

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

F.P., Appellant)
and) Docket No. 18-0168
U.S. POSTAL SERVICE, VEHICLE) Issued: December 3, 2018
MAINTENANCE FACILITY, Seattle, WA,)
Employer)

)

Appearances:

James Vasquez, Esq., 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 October 30, 2017 appellant filed a timely appeal from a June 29, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from July 5, 2016, the date of the most recent merit decision, to the filing of this appeal, pursuant

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.

to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.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).

FACTUAL HISTORY

On March 10, 2016 appellant, then a 64-year-old tire repairman, filed a traumatic injury claim (Form CA-1) alleging that, on February 1, 2016, he fractured a right toe when a large tire fell on it while in the performance of duty. The claim form was signed by appellant and dated March 10, 2016. A supervisor noted that appellant stopped work on February 5, 2016 and had not yet returned.

By letter dated March 3, 2016, Dr. Connie Morantes, a Board-certified internist, noted that appellant experienced pain in his left foot following an injury at work on February 5, 2016. She referred appellant for an evaluation with a foot specialist and recommended that he not return to work until his scheduled evaluation on April 4, 2016.

In a certification of a serious medical condition dated May 9, 2016, Dr. Kavita Kumar, a podiatric surgery specialist, diagnosed delayed healing of a hallux toe fracture of the left foot. She estimated that appellant's condition would take three to four months to resolve. Dr. Kumar noted that appellant could not perform some duties of his job due to the condition, including standing, walking, lifting of heavy objects, bending, twisting, or pulling of the left leg and foot.

On June 27, 2016 appellant filed a claim for compensation (Form CA-7) for leave without pay (LWOP) from March 11 through 25, 2016. A supervisor noted that appellant was not eligible for continuation of pay (COP) due to delayed notification of his claim.

By letter dated July 5, 2016, OWCP notified appellant that compensation was not payable for the first three days of temporary disability after the expiration of COP in traumatic injury cases, unless the total period of disability was followed by permanent disability or exceeded 14 days. Because the evidence submitted did not indicate that he was disabled for more than 14 days, OWCP explained that it could not pay him compensation for the claimed date of March 11, 2016.

By decision dated July 5, 2016, OWCP accepted appellant's claim for a nondisplaced unspecified fracture of the left great toe. On the same date, it denied his claim for COP for the

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the June 29, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

period February 2 through March 17, 2016. OWCP explained that COP was denied because the injury was not reported on a form approved by OWCP within 30 days following the injury.

On January 23, 2017 appellant filed a claim for compensation (Form CA-7) for LWOP from February 22 through March 4, 2016.

On April 25, 2017 appellant requested reconsideration of OWCP's July 5, 2016 decision denying his claim for COP. In an attached letter dated April 18, 2017, counsel argued that because appellant timely reported the injury to his supervisor, he should be entitled to COP. He noted that appellant had to use his sick and annual leave in order to cover his period of disability, and that the employing establishment had "clawed back pay" that he had received due to his injury. Counsel argued that appellant relied on the employing establishment to submit the proper and appropriate forms to have OWCP consider his claim.

By decision dated June 29, 2017, OWCP denied appellant's request for reconsideration. It found that the letter from counsel was irrelevant or immaterial and thus had no bearing on the underlying issue in this case. OWCP noted that appellant's request for COP was denied because it was not on a form approved by OWCP within 30 days following the injury. Appellant's date of injury was February 1, 2016, but he did not sign and date the Form CA-1 until March 10, 2016.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ 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.⁷

⁴ 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

⁵ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

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).

OWCP issued a decision dated July 5, 2016 denying appellant's request for COP, as his accepted injury was not reported on a form approved by OWCP within 30 days following the injury. Appellant timely filed a request for reconsideration of his claim with OWCP as it was filed within one year from the date of the last merit decision.

As noted above, the Board does not have jurisdiction over the merits of the July 5, 2016 decision. 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 review of the merits of his claim.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. While counsel argued that appellant's claim was timely submitted for COP because appellant notified his supervisor in writing of his injury in a timely manner, OWCP had already considered this argument in its decision dated July 5, 2016. As such, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).⁸

The underlying issue is whether appellant timely requested COP. A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any such evidence in this claim. While counsel argued that appellant's claim was timely submitted for COP, no relevant and pertinent new evidence was submitted on reconsideration in support of this argument. As such, appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) to warrant reconsideration of his claim.⁹

CONCLUSION

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

⁸ *Id.* at § 10.606(b)(3)(i) and (ii).

⁹ *Id.* at § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 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