United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 18-1022**
	)	**Issued: October 24, 2018**
DEPARTMENT OF THE ARMY, ARMY NATIONAL GUARD, Johnston, IA, Employer	)	

Appearances:
Benjamin Hayek, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 19, 2018 appellant, through counsel, filed a timely appeal from a January 9, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated May 8, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the case.

[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.*

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 January 23, 2017 appellant, then a 55-year-old supervisory information technology specialist, filed a traumatic injury claim (Form CA-1) alleging that on January 10, 2017 he slipped on ice and fell down three stairs walking out of the front of his office building.[3] He related that at the time of his fall he was wearing a back brace because he was recovering from two previous back surgeries. Appellant stopped work on January 11, 2017 and did not return. The employing establishment did not controvert the claim and completed and signed an authorization for examination and/or treatment (Form CA-16) on January 18, 2017.

In the attending physician's portion of the January 18, 2017 authorization for examination and/or treatment (Form CA-16), Dr. David Hatfield, a Board-certified orthopedic surgeon, provided a history of appellant falling on ice at work on January 10, 2017. He found muscle soreness and spasm after the fall and advised that x-rays revealed abnormal findings. Dr. Hatfield also noted that appellant had undergone back surgery on April 26 and November 22 and 29, 2016. He checked a box marked "yes" that the condition was caused or aggravated by employment and found that appellant was totally disabled.

Dr. Hatfield, in a January 18, 2017 report, noted that appellant related that he was doing well following a November 2016 anterior posterior decompression and fusion at L5-S1 until he fell down approximately four stairs leaving work on January 10, 2017. He noted that x-rays did not show loosening or changes in the hardware. Dr. Hatfield opined that appellant might have "some disruption in healing" and listed work restrictions.

On January 19, 2017 Dr. Hatfield indicated that appellant should work part time for an additional four weeks due to his January 10, 2017 fall. He submitted form reports on February 14 and 27, 2017 providing work restrictions. In a February 28, 2017 attending physician's report, (Form CA-20), Dr. Hatfield diagnosed low back pain after lumbar surgery and checked a box marked "yes" that the condition was caused or aggravated by the described employment activity of appellant falling on ice on January 10, 2017. He provided as a rationale that appellant's back pain increased instead of improving.[4] In a February 28, 2017 chart note, Dr. Hatfield advised that appellant's "back certainly got aggravated with this fall at work and we need to continue to allow time to heal."[5]

By decision dated May 8, 2017, OWCP denied appellant's traumatic injury claim. It found that he had not submitted medical evidence sufficient to establish that he sustained a diagnosed

[3] Appellant submitted a statement from a witness who saw him fall.

[4] Dr. Hatfield provided similar findings in an April 5, 2017 CA-20 form.

[5] On April 3, 2017 Dr. Hatfield noted that appellant's condition was improving though he had a "setback with his fall including the right thigh and groin symptoms."

condition as a result of the accepted work incident. OWCP determined that Dr. Hatfield diagnosed pain rather than a specific medical condition caused or aggravated by the accepted January 10, 2017 employment incident.

On May 24, 2017 Dr. Hatfield advised that appellant underwent an anterior and posterior decompression and fusion at L5-S1 in November 2016. He noted that the circumstances of the January 10, 2017 fall were not in doubt and related, "As [appellant] was progressing well until the fall as described, would have not yet had a solid fusion, and had a distinct setback following the fall, I would relate his delay in healing and slowed progress to the fall as described."

In a July 19, 2017 report, Dr. Hatfield related that appellant had a previous back surgery in November 2016 and fell on ice on January 10, 2017. He ordered a bone growth stimulator after the fall due to the "potential disruption in fusion mass." Dr. Hatfield related, "Given [appellant's] fall and potential delay in healing as above return to work was delayed in order to maximize healing."

Dr. Hatfield, on September 6, 2017, again discussed appellant's history of back surgery and his January 10, 2017 fall on ice leaving work, noting that he spoke with him on the telephone the day of his injury. He evaluated appellant on January 18, 2017 for possible disruption of the hardware and fusion due to the fall. Dr. Hatfield advised:

> "No gross radiographic changes were appreciated on imaging at that time. However, [appellant's] instrumented lumbar fusion was distinctly aggravated…. Note original diagnosis of lumbar fusion was not altered by the fall. However, the fall did directly result in a marked setback and aggravation in his findings and progress. Thus, in an attempt to lessen the impact of such fall, a bone growth stimulator was ordered. Further, recovery period was extended with [a] lengthened time from of bracing and delayed return to work activities."

Dr. Hatfield questioned the denial of appellant's claim given the "magnitude of his surgery and the magnitude of his fall…."

Appellant, on October 24, 2017, requested reconsideration. He related that he had worked with his supervisor and his physician to have his claim approved.

By decision dated January 9, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to section 8128(a). It found that he had not raised a relevant legal argument nor showed that OWCP erroneously applied or interpreted a specific point of law. Further, OWCP found that the evidence submitted "is cumulative and substantially similar to evidence already contained in the case record." It explained that Dr. Hatfield's reports did not contain a diagnosis of a medical condition causally related to the employment incident.

On appeal, appellant contends that it is undisputed that he had spinal surgeries on November 22 and 29, 2016 and that his recovery from the surgery was aggravated by his January 10, 2017 fall. He questions why OWCP has not accepted the medical evidence from Dr. Hatfield, noting that OWCP appears to require a claimant to have a new diagnosis rather than showing an exacerbation of a preexisting condition.

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.[6]

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.[7]

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.[8] If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[9] 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.[10]

ANALYSIS

The Board finds that appellant has not established that OWCP erroneously applied or interpreted a specific point of law or raised a relevant legal argument not previously considered. Appellant did, however, submit pertinent new and relevant evidence not previously considered. The Board thus finds that OWCP improperly denied his request for reconsideration of the merits of his claim.

In support of his request for reconsideration, appellant submitted new medical reports from Dr. Hatfield. On May 24, 2017 Dr. Hatfield advised that appellant had a delay in healing due to his January 10, 2017 fall, noting that he had undergone a lumbar fusion in November 2016. In a report dated July 19, 2017, he again noted that the fall had potentially delayed appellant's healing and advised that he ordered a bone growth stimulator to avoid a possible fusion mass disruption. On September 6, 2017 Dr. Hatfield related that appellant had sustained an aggravation of his lumbar fusion due to his fall which delayed his recovery and resumption of employment. He provided a diagnosis of an aggravation of a healing lumbar fusion causally related to the accepted

[6] 5 U.S.C. § 8128(a).

[7] 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010).

[8] *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.

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

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

January 10, 2017 employment incident.[11] Prior to the submission of the September 6, 2017 report, appellant had not submitted medical evidence providing a definite diagnosis. Dr. Hatfield's report directly addressed the basis upon which OWCP denied appellant's claim as it provided a diagnosed condition and discussed its relationship to the employment injury.[12]

The Board thus finds that OWCP improperly refused to