with a lift. He noted objective findings of equal and symmetric deep tendon reflexes and he ambulated with an irregular gait. Dr. Dorsey diagnosed nondisplaced bicondylar fracture of the right tibia, nondisplaced subtrochanteric fracture of unspecified femur, intervertebral disc displacement of the lumbar region, and major depressive disorder, single episode. He noted a treatment plan of orthopedic shoes, continue medications as directed, and remain off work until May 18, 2016. Other progress notes from Dr. Dorsey dated April 15 to May 17, 2016 indicated that appellant continued to have back and hip pain.

Appellant was treated by Dr. Albert on November 14, 2014 and January 23, July 24, August 21, September 18, and October 2, 2015, and he noted diagnoses and advised that appellant was not capable of participating in vocational rehabilitation training as he did not have the mental capacity to learn or retain new information. Dr. Albert advised that appellant was totally disabled from all work with or without restrictions. He indicated that appellant continued to exhibit symptoms of the accepted conditions which were medically present and disabling. Dr. Albert noted that appellant continued to be totally disabled as a consequential result of the accepted conditions which are due to work-related events.

In a June 28, 2016 decision, OWCP denied appellant's March 30, 2016 request for reconsideration as the evidence submitted was insufficient to warrant merit review as the submitted evidence was either duplicative or cumulative in nature.

LEGAL PRECEDENT

Under section 8128(a) of FECA,⁶ OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”⁷

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁸

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(b).

ANALYSIS

OWCP denied appellant's claim for a recurrence of disability for the period October 9, 2009 to January 31, 2013 because the evidence of record failed to establish that his disability was causally related to the accepted May 16, 2001 work-related injury. Thereafter, it denied appellant's reconsideration request without conducting a merit review.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim. The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law. In his March 30, 2016 reconsideration request, appellant indicated that he submitted new evidence on April 10, 2015, but OWCP failed to consider this evidence prior to issuing a decision on his claim. He asserted that this was an error of law. These assertions, however, do not show a legal error by OWCP or a new and relevant legal argument. The underlying issue in this case is whether appellant submitted medical evidence establishing that he sustained a recurrence of his medical condition causally related to the May 16, 2001 work incident. That is a medical issue which must be addressed by relevant new medical evidence.⁹

Appellant did not submit any pertinent new and relevant medical evidence in support of his claim. He submitted reports from Dr. Albert dated November 14, 2014 and January 23, July 24, August 21, September 18, and October 2, 2015 in which he diagnosed depressive disorder, severe occupational and social difficulties, and opined that appellant was unable to work at his usual and customary job. Dr. Albert opined that appellant was incapable of participating in vocational rehabilitation training, as he did not have the mental capacity to learn or retain new information and that he was totally disabled from work. He indicated that appellant continued to exhibit symptoms of the accepted conditions and continued to be totally disabled as a result of the work-related events. However, these reports are irrelevant because they do not specifically address the issue of whether appellant sustained a recurrence of disability for the period October 9, 2009 to January 31, 2013 causally related to his May 16, 2001 accepted work injury. Additionally, these reports are similar to Dr. Albert's prior reports already contained in the record, specifically reports dated March 7, May 16, June 13, August 22, and October 22, 2014,¹⁰ and which were previously considered by OWCP in its decisions dated January 2 and July 9, 2015 and found deficient. Therefore, this new evidence is insufficient to warrant reopening the case for a merit review.

Similarly, appellant submitted primary treating physician's progress reports dated July 14 to October 20, 2015 from Dr. Dorsey who noted appellant's subjective complaints and objective findings and diagnosed introchanteric closed fracture, subtrochanteric closed fracture, and closed fracture of the upper end of the tibia. Dr. Dorsey advised that appellant was to remain off work

⁹ See *Bobbie F. Cowart*, 55 ECAB 746 (2004). Furthermore, the Board notes that the only evidence of record dated or received by OWCP on April 10, 2015 are appellant's reconsideration requests noted *infra*.

¹⁰ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; see *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

until November 20, 2015. In primary treating physician's progress reports dated November 17, 2015 to April 19, 2016 he diagnosed displaced bicondylar fracture of the right tibia, nondisplaced subtrochanteric fracture of unspecified femur, intervertebral disc displacement of the lumbar region and major depressive disorder, single episode. Dr. Dorsey noted a treatment plan of orthopedic shoes, continue medications as directed, and remain off work until May 18, 2016. However, these reports are irrelevant as they are similar to his previously submitted reports dated June 17, 2014 to April 21, 2015, which were considered by OWCP in its decisions dated January 2 and July 9, 2015. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹¹ Therefore, these reports are insufficient to require OWCP to reopen the claim for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that he established that he sustained a recurrence of disability as the employing establishment did not have any work available for him to perform within his restrictions during the recurrence period. He contends that OWCP should have paid him compensation benefits during this period that his employing establishment did not have work available for him to perform. As explained, the Board does not have jurisdiction over the merits of the claim.

CONCLUSION

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

¹¹ See *Daniel Deparini, id.*

ORDER

IT IS HEREBY ORDERED THAT the June 28, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2017
Washington, DC

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

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

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