

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

F.A., Appellant)	
)	
and)	Docket No. 17-1231
)	Issued: January 17, 2018
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer)	
)	

Appearances:
Thomas S. Harkins, 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 May 15, 2017 appellant, through counsel, filed a timely appeal from a December 21, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated February 12, 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 to review the merits of the claim.

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.

² 5 U.S.C. § 8101 *et seq.*

On appeal counsel contends that OWCP failed to consider all of appellant's conditions in terminating his wage-loss compensation and schedule award benefits for refusing an offer of suitable work in accordance with 5 U.S.C. § 8106(c)(2). He contends that appellant had a serious subsequently-arising cardiac condition requiring surgery and that OWCP did not properly consider this argument in denying appellant's request for reconsideration on December 21, 2016.

FACTUAL HISTORY

On May 20, 2002 appellant, then a 49-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1), alleging that he sustained a right knee injury when pulling a postal conveyor out of his truck. He heard a pop in his right knee which developed swelling and pain. On July 8, 2002 OWCP accepted appellant's claim for medial collateral ligament rupture of the right knee. Dr. Louis C. Rose, a Board-certified orthopedic surgeon, performed an arthroscopy of appellant's right knee on September 26, 2002 and diagnosed partial tear of the medial meniscus, partial tear of the lateral meniscus, hypertrophic synovium, and chondral defect of the medial femoral condyle. On April 15, 2003 OWCP entered appellant on the periodic rolls.

Dr. Rose released appellant to return to part-time sedentary work on November 18, 2003. Appellant returned to limited duty four hours a day on March 22, 2004.

Appellant filed a recurrence of disability (Form CA-2a) on April 27, 2005 and stopped work on May 2, 2005 due to his May 15, 2002 work injury. On April 30, 2005 Dr. Rose performed an authorized right total knee replacement. On June 15, 2005 OWCP accepted appellant's claim for recurrence of total disability beginning April 30, 2005. Appellant returned to part-time work on December 14, 2005. He claimed recurrence of disability on March 14, 2006 alleging he stopped work on March 9, 2006 due to his May 15, 2002 employment injury. Appellant indicated that he required additional right knee surgery. On March 9, 2006 Dr. Rose performed an arthroscopy with synovectomy and lysis of adhesion to all compartments on appellant's right knee. On March 28, 2006 OWCP accepted appellant's claimed recurrence of disability commencing March 9, 2006. Appellant returned to work on January 8, 2007 for four hours a day with restrictions.

By decision dated February 14, 2008, OWCP found that appellant's part-time limited-duty position represented his wage-earning capacity. On March 12, 2008 appellant requested an oral hearing from OWCP's Branch of Hearings and Review. He testified at the oral hearing before an OWCP hearing representative on June 23, 2008. By decision dated August 5, 2008, OWCP's hearing representative found that OWCP had properly determined appellant's wage-earning capacity based on his actual earnings.

Appellant filed a claim for recurrence of disability commencing November 17, 2010. He reported that light-duty work was no longer available on that date due to the National Reassessment Process. By decision dated August 5, 2011, OWCP denied appellant's claim for compensation beginning December 17, 2010. Counsel requested reconsideration on July 26, 2012. On October 17, 2012 OWCP accepted appellant's claim for a recurrence of total disability commencing December 17, 2010. In a separate decision dated October 17, 2012, it accepted appellant's claim for the additional conditions of tear of the lateral meniscus of the right knee and post-traumatic arthritis of the right knee. OWCP entered appellant on the periodic rolls on February 22, 2013.

In a letter dated March 8, 2013, OWCP referred appellant for a second opinion evaluation with Dr. Hormozan Aprin, a Board-certified orthopedic surgeon. In a report dated March 27, 2013, Dr. Aprin reviewed appellant's medical history including his diagnoses of diabetes, myocardial infarction on June 23, 2010 with five coronary artery stents, cervical spine fusion in 1992, left shoulder rotator cuff repair in 2000 and right knee arthroscopy in 1975. He found that appellant's coronary condition did not prevent him from gainful employment and provided a completed work capacity evaluation (OWCP-5) with restrictions on walking, standing, bending, stooping, pushing, pulling, lifting and climbing for two hours intermittently each. Dr. Aprin found that appellant could not operate a motor vehicle at work, squat, or kneel. He provided a lifting, pushing, and pulling restriction of 10 to 20 pounds.

On May 30, 2013 the employing establishment offered appellant a limited-duty position as a customer care agent. Dr. Aprin reviewed this position on August 5, 2013 and opined that appellant could perform this sedentary position.

Dr. Rose completed a report on August 27, 2013 and indicated that appellant was totally disabled from work.

The employing establishment offered appellant a modified mail processing clerk position on September 23, 2013, working four hours a day with restrictions on walking and standing no more than two hours a day intermittently, pushing, pulling, and lifting 10 to 20 pounds intermittently for two hours a day, climbing intermittently for two hours a day, and bending and stooping for two hours a day intermittently. Appellant was not required to operate a motor vehicle at work, squat, or kneel.

In a letter dated October 9, 2013, OWCP informed appellant that the employing establishment had provided him with a suitable work position and afforded him 30 days to accept the position or to provide a reasonable acceptable reason for refusing the offer. Appellant did not respond.³

By decision dated December 9, 2013, OWCP terminated appellant's wage-loss compensation and entitlement to schedule award benefits, effective December 15, 2013 due to his refusal of suitable work in accordance with 5 U.S.C. § 8106(c)(2).

