

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 August 30, 2011 appellant, then a 28-year-old transitional employee (TE) carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on August 25, 2011 when he was attacked by a homeowner's dog while delivering mail. The dog had jumped over a wall and that he stumbled while backing up and fell over the homeowner's car, which caused injury to his back. Appellant stopped work on August 28, 2011, but returned to work August 30, 2011. Following development of the claim, OWCP accepted the claim for sprain of back, lumbar region. Appellant stopped work on September 26, 2011.

On September 24, 2013 OWCP received a notice of recurrence (Form CA-2a) from appellant claiming a worsening of his condition and wage loss due to a withdrawal of his light-duty assignment. Appellant alleged that he was laid off on September 26, 2011 due to the accident. He indicated that his condition progressively worsened and that he believed he was laid off because he was unable to function like before. The employing establishment advised that appellant last worked on September 26, 2011. It stated that he was removed from employment for failure to report an accident in a timely manner and failure to be in regular attendance. A September 24, 2013 statement from a supervisor supported the employing establishment's assertion. The supervisor indicated, "The Letter of Removal underwent the Grievance/Arbitration process and it sustained."

Appellant filed claims for wage-loss compensation (Form CA-7) from October 3, 2011 through January 6, 2012. He also submitted diagnostic testing, physical therapy reports, and medical notes from Life Health Solutions dated January 17, 2015 through April 5, 2016, which certified that he was receiving treatment due to a job-related injury.

An illegible August 26, 2011 note from Dr. Luis A. Rivera Roman, a general practitioner, appears to diagnose a lumbar sprain. A Form CA-16 medical report, with an illegible signature, dated August 26, 2011 released appellant to regular work as of August 28, 2011.

In a September 11, 2013 report, Dr. Mildred Diaz, a general practitioner, described the work-related incident. She provided diagnoses of lumbar radiculopathy and lumbar disc syndrome.

In a November 5, 2014 report, Dr. Roman described the work-related incident. He opined that the work incident caused lumbar sprain, lumbar radiculopathy, and lumbar disc displacement and provided a detailed medical explanation as to how the diagnoses were caused by the work incident.

In a January 17, 2015 report, Dr. Ivette Ostolaza, a family practitioner, noted appellant's work history, described the August 25, 2011 work incident, and reviewed diagnostic testing from 2012 and 2013. She diagnosed disc desiccation at L2-L3 and L4-51, schmorl nodes from T12-

L1 down to L5-S1, L3-L4 disc bulge, L4-L5 bulge, L5-S1 herniated nucleus pulposus (HNP), HNP and osteoarthritis at T12, cervical disc disease, lumbar degenerative disc disease, and lumbar radiculopathy which she opined were permanently aggravated by the August 25, 2011 injury.

Medical reports from Dr. Jesus Ramos, a physiatrist, dated February 28 and April 11, 2015 were received. In his February 28, 2015 report, Dr. Ramos noted the August 25, 2011 work incident, reviewed magnetic resonance imaging (MRI) scan testing of the cervical and lumbosacral spine from 2012, 2013, and 2015, and presented examination findings. He diagnosed small protruded disc at L5-S1, discogenic changes and degenerative joint disease in the lumbar spine, a protruded disc at C3-5, a bulging disc at C5-6, desiccation at L2-L3 and L4-51, schmori nodes from T12-L1 down to L5-S1, L3-L4 disc bulge, L4-L5 bulge, L5-S1 HNP, HNP and osteoarthritis at T12, cervical disc disease, lumbar degenerative disc disease, and lumbar radiculopathy. Dr. Ramos opined that appellant's traumatic injury permanently aggravated his conditions of the spine. In his April 11, 2015 report, he reported on appellant's progress.

Medical reports dated May 13, July 8, August 12, September 2, and December 9, 2015 and January 20, 2016 were received from Dr. Sol M. Abreu Sosa, a physiatrist. In his May 13, July 8, and August 12, 2015 and January 20, 2016 reports, Dr. Sosa diagnosed small protruded disc at L5-S1, discogenic changes and degenerative joint disease in lumbar spine, protruded disc at C3-5, bulging disc at C5-6, desiccation at L2-L3 and L4-51, schmori nodes from T12-L1 down to L5-S1, L3-L4 disc bulge, L4-L5 bulge, L5-S1 HNP, HNP and osteoarthritis at T12, cervical disc disease, lumbar degenerative disc disease, and lumbar radiculopathy. Based on Dr. Roman's November 5, 2014 narrative as well as appellant's symptomatology, objective physical examination, and results of MRI scans of the cervical and lumbar spine, Dr. Sosa opined that the work injury aggravated appellant's lumbar spine for which he receives physical therapy, and that it also caused cervical pain, cervical muscle spasms, and brachial neuritis/radiculitis. He indicated that the claim should include the conditions of cervical myalgias, displacement of cervical intervertebral disc, brachial neuritis and radiculitis, lumbar neuritis and radiculitis as well as lumbar myalgias, lumbago, and lumbar disc displacement.

In a February 26, 2016 report, Dr. Amogh Sahal, a physiatrist, noted the history of the August 25, 2011 work injury, reviewed objective testing, and noted examination findings. He diagnosed neck pain/cervical disc bulges in multiple levels, low back pain/lumbar disc bulges in multiple levels, lumbar radiculopathy, possible cervical radiculopathy, and anxiety. Dr. Sahal opined that appellant was disabled due to these above medical conditions and noted that the past injury was associated with appellant's current complaints as described in previous documentation.

In a May 5, 2016 letter, OWCP advised appellant of the definition of a recurrence of disability and indicated that additional evidence was needed to support his recurrence claim. It requested medical evidence from appellant's physician which explained how appellant's current conditions were due to the original injury of August 25, 2011. OWCP also requested that appellant respond to questions on its claim development questionnaire and comment on the employing establishment's September 24, 2013 statement regarding the Letter of Removal. Appellant was afforded 30 days to submit the requested information.

