

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

_____)	
T.P., Appellant)	
)	
and)	Docket No. 18-0608
)	Issued: August 2, 2018
U.S. POSTAL SERVICE, FORESIGHT)	
CARRIER ANNEX, Grand Junction, CO,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
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 January 30, 2018 appellant filed a timely appeal from a November 6, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated June 22, 2017, to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

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 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

The case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 27, 2014 appellant, then a 27-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he sustained a right upper arm sprain when a coworker grabbed and twisted his right arm, lifted him off the ground, and slammed him into a cart. OWCP accepted the claim for resolved right shoulder strain and an adjustment disorder.

OWCP determined that a conflict in the medical opinion evidence arose between Dr. Craig H. Stagg,³ an attending occupational medicine specialist, and Dr. James K. Weaver, a Board-certified orthopedic surgeon and OWCP referral physician,⁴ regarding whether appellant sustained an aggravation of a preexisting left shoulder and a cervical spine condition due to his June 27, 2014 work injury. It referred him to Dr. Robert P. Hansen, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated January 27, 2015, Dr. Hansen opined that appellant's accepted employment injury did not aggravate a preexisting neck or left shoulder condition.

By decision dated February 3, 2015, OWCP found that the medical evidence of record established that appellant's right shoulder sprain had resolved and that his left shoulder and neck symptoms were unrelated to his work injury. It denied his claim for compensation for disability beginning August 28, 2014.⁵

By decision dated February 1, 2016, an OWCP hearing representative affirmed the February 3, 2015 decision. She found that there had been no conflict in medical opinion between Dr. Weaver and Dr. Stagg at the time OWCP referred appellant to Dr. Hansen. The hearing representative determined that Dr. Hansen's opinion as a second opinion physician constituted the weight of the medical evidence and established that appellant did not sustain a cervical or left shoulder condition resulting in disability from work due to his employment injury.⁶

² Docket No. 16-0718 (issued August 1, 2016).

³ Dr. Stagg advised, in August and October 2014 reports, that appellant's work injury had aggravated a preexisting left shoulder and cervical spine condition.

⁴ On November 19, 2014 Dr. Weaver opined that the June 27, 2014 assault aggravated appellant's cervical disc disease. He also diagnosed depression and a resolving right shoulder strain and advised that appellant was unable to perform his usual work duties.

⁵ Appellant filed a claim for wage-loss compensation (Form CA-7) commencing August 9, 2014.

⁶ The hearing representative additionally noted that Dr. Bowen's report was insufficient to establish a psychiatric condition; however, on August 25, 2015 OWCP had referred appellant to Dr. George Kalousek, a Board-certified psychiatrist, for a psychiatric evaluation. Based on Dr. Kalousek's report OWCP expanded acceptance of his claim to include an adjustment disorder.

Appellant appealed to the Board. By decision dated August 1, 2016, the Board set aside the February 1, 2016 decision.⁷ The Board found that a conflict in the medical opinion evidence existed between Dr. Stagg and Dr. Hansen regarding whether appellant sustained an aggravation of a preexisting condition due to his June 27, 2014 work injury and, if so, whether it resulted in disability from employment. The Board remanded the case for OWCP to refer him for an impartial medical examination.

OWCP referred appellant to Dr. I. Stephen Davis, a Board-certified orthopedic surgeon, for an impartial medical examination. In the accompanying statement of accepted facts (SOAF), it indicated that the accepted condition was a resolved right shoulder strain and included a notation that it had issued a weight of the evidence memorandum on February 2, 2015. OWCP requested that Dr. Davis provide the diagnosed conditions due to the work injury and assess appellant's current disability from employment.

In a report dated October 10, 2016, Dr. Davis opined that appellant sustained a right shoulder and elbow sprain due to the June 27, 2014 work injury, noting that cervical and left shoulder symptoms had not been "documented at the time of the assault." He indicated that appellant initially complained of neck and left shoulder problems on July 25, 2014. Dr. Davis found no permanent left shoulder or cervical spine injury due to the June 27, 2014 employment injury. He subsequently advised that appellant's left shoulder and cervical complaints were "temporarily aggravated as a result of this alleged assault."

By decision dated October 25, 2016, OWCP denied expansion of the claim to include acceptance of left shoulder and cervical spine conditions.⁸

Appellant requested a telephone hearing before an OWCP hearing representative. Following a preliminary review, in an April 27, 2017 decision, OWCP's hearing representative vacated the October 25, 2016 decision. She noted that OWCP did not specifically outline the conflict to be resolved in its September 8, 2016 conflict statement or ask the referee physician to address the relevant issue of whether appellant sustained a left shoulder or cervical spine injury due to his work injury. The hearing representative also found that the SOAF did not include the accepted condition of adjustment disorder, provide the physical requirements of his work duties, or describe his work status. She noted that it also improperly referenced a weight of the evidence memorandum. The hearing representative found that Dr. Davis incorrectly determined that appellant initially complained of left shoulder problems to Dr. Stagg on July 25, 2014 instead of the correct date of June 30, 2014. She additionally determined that the report of Dr. Davis was inconsistent as he indicated both that appellant's left shoulder and cervical complaints were temporarily aggravated by the work incident and also that the conditions resulted from a prior injury. The hearing representative remanded the case for OWCP to prepare a proper SOAF and obtain clarification from Dr. Davis regarding whether he sustained any aggravation, temporary or

⁷ See *supra* note 2.

