

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

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| J.S., Appellant |) | |
| |) | |
| and |) | Docket No. 17-1886 |
| |) | Issued: August 23, 2018 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Jersey City, NJ, Employer |) | |
| |) | |

Appearances:
Thomas R. Uliase, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 6, 2017 appellant, through counsel, filed a timely appeal from an April 26, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated July 27, 2016 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 this case.

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 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).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case, as set forth in the prior decision, are incorporated herein by reference. The facts relevant to this appeal are as follows.

On March 11, 2008 appellant, a 59-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1), alleging that he sprained his right arm on that date as a result of "pulling [a] 5th wheel release lever." OWCP accepted the claim for right shoulder and upper arm sprain and aggravation of preexisting degeneration of cervical intervertebral disc disease. It also authorized two cervical procedures which appellant underwent on May 5, 2009.

By decision dated February 23, 2012, an OWCP hearing representative affirmed an August 2, 2011 decision which reduced appellant's compensation benefits because it determined that he had the capacity to earn wages as a customer order clerk. Appellant appealed the February 23, 2012 decision to the Board. In its April 22, 2013 decision, the Board found that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of customer order clerk.

The record contains EN1032 forms dated August 18, 2008, August 25, 2010, and October 24, 2011 from appellant who indicated under "Part C -- Dependents" that he was married and that he and his spouse lived together.

In an EN1032 form dated November 10, 2012, appellant indicated under "Part C -- Dependents" that he was not married and had a dependent who was born on September 11, 1987.

In an October 31, 2013 EN1032 form, appellant indicated under "Part C -- Dependents" that he was married and that he and his spouse lived together.

In an October 30, 2014 EN1032 form, appellant indicated under "Part C -- Dependents" that he was not married, was making regular direct payments of spousal support, and had a daughter who was born on September 11, 1987.

In a November 25, 2014 letter, OWCP advised appellant that he was not eligible for the augmented compensation rate of 75 percent over the basic rate because he did not meet FECA criteria. It found that based on the evidence submitted on the EN1032 form dated October 30, 2014 appellant was not married and his only claimed dependent was over the age of 23. OWCP requested additional evidence from appellant if his daughter was incapable of self-support, in the form of a medical report from a physician, in order to qualify her as a dependent.

³ Docket No. 12-1343 (issued April 22, 2013).

In response, counsel submitted a certificate of marriage from the State of New Jersey indicating that appellant was married to his second wife as of February 11, 2006.

In a January 8, 2015 letter, OWCP requested additional information from appellant regarding the current status of his marriage, whether or not he presently lived with his spouse, and any other claimed dependents.

In a letter dated November 5, 2015, counsel argued that appellant was eligible for the augmented compensation rate because he had claimed that he was no longer married to his first wife, whom he had been divorced from for approximately 13 years. He contended that this did not constitute a discrepancy because appellant was married to his second wife, as of February 11, 2006. Appellant's second wife also submitted a statement dated August 24, 2015 advising that her marriage certificate was attached.

In a November 12, 2015 letter, OWCP advised that appellant was not eligible for the augmented compensation rate because appellant failed to submit a written statement explaining the discrepancies on the EN1032 form he certified on October 30, 2014. It afforded him 30 days to respond.

Appellant submitted a November 16, 2015 statement indicating that he was indeed married, that his second wife lived with him now, and that she had lived with him continuously since the date of marriage.

In a December 1, 2015 letter, OWCP advised appellant that it had reviewed the information submitted regarding his eligibility for additional compensation due to his marital status and it indicated that the case file reflected that he paid alimony to his first wife, which was not the same as child support under FECA. It further found that the statement from counsel failed to establish that appellant's second wife remained living with him throughout the duration of the marriage. OWCP noted that in the EN1032 form dated November 10, 2012 appellant also answered "No" to the question asking if he was married. It advised that appellant had not yet submitted a written statement explaining why each EN1032 form he submitted had not contained consistent information.

On December 18, 2015 counsel submitted a December 11, 2015 statement from second wife indicating that she and appellant had been residing together since 2004 and got married on February 11, 2006.

By decision dated January 11, 2016, OWCP found that the evidence of record was insufficient to establish appellant's entitlement to receive retroactive compensation benefits based on the augmented rate of 75 percent because he had supplied inconsistent information on the EN1032 forms.

On January 18, 2016 appellant, through counsel, requested an oral hearing by a representative of the Branch of Hearings and Review.

A hearing was held before an OWCP hearing representative on April 18, 2016. Appellant provided testimony, including the fact that he divorced his first wife in 2000 and then married his second wife in 2006. He testified that he had been living with the second wife since 2004. Counsel

argued that appellant was confused as to the definition of dependent and felt that since his wife was working that she was not a dependent, but clearly made a mistake. The hearing representative held the case record open for 30 days for the submission of additional evidence.

By decision dated July 5, 2016, OWCP's hearing representative affirmed the January 11, 2016 decision, finding that appellant had not submitted sufficient evidence to establish entitlement to retroactive augmented compensation because the EN1032 forms he completed failed to support that he had a qualifying dependent for the period claimed. She further found that appellant had not submitted sufficient evidence to explain or justify the discrepancies found in the completion of the EN1032 forms.

Subsequently, appellant submitted two OWCP-957 forms and medical reports dated June 8 through December 27, 2016.

On January 31, 2017 appellant, through counsel, requested reconsideration. Counsel argued that appellant should receive retroactive compensation at the augmented compensation rate and submitted a January 23, 2017 statement from appellant who indicated that he was married to his second wife on February 11, 2006 and they lived together. Appellant subsequently submitted medical reports dated February 7 and 28, and March 20, 2017.

By decision dated April 26, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim, finding that he failed to advance a relevant legal argument or submit any relevant and pertinent new evidence. It determined that he had submitted cumulative evidence in the form of a personal statement providing the date of his marriage, the name of his wife, and that they had been living together since their marriage; however, his compensation had been reduced due to his lack of explanation and justification regarding the discrepancies pertaining to his marriage on his prior EN1032 forms. OWCP further found that the medical evidence submitted was not relevant to the underlying issue of appellant's entitlement to retroactive augmented compensation.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ A timely application for reconsideration, including all supporting documents, must set forth

⁴ This section provides in pertinent part: "[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 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

Appellant's January 31, 2017 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, the Board finds that he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to further review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

In support of his reconsideration request, appellant submitted a January 23, 2017 statement indicating that he was married to his second wife on February 11, 2006 and that they lived together. The Board finds that submission of this evidence did not require reopening appellant's case for merit review. As OWCP denied his claim based on the lack of supportive factual evidence and this document repeats evidence already of record, it is cumulative and does not constitute relevant and pertinent new evidence. Therefore, it is not sufficient to require OWCP to reopen the claim for consideration of the merits.⁹

Appellant further submitted two OWCP-957 forms and medical reports dated June 8, 2016 through March 20, 2017 in support of his claim. The Board finds that submission of this evidence did not require reopening appellant's case for merit review because it failed to address the underlying issue before OWCP.¹⁰ As OWCP denied appellant's claim based on the lack of supportive factual evidence establishing his entitlement to retroactive augmented compensation, the Board finds that this evidence does not constitute new and relevant evidence. Therefore, it is insufficient to require OWCP to reopen appellant's claim for consideration of the merits.

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(3) and properly denied his request for reconsideration.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

⁹ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case. *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹⁰ The submission of argument and/or evidence which does not address the particular issue involved does not constitute a basis for reopening a case. *A.D., id.*; see also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

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).

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2018
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