On June 2, 2016 OWCP received a May 28, 2016 note from appellant with the first page of its May 5, 2016 letter attached. Appellant stated, "This is respond to letter (OWCP) of date May 5, 2016. If you have any question please contact me."

Appellant submitted medical notes from Life Health Solutions dated April 26 through June 24, 2016.

In a May 20, 2016 medical report, Dr. Ostolaza diagnosed lumbosacral intervertebral disc disorder/disc herniation, cervical disc disorder/disc herniation, and radiculopathy in lumbar and cervical region. She opined that appellant suffered a traumatic injury while performing his letter carrier job and that the injuries he sustained resulted in a lower back and cervical conditions. Dr. Ostolaza indicated that appellant's lower back condition had gradually worsened and precipitated into bulging discs at L3-L4 and L4-L5 and a disc herniation at L5-S1. She noted that the herniations caused appellant to develop radiculopathy which affected his lower extremities. Dr. Ostolaza also opined that appellant's cervical condition was causally related to the August 25, 2011 work injury and provided a medical explanation for the cause of appellant's cervical disc conditions. She indicated that, since the accident, appellant's cervical condition had also declined.

Statements from the employing establishment were received on June 29 and July 6, 2016. The employing establishment indicated, with supporting evidence, that appellant had failed to report the accident in a timely manner and had failed to be regular in attendance in July, August, and September 2011. Had appellant been regular in attendance and complied with the established agency procedures, the employing establishment noted that he would not have been removed.

The record reflects appellant's last day in pay status was November 23, 2011. The reason provided on the PS Form 50 was "termination-expiration of appointment."

By decision dated July 18, 2016, OWCP denied appellant's claim for recurrence. It found that appellant had not established that he had a return or increase in disability due to a change/withdrawal of the assignment, but rather was removed from employment for misconduct and that appellant had not provided any comments to refute that was the basis for his removal. OWCP further found that the medical evidence of record around the time of the alleged September 25, 2011 recurrence failed to provide a rationalized explanation as to how his work stoppage was caused by a spontaneous change or worsening in the accepted lumbar strain without an intervening injury. It also noted that there was a gap in medical evidence from 2011 through 2013 and that most of the medicals received were from 2015 and 2016.

On June 29, 2017 OWCP received appellant's request for reconsideration along with a copy of his counsel's representation. Evidence received in support of the request included physical therapy notes, requests for authorization, and prescriptions/referrals.

In an October 7, 2016 attending physician's report (Form CA-20), Dr. Ostolaza diagnosed lumbar radiculopathy, lumbar degenerative disc disease, discs bulge at L3-L4, L4-L5, and L5-S1 due to the August 25, 2011 work injury. She opined that appellant was permanently totally disabled.

In a December 2, 2016 report, Dr. Ostolaza noted examination findings and diagnosed lumbosacral intervertebral disc disorder/disc herniation and radiculopathy lumbar region. She advised the recent electromyography/nerve conduction velocity (EMG/NCV) study indicated that appellant suffered from radiculopathy as a result of his lumbar condition. Dr. Ostolaza opined that appellant was totally disabled.

Medical reports from Dr. Sahal dated July 22, 2016, February 17 and May 12, 2017 were received. Dr. Sahal reported on appellant's conditions. She diagnosed cervical disc bulges in multiple levels, lumbar disc bulges in multiple levels, lumbar radiculopathy, cervical radiculopathy, and anxiety. In her February 17 and May 12, 2017 reports, Dr. Sahal indicated that appellant was disabled due to the lumbar disc bulges, lumbar disc herniations, and lumbar radiculopathy. She indicated that appellant's current diagnoses and complaints have already been determined to be related to appellant's work injury.

In a January 20, 2016 injury diagnosis update, Dr. Sosa indicated that the diagnoses of other intervertebral displacement lumbar region, other intervertebral disc displacement lumbosacral region, other cervical disc displacement mid cervical region, and lumbar radiculopathy were injury related.

By decision dated August 1, 2017, OWCP denied appellant's request for reconsideration.

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 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

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.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

ANALYSIS

In the last merit decision dated July 18, 2016, OWCP denied appellant's claim for a recurrence of disability due to a change in the nature and extent of his light-duty job requirements or withdrawal of a light-duty assignment made specifically to accommodate appellant's work-related injury without misconduct. It denied his request for reconsideration in nonmerit decision dated August 1, 2017.

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. In his August 8, 2016 request for reconsideration, appellant did not identify or show that OWCP erroneously applied or interpreted a specific point of law.

While appellant submitted additional medical evidence which documented his medical conditions, none of the medical evidence submitted addressed whether appellant's disability occurred or increased due to a change in the nature and extent of his light-duty job requirements or a withdrawal of a light-duty assignment made specifically to accommodate the accepted lumbar strain. As the new medical evidence did not discuss the critical question of whether appellant's disability occurred or increased due to a change in the nature and extent of his light-duty job requirements or a withdrawal of a light-duty assignment made specifically to accommodate the accepted lumbar strain, they do not comprise a basis for reopening the case.⁹ As such, the medical evidence is not relevant to the issue of recurrence of disability.

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence or argument. Appellant did not provide arguments or evidence that shows OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal appellant contends that the employing establishment did not make any arrangements to accommodate his work-related conditions after his injury. Rather, he performed the same work duties and work assignments. Appellant also alleged that he never had any misconduct. He stated that the case of misconduct was appealed and it was concluded that he had no misconduct. These arguments pertain to the merits of the claim, which are not before the Board on the present appeal.

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).

⁹ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board