

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

C.N., Appellant)	
)	
and)	Docket No. 17-1475
)	Issued: May 23, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Worcester, MA, Employer)	
)	

Appearances:
David P. McCormack, 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 June 22, 2017 appellant, through counsel, filed a timely appeal from a January 24, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days elapsed from OWCP's last merit decision dated December 14, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

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 Appellant timely requested oral argument before the Board. By order dated December 19, 2017, the Board exercised its discretion and denied the request as the matter could be adequately adjudicated based on a review of the case record. *Order Denying Oral Argument*, Docket No. 17-1475 (issued December 19, 2017).

³ 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).

FACTUAL HISTORY

On May 18, 2012 appellant, then a 64-year-old retired letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained a permanent aggravation of right ankle osteoarthritis causally related to factors of his federal employment.⁴ He attributed his ankle condition to walking with an altered gait while awaiting surgery for a prior employment-related left knee injury.⁵ Appellant received treatment following his work injury from Dr. Byron V. Hartunian, an orthopedic surgeon. On May 14, 2012 Dr. Hartunian opined that he sustained an acceleration of his underlying arthritis due to work duties, which included lifting, carrying, standing, and climbing.

OWCP referred appellant to Dr. Steven A. Silver, a Board-certified orthopedic surgeon, for a second-opinion examination. It requested that he address whether either appellant's work duties or his prior left knee injury under OWCP File No. xxxxxx836 caused or aggravated his right ankle condition. On October 25, 2012 Dr. Silver opined that appellant sustained a temporary aggravation of preexisting degenerative arthritis of the right ankle when he favored his left knee after an injury. He found that work activities did not cause appellant's right ankle arthritis, noting that he had underlying gout.

On November 7, 2012 OWCP accepted the present claim for a temporary aggravation of preexisting right ankle osteoarthritis that had resolved as of August 2009.

Appellant, on February 13, 2013, filed a claim for a schedule award (Form CA-7). He submitted a January 25, 2013 impairment evaluation from Dr. Hartunian, who opined that he had five percent permanent impairment of the right lower extremity under the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁶ On April 24, 2013 Dr. Hartunian opined that appellant's work duties had permanently accelerated his right ankle arthritis.

OWCP subsequently found a conflict existed between Dr. Hartunian and Dr. Silver regarding whether appellant sustained an employment-related temporary or permanent aggravation of his right ankle arthritis. It referred him to Dr. John H. Chaglassian, a Board-certified orthopedic surgeon, for an impartial medical examination to determine whether he sustained a temporary or permanent employment-related aggravation of a preexisting right ankle

⁴ The employing establishment advised that appellant had retired on March 22, 2011 and was last exposed to the conditions alleged to have caused his condition around September 2010. OWCP assigned the claim File No. xxxxxx190.

⁵ Appellant's prior claim was assigned File No. xxxxxx836. That claim was accepted for left medial meniscal tear and sprains of the left medial collateral ligament and left cruciate ligament

⁶ A.M.A. *Guides* (6th ed. 2009).

condition and, if he sustained a permanent aggravation, to rate any permanent impairment of the right lower extremity in accordance with the A.M.A., *Guides*. OWCP provided Dr. Chaglassian with an attachment setting forth the definition of aggravation, acceleration, and precipitation.

On March 5, 2014 Dr. Chaglassian discussed appellant's history of work injuries to his left knee and right ankle. He found that his arthritis was unrelated to his employment, but was instead due to obesity, gout, plantar fasciitis, and weak arches. Dr. Chaglassian noted that appellant used crutches for only one week after his left knee surgery, and that following this time he bore weight on each leg equally. He found that he sustained a temporary aggravation of his preexisting right ankle condition that lasted approximately six weeks after his left knee surgery. Dr. Chaglassian determined that appellant had not sustained a permanent aggravation of his condition.

By decision dated February 20, 2015, OWCP denied appellant's claim for a schedule award. It found that Dr. Chaglassian's opinion constituted the special weight of the evidence and established that appellant had no permanent aggravation of his right ankle arthritis.

On March 6, 2015 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. He subsequently requested a review of the written record in lieu of an oral hearing.

Dr. Hartunian, in a report dated September 10, 2015, asserted that Dr. Silver did not address whether appellant's work duties caused or contributed to the progression of his arthritis of the right ankle. He cited medical research supporting that physical activity caused joint inflammation and an acceleration of arthritis. Dr. Hartunian advised that Dr. Silver failed to address whether appellant's work duties contributed to his right ankle arthritis by causing chronic inflammation.

By decision dated December 14, 2015, OWCP's hearing representative affirmed the February 20, 2015 decision. She found that the additional report from Dr. Hartunian, who was on side of the conflict in opinion, was insufficient to either outweigh or create a new conflict with the opinion of Dr. Chaglassian. The hearing representative noted that Dr. Hartunian did not address how appellant's right ankle progressed beyond that resulting from natural progression.

On December 12, 2016 appellant, through counsel, requested reconsideration. Counsel contended that the hearing representative improperly framed the issue as whether appellant's January 23, 2009 left knee injury aggravated his right ankle arthritis. Instead, counsel framed the issue as whether appellant's 17-year tenure as a letter carrier contributed in any way to his right ankle osteoarthritis, thus permanently aggravating the condition. He further asserted that OWCP failed to provide Dr. Silver and Dr. Chaglassian with a complete definition of acceleration, citing *S.S.*⁷ Counsel argued that, under Board case law, OWCP must provide physicians with accurate and complete definitions of causation. He further maintained that Dr. Silver did not address whether appellant's work duties caused or contributed to his right ankle osteoarthritis, and thus, his opinion was invalid and insufficient to create a conflict in medical opinion. Counsel alleged that the hearing representative erred in finding Dr. Hartunian's opinion insufficient.

