

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

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M.P., Appellant )

and )

**DEPARTMENT OF HOMELAND SECURITY,  
FEDERAL AVIATION MARSHAL SERVICE,  
Brooklyn Heights, OH, Employer**)

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**Docket No. 17-1199  
Issued: March 1, 2018**

*Appearances:*

*Jesse Slade, for the appellant<sup>1</sup>*

*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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On May 10, 2017 appellant, through his representative, filed a timely appeal from a March 31, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated July 28, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

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<sup>1</sup> 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.

<sup>2</sup> 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).

On appeal appellant's representative contends that OWCP failed to properly consider the arguments regarding appellant's alleged consequential injuries and recurrence claim. She alleges that OWCP found that his return to work was an intervening incident, but noted that in order to claim a recurrence a claimant must return to work. Appellant's representative also asserts that OWCP failed to address appellant's claim that the employing establishment withdrew his light-duty assignment.

## **FACTUAL HISTORY**

On April 22, 2014 appellant, then a 49-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that he developed a right hip and lower back condition when running on a hard surface while completing the mission ready assessment test.<sup>3</sup> He accepted a light-duty assignment, within his work restrictions, beginning April 30, 2014, which required answering telephones, performing administrative duties, and maintaining a gym area. Appellant underwent a magnetic resonance imaging (MRI) scan of the lumbosacral spine on May 2, 2014 which showed multilevel disc degeneration with a disc bulge and annular tear at L3-4 and L4-5 as well as a central disc herniation with annular tear at L5-S1. On June 17, 2014 OWCP accepted her claim for lumbar sprain and right hip sprain.

Appellant completed a narrative statement dated June 25, 2014 and reported pain, numbness, and stiffness in his lower back beginning in March 2010 while policing long haul flights in the performance of duty. These flights were 6.5 to 9 hours in length. Appellant also experienced left leg radiating pain. He reported undergoing an MRI scan in connection with a different claim<sup>4</sup> involving a blood clot.

Dr. Louis Keppler, a Board-certified orthopedic surgeon, completed a report on June 25, 2014. He reviewed appellant's May 2, 2014 MRI scan and found a disc herniation with annular tear at L5-S1. Dr. Keppler opined that this herniation was a recent traumatic injury and was caused by the April 22, 2014 employment injury. He also diagnosed preexisting degenerative disc disease and opined that this condition was substantially aggravated by the mechanism of trauma and injury. Dr. Keppler further found that appellant's L4-5 annular tear and disc herniation was caused by the employment injury on April 22, 2014.

On June 27, 2014 appellant's attending Dr. Nicolas Young, an osteopath, noted that appellant developed low back pain and stiffness with radiation into his left leg in March 2010. Appellant related having a 2010 MRI scan which showed disc bulge or herniation. Dr. Young reported that after the mission ready exercise on April 22, 2014 appellant's back pain became constant. He reviewed appellant's May 2, 2014 MRI scan and requested that appellant's

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<sup>3</sup> Appellant has prior claims with OWCP, which are not presently before the Board.

<sup>4</sup> File No. xxxxxx095. This claim is not before the Board on the present appeal.

accepted conditions be expanded to include displacement of lumbar intervertebral disc without myelopathy and degeneration of lumbar intervertebral disc. Dr. Young opined that appellant's preexisting disc bulges were significantly worsened, specifically by annular tearing during the mission ready assessment test.

On July 31, 2014 OWCP accepted appellant's claim for the additional conditions of aggravation of degeneration of the lumbar spine from L2 through L5 and L4-5 and L5-S1 annular tears and disc herniations.

Appellant underwent a second lumbar MRI on March 5, 2015 which demonstrated L2-3 disc with annular fissuring resulting in mild displacement of the left L2 nerve, mild annular bulges of the L2-3and L4-5 disc, and small central protrusion of the L5-S1 disc.

Dr. George Friedhoff, an osteopath, performed a left L5 selective nerve root block on March 19, 2015. He noted that appellant should be released from running for training purposes, and that his flights be limited to two hours for six hours. On April 20, 2015 Dr. Young released appellant to return to full duty on April 20, 2015 with no restrictions. On April 21, 2015 he indicated that appellant could participate in all aspects of the fitness assessment, except for the 1.5 mile run and should permanently replace this activity with the stationary bicycle. Appellant returned to full-time work on April 23, 2015 and stopped work on May 26, 2015.

Appellant requested a return to light-duty work May 26, 2015. Dr. Friedhoff completed an attending physician's report (Form CA-20) on May 26, 2015 and diagnosed lumbar and hip sprain. He indicated that appellant was partially disabled from May 26 through June 19, 2015 and could perform no running or prolonged sitting. On an employing establishment form dated May 26, 2015, Dr. Friedhoff found that appellant could not participate in physical conditioning, employ defensive tactics, or stand for one hour.

In a letter dated May 27, 2015, the employing establishment reported that it was unable to offer appellant a limited-duty assignment in keeping with his restrictions of no prolonged sitting and not being able to stand for one hour.