⁸ OWCP found, in its October 25, 2016 decision, that appellant had not established a work injury; however, as subsequently noted by OWCP's hearing representative, the issue was claim expansion.

permanent, of his left shoulder and cervical condition due to his work injury and, if so, whether it resulted in disability from employment beginning August 9, 2014.

On May 2, 2017 OWCP requested that Dr. Davis provide a supplemental report regarding whether appellant's preexisting left shoulder and cervical spine conditions were aggravated by the June 27, 2014 work injury and, if so, whether he was disabled from work due to the aggravation as of August 9, 2014. It provided Dr. Davis with a May 2, 2017 SOAF that was identical with the prior SOAF provided on September 8, 2016.

In a June 15, 2017 supplemental report, Dr. Davis noted that appellant complained of pain in his right shoulder and elbow at the time of injury and "neck and left shoulder pain as documented shortly thereafter." He advised that there was no new evidence that altered his original opinion. Dr. Davis opined that the objective evidence demonstrated no worsening of appellant's preexisting left shoulder and cervical condition due to the work injury and concluded, in agreement with Dr. Hansen, that his left shoulder and cervical symptoms were unrelated to the June 27, 2014 employment injury.

By decision dated June 22, 2017, OWCP denied expansion of the acceptance of appellant's claim to include a cervical or left shoulder condition.⁹ It found that the reports from Dr. Davis constituted the special weight of the evidence and established that appellant's preexisting left shoulder and cervical conditions were not caused or aggravated by his employment injury.

On August 15, 2017 appellant requested reconsideration. He asserted that the issue was whether he sustained a temporary aggravation of a preexisting condition resulting from a 2006 motor vehicle accident rather than whether the accepted June 27, 2014 employment injury caused his preexisting condition. Appellant challenged Dr. Davis' reliance on Dr. Hansen's report as he was no longer a referral physician. He maintained that Dr. Davis' October 10, 2016 report was inconsistent and based on an inaccurate factual background. Appellant contended that OWCP failed to comply with the instructions of OWCP's hearing representative, noting that it provided him with the same SOAF and almost the same questions as it did before his original report. He also asserted that Dr. Davis indicated that there was no new information that would change his opinion and thus provided no real clarification of his report or resolution of its inconsistencies. Appellant questioned why OWCP failed to notify Dr. Davis that he had complained of neck and shoulder symptoms when he sought treatment on June 30, 2014 and not on July 25, 2014 as Dr. Davis found in his initial report.

By decision dated November 6, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a). It found that he had not raised a relevant legal argument or submitted new and relevant evidence sufficient to warrant reopening his case for further merit review.

On appeal appellant enclosed a copy of his August 2017 request for reconsideration.

⁹ OWCP indicated that it was denying expansion of the acceptance of the claim to include a cervical disc and resolving right rather than left shoulder strain; however, this appears to be a typographical error.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.¹⁰

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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 new evidence not previously considered by OWCP.¹¹

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹² If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹³ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁴

ANALYSIS

By decision dated June 22, 2017, OWCP denied expansion of the acceptance of appellant's claim to include an aggravation of a cervical disc or left shoulder strain. On August 15, 2017 it received his request for reconsideration. Appellant's request was timely filed as it was received within one year of OWCP's merit decision.¹⁵

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law or submit relevant and pertinent new evidence not previously considered. He did, however, raise a new and relevant legal argument. The Board thus finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

On reconsideration appellant contended that the issue was whether he sustained a temporary aggravation of a preexisting condition due to his work injury instead of the etiology of the preexisting condition. OWCP, however, properly requested that Dr. Davis address whether the June 27, 2014 employment injury aggravated his preexisting left shoulder and cervical spine conditions.

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010).

¹² *Id.* at § 10.607(a).

¹³ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁴ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁵ *See supra* note 12.

Appellant further argued that Dr. Davis' opinion was based on an inaccurate factual background, noting in particular that OWCP failed to comply with the instructions of the hearing representative to update the SOAF. OWCP's hearing representative instructed OWCP to request a supplemental report from Dr. Davis and provide him with a SOAF that included all accepted conditions, described his work duties, excluded reference to a weight of the evidence memorandum, and provided his work status. OWCP, however, did not update the SOAF prior to requesting that Dr. Davis clarify his opinion.

As appellant has advanced a new and relevant legal argument 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.¹⁶ The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue an appropriate merit decision on the claim.

CONCLUSION

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

¹⁶ See *L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 2, 2018
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