⁷ Docket No. 10-1369 (issued November 9, 2010).

In a November 1, 2016 narrative statement, appellant asserted that he continued to have right ankle problems after Dr. Chaglassian found that his temporary aggravation would have resolved. He questioned why the physician did not ask whether he had continued right ankle pain.

Dr. Hartunian, in a report dated November 16, 2016, reviewed OWCP's December 14, 2015 decision. He advised that medical research demonstrated that osteoarthritis did not have a natural progression or course, but that instead symptoms usually fluctuated, with some individuals having no trouble for years. Dr. Hartunian noted that if work duties contributed in any way to a claimant's condition it was compensable.

By decision dated January 24, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim under section 8128(a). It found that he had not raised a relevant legal argument and that the newly submitted report from Dr. Hartunian was cumulative in nature.

On appeal counsel asserts that OWCP failed to provide its referral physicians with the proper standard of causation. He also raises arguments regarding the merits of the claim, contending that Dr. Hartunian's opinion is sufficient to meet appellant's burden of proof to show a permanent aggravation of arthritis due to his employment. Counsel alleges that Dr. Chaglassian's opinion is of insufficient probative value to resolve the conflict in medical opinion.

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.⁸

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.⁹

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.¹⁰ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ 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.¹²

⁸ 5 U.S.C. § 8128(a).

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

¹⁰ *Id.* at § 10.607(a).

¹¹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹² *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

In its last merit decision dated December 14, 2015, OWCP denied appellant's schedule award claim after finding that he sustained only a temporary employment-related aggravation of his preexisting right ankle osteoarthritis that had resolved by August 2009. On December 12, 2016 appellant, through counsel, timely requested reconsideration. The issue is whether he submitted evidence or argument in support of his reconsideration request sufficient to warrant reopening his case for further merit review pursuant to section 10.606(b)(3).

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advanced a relevant legal argument not previously considered, or submitted pertinent new and relevant evidence. On reconsideration, counsel argued that OWCP failed to provide the referral physician, Dr. Silver, and the referee physician, Dr. Chaglassian, with a complete definition of acceleration, as required by *S.S.* He maintained that, consequently, Dr. Silver's opinion was invalid and insufficient to create a conflict in medical opinion, and that Dr. Chaglassian's opinion was of no weight. In *S.S.*, however, the Board found the case was not in posture for decision when OWCP provided a referee physician with an inaccurate definition of aggravation, noting that it informed the physician that an aggravation of symptoms of an underlying condition was not an aggravation of the underlying condition. In this case, OWCP provided Dr. Silver and Dr. Chaglassian with definitions of causation, aggravation, acceleration, and precipitation that adequately confirmed to the definitions set forth in its procedures.¹³ Consequently, counsel's contention lacks a reasonable color of validity.¹⁴ Where a legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.¹⁵

Counsel also alleged that the hearing representative failed to consider whether work duties permanently aggravated appellant's right ankle osteoarthritis. OWCP's hearing representative, however, found that the evidence was insufficient to show that factors of his federal employment materially worsened his preexisting right ankle condition.

A claimant may be entitled to merit review by submitting relevant and pertinent evidence not previously considered by OWCP. In a November 1, 2016 statement, appellant related that he had continued right ankle problems after Dr. Chaglassian found that his temporary aggravation had resolved. The issue, however, is whether the medical evidence is sufficient to show that he sustained a permanent aggravation of his right ankle condition. Appellant's lay opinion regarding

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (January 2013).

¹⁴ The Board notes that OWCP procedures do not affirmatively mandate that such definitions be sent to referral physicians, but instead contemplate that OWCP will provide information appropriate to the question at issue. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.7(f) (September 2009) (when OWCP needs to define such terms as aggravation, precipitation or acceleration, it should do so in a letter to the physician).

¹⁵ See *D.F.*, Docket No. 17-0694 (issued June 22, 2017); *D.T.*, Docket No. 14-1239 (issued December 9, 2014).

his condition is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.¹⁶

In a report dated November 16, 2016, Dr. Hartunian maintained that medical research found that osteoarthritis did not have a natural progression, but that instead symptoms in individuals varied. He noted that causation was established if work factors contributed in any way to a condition. Dr. Hartunian's report, however, is general in nature rather than specific to appellant and thus does not constitute pertinent new and relevant evidence sufficient to reopen his claim for merit review.¹⁷

On appeal counsel contends that OWCP did not provide its physician with the appropriate causation standard. As noted, however, it included definitions of causation, aggravation, acceleration, and precipitation consistent with the definitions set forth in its procedures.¹⁸ Counsel further argues the merits of the case, contending that Dr. Chaglassian's opinion was of insufficient probative value and that Dr. Hartunian's opinion constitutes the weight of the evidence. As noted, however, the Board does not have jurisdiction over the merits of this claim. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute pertinent new and relevant evidence not previously considered. As he did not meet any of the necessary regulatory requirements, he is not entitled to further 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).

¹⁶ See *L.G.*, *supra* note 8; *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁷ See *B.J.*, Docket No. 15-0795 (issued June 15, 2015).

¹⁸ See *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 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