Appellant stopped work on May 27, 2015. He filed a claim for compensation (Form CA-7) requesting leave without pay from May 28 through 29, 2015. In a June 8, 2015 letter, OWCP noted that appellant returned to full-time work on April 23, 2015 and that he stopped work completely on May 26, 2015. It requested additional factual and medical evidence and afforded appellant 30 days for a response.

Dr. Friedhoff completed a note on June 2, 2015 and reported that appellant attempted to return to full-duty work, but was unable to sit for long periods of time secondary to his L5 radiculopathy. He excluded appellant from flights, and indicated that appellant could return to his desk job. Dr. Friedhoff reported that the employing establishment would not allow appellant to police only short flights of two hours or less, and that on the longer flights appellant experienced low back pain with no lower extremity weakness. He completed a work capacity Form OWCP-5 on June 5, 2015 and found that appellant could not perform his date-of-injury position without restrictions. Dr. Friedhoff also completed an employing establishment form on June 5, 2015 regarding appellant's duty status recommendations. He indicated that appellant

was unable to sit more than four hours to complete long flights, and recommended that he sit less than four hours on flights. Dr. Friedhoff further opined that appellant had not reached maximum medical improvement and expected that appellant could return to full duty on July 15, 2015.

On June 16, 2015 Dr. Daniel Weeks, an osteopath and employing establishment physician, completed a medical records review and found, based on Dr. Friedhoff's reports, that appellant was unable to perform the required tasks of his position. He determined that appellant was medically disqualified to work as a law enforcement officer for the employing establishment.

Dr. Friedhoff, in a June 22, 2015 note, indicated that after appellant returned to work he developed recurrent low back and left leg pain. In a report dated June 23, 2015, he noted appellant's history of stiffness in his back and numbness in his legs while on long flights prior to the April 22, 2014 work injury. Dr. Friedhoff noted that appellant reported low back pain with L5 radiculopathy and left leg pain which was aggravated when seated for more than two hours. On examination he found left leg diminished light touch and pin prick at the L5 distribution which correlated with MRI scan findings. Dr. Friedhoff attributed appellant's condition to his April 22, 2014 work injury. He opined that appellant returned to work too soon due to pain relief from a L5 selective nerve root block, but that appellant was not sufficiently healed and that sitting for extended periods caused his back pain to return. Dr. Friedhoff opined that appellant could perform desk duties in eight-hour shifts with breaks to reposition and stretch.

In a June 12, 2015 a narrative statement, appellant noted his April 22, 2014 work injury. He alleged that he was denied reasonable accommodation on March 23, 2015 and was denied limited duty on May 27, 2015. Appellant related that sitting for a prolonged period, such as during a flight, caused pain, stiffness, and numbness in his lower back and hips as well as a burning sensation in his shins and left hamstring. He asserted that he returned to full-duty work too soon and was not sufficiently healed to work. Appellant alleged that his current condition was a recurrence or continuation of his April 22, 2014 work injury. He denied any new incident or injury and asserted that he still had his original symptoms. Appellant alleged that the employing establishment was aware that his return to flight status could possibly be temporary and that it was with this understanding that Dr. Young released him to attempt to return to full duty.

On June 25, 2015 the employing establishment informed appellant that he was no longer medically qualified to perform the essential duties of his position.

By decision dated September 2, 2015, OWCP denied appellant's claim for wage-loss compensation beginning May 26, 2015. It noted Dr. Young released appellant to return to full-duty work effective April 20, 2015. Appellant worked full-duty work from April 23 through May 25, 2015 before stopping on May 27, 2015. OWCP found that the medical evidence did not establish that his recurrence of disability on May 27, 2015 was due to his accepted employment injury. By letter dated September 11, 2015, appellant, through his representative, requested an oral hearing from OWCP's Branch of Hearings and Review. She withdrew that request on January 7, 2016.

A left hip MRI scan on January 28, 2016 revealed a focal labral tear at the base of the superior labrum. In a March 21, 2016 report, Dr. William Stanfield, a Board-certified orthopedic surgeon, diagnosed a left hip superior labrum tear which he attributed to the April 22, 2014 work injury of running on a hard surface. He noted that appellant's left hip symptoms were initially considered to be part of his low back injuries until appellant underwent a left hip MRI scan on January 28, 2016 which demonstrated a tear of the left superior labrum as well as an attenuated ligament teres. Dr. Stanfield opined that this injury required surgery and that appellant's physical activities on April 22, 2014 resulted in his hip injury.