On November 18, 2014 counsel requested reconsideration of the December 9, 2013 decision. He contended that appellant was not capable of performing the designated suitable position due to a nonwork-related serious heart condition requiring surgery. Counsel asserted that appellant was not capable of performing the duties of the offered position "at all times relevant herein." In support of this request, he submitted medical records. Appellant was hospitalized on August 4, 2013 for his cardiac condition. On August 5, 2013 he underwent a cardiac catheterization. Dr. Ricardo Bello, a Board-certified thoracic cardiovascular surgeon, performed surgery on August 12, 2013 diagnosing coronary artery disease, severe mitral regurgitation, hypertension, hypercholesterolemia, diabetes with peripheral neuropathy, nephrolithiasis, and osteoarthritis. He performed a triple coronary bypass and mitral valve repair. Appellant was discharged from the hospital on August 19, 2013. On September 11, 2013

³ On November 20, 2013 OWCP suspended appellant's wage-loss compensation effective November 17, 2013 as he failed to complete the requested October 2, 2013 Form CA-1032.

Dr. Bello indicated that appellant could perform no heavy lifting for six weeks following his August 12, 2013 surgery.

By decision dated February 12, 2015, OWCP denied modification of its prior decisions finding that appellant had not established that the offered position was not suitable based on his cardiac condition and the resulting hospitalization.

Counsel requested reconsideration of the February 12, 2015 decision on February 10, 2016 and contended that the medical evidence of record established that appellant was unable to perform the duties of the offered position due to a serious nonwork-related heart condition requiring surgery and was hospitalized from August 4 through 19, 2013 due to this condition. He again requested reconsideration on September 23, 2016 and alleged that OWCP had failed to issue a decision on the February 10, 2016 request for reconsideration within 90 days in keeping with its procedures.

By decision dated December 21, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that appellant's request for reconsideration neither raised substantive legal questions, nor included new and relevant evidence and was insufficient to warrant a review of the February 12, 2015 merit decision. OWCP also indicated that it was not required to conduct a merit review of appellant's claim, despite the delay in issuing a reconsideration decision, as the 180-day period for filing an appeal with the Board expired before appellant filed his request for reconsideration with OWCP.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁴ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁵ Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁶ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.⁷

⁴ 5 U.S.C. §§ 8101-8193, 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608.

⁷ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

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 terminated appellant's wage-loss compensation and entitlement to schedule award benefits effective December 15, 2013 due to his refusal of suitable work in accordance with 5 U.S.C. § 8106(c)(2). On February 10, 2016 appellant, through counsel, requested reconsideration of the February 12, 2015 merit decision denying modification of the termination and again contended that the medical evidence in the record established that appellant was unable to perform the duties of suitable work position due to a serious heart condition requiring surgery and was hospitalized from August 4, through 19, 2013. He also alleged that OWCP had failed to issue a decision on the February 10, 2016 request for reconsideration within 90 days in keeping with its procedures. OWCP denied this request in a decision dated December 21, 2016 without reviewing the merits of the case.

As noted above, the Board does not have jurisdiction over the merits of the February 12, 2015 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 further review of the merits of his claim. The Board finds that in his February 10, 2016 request for reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law, he did not advance a relevant legal argument not previously considered by OWCP and he did not submit relevant and pertinent new evidence not previously considered by OWCP. Thus, he is not entitled to a review of the merits of his claim based on the requirements under section 10.606(b)(3).

Counsel failed to submit relevant and pertinent new evidence with his reconsideration request. He relied on a legal argument that OWCP failed to consider all of appellant's diagnosed medical conditions when it found that the offered position was suitable work. The Board finds that appellant failed to show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered by OWCP.⁸ OWCP previously addressed appellant's cardiac hospitalization and surgery in the February 12, 2015 merit decision and found that this did not establish that the offered position was not suitable work. As such this legal argument cannot be considered new. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Counsel further argued that OWCP failed to issue a timely decision regarding the request for reconsideration, and that this prejudiced appellant's appeal rights. The Board notes that OWCP has a timeliness goal for issuing reconsideration decisions of within 90 days from receipt of the request.⁹ OWCP's procedures provide that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review the merits of the case by the Board, OWCP should conduct a merit review. However, the procedures note that there is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following

⁸ *T.L.*, Docket No. 16-1408 (issued June 26, 2017).

⁹ *V.D.*, Docket No. 16-1484 (issued January 6, 2017); *M.D.*, Docket No. 13-1344 (issued November 7, 2013).

OWCP's receipt of the claimant's reconsideration request.¹⁰ The last merit decision in this case was the February 12, 2015 denial of modification. Appellant had 180 days after this decision, or until August 11, 2015, to appeal that decision to the Board. OWCP received the reconsideration request on February 10, 2016. Accordingly, it received appellant's reconsideration request after the 180-day period for the appeal expired, and therefore OWCP's delay in issuing the decision on the request for reconsideration did not impact appellant's appeal rights.¹¹

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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 December 21, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 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

¹⁰ *Supra* note 7 at Chapter 2.1602.7(a) (October 2011).

¹¹ *V.D.*, *supra* note 9; *B.D.*, Docket No. 15-0400 (issued May 12, 2016).