On May 6, 2016 appellant, through his representative, requested reconsideration, contending that OWCP did not properly develop the recurrence claim. He submitted a March 7, 2016 report from Dr. Keppler noting the April 22, 2014 work injury and reviewing appellant's diagnostic studies. Dr. Keppler opined that after returning to full duty appellant's work-related conditions worsened and caused consequential injuries. He noted that after returning to full duty appellant was unable to run or perform the rigorous physical fitness requirements. Dr. Keppler related appellant's physical limitations and advised that he was unable to perform self-defense tactics or physically restrain a passenger if necessary. He found that, as appellant attempted to perform the full duties of an air marshal for one month, his symptoms worsened such that he was again partially disabled. These symptoms included intense muscle cramps in the left leg, radiating nerve pain in the left leg as well as the right shin and foot, and paresthesias and antalgic gait. Appellant had occasional left foot drag as well as loss of balance and strength in the left leg. He did not experience this level of dysfunction prior to returning to full duty. Appellant also opined that appellant's light-duty position of sitting resulted in a worsening of his spine condition including Schmorl's nodes at T12-L1 as newly demonstrated on his March 5, 2015 MRI scan. Dr. Keppler also noted appellant's January 28, 2016 MRI scan of the left hip which demonstrated a superior labrum tear. He opined that appellant's symptoms of sciatica, paresthesia, and muscle cramps resulted in a sleep disorder. Dr. Keppler noted, "The worsening of [appellant's] work-related medical conditions after returning to full duty is the reasonable conclusion for his current work-related diagnosis. Returning to full duty and performing his normal job duties full time is how the current diagnosis occurred."

By decision dated July 28, 2016, OWCP denied modification of its prior decision. It found that appellant had performed his regular duties for one month and that this was an intervening period of exposure as appellant's physician's indicated a worsening of his conditions from these duties. OWCP further found that Dr. Keppler's report was insufficient to establish that appellant's work stoppage was due to the work event of April 22, 2014.

Appellant again requested reconsideration on December 15, 2016 and submitted additional evidence. Appellant's representative disagreed with OWCP's findings and conclusions asserting that OWCP had failed to properly apply the law to appellant's temporary return to full duty and resulting disability. She asserted that OWCP confused appellant's active OWCP claims and the evidence submitted and should not have used Dr. Stanfield's report to deny the current claim. The representative further asserted that OWCP should have addressed the substance of her arguments and cited to authority. She argued that Dr. Keppler's reports were sufficient to establish a recurrence of disability. In the alternative, the representative contended that if appellant's return to full duty was an intervening event as determined by

OWCP, then OWCP should have converted his claim to the proper type of claim and adjudicated it accordingly.

In a September 22, 2016 note, Dr. Keppler opined that appellant's medical conditions occurred without an external cause including work activities. He noted that appellant returned to work, but his work-related conditions worsened. Dr. Keppler also restated appellant's diagnoses.

By decision dated March 31, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

### **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.<sup>5</sup> 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.<sup>6</sup> Section 10.608 of OWCP's regulations provides that, when a request for reconsideration is timely, but does 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.<sup>7</sup> 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.<sup>8</sup>

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.<sup>9</sup>

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> 20 C.F.R. § 10.606(b)(3).

<sup>7</sup> *Id.* at § 10.608.

<sup>8</sup> *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

<sup>9</sup> 20 C.F.R. § 10.5(x).

## **ANALYSIS**

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

On December 15, 2016 appellant filed a timely request for reconsideration of OWCP's July 28, 2016 merit decision. By decision dated March 31, 2017, OWCP denied his request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

OWCP accepted appellant's claim for lumbar sprain and right hip sprain, aggravation of degeneration of the lumbar spine from L2 through L5 and L4-5 and L5-S1 annular tears and disc herniations. Appellant returned to light duty in a sedentary position on April 30, 2014. He performed this position until April 23, 2015 when he returned to full-duty work until May 26, 2015 when he again requested a light-duty position. At that time, the employing establishment indicated that there was no light duty available for appellant within his restrictions. OWCP's procedures require that where recurrent disability for work is claimed within 90 days of the first return to duty, the focus is on disability rather than causal relationship.<sup>10</sup>

On September 2, 2015 OWCP denied appellant's claim for disability beginning May 26, 2015 finding that he had not established a recurrence of disability. It found that his return to full-duty work for approximately one month was an intervening cause, such that his current conditions and disability were no longer directly related to his April 22, 2014 employment injury, but were causally related to his work duties beginning April 23 through May 26, 2015. In the April 15, 2016, request for reconsideration, appellant's representative contended that, if appellant's claim could not be considered a recurrence of disability due to his intervening period of full duty, then OWCP was required to convert appellant's claim to "the proper type of claim and adjudicate it accordingly."

The Board finds that this is a relevant legal argument not previously considered by OWCP<sup>11</sup> and requires OWCP to reopen appellant's claim for consideration of the merits under 20 C.F.R. § 10.606(b)(3). Thus OWCP's denial of appellant's request for review of the merits of his claim constituted an abuse of discretion. Consequently, the case must be remanded for OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, OWCP shall issue a merit decision.

## **CONCLUSION**

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

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<sup>10</sup> *Supra* note 8 at Part 2 -- Claims, *Recurrences*, Chapter 2.1500.5 (June 2013).

<sup>11</sup> *In S.S.*, the Board found that OWCP is required to ascertain the correct type of claim and provide guidance regarding the specific evidence required to establish that claim. *S.S.*, Docket No. 16-0675 (issued July 15, 2016). *See J.J.*, Docket No. 17-0614 (issued June 13, 2017) (where in appellant merely requested that OWCP review the medical evidence and the Board did not have merit jurisdiction).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 31, 2017 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further action consistent with this decision.

Issued: March 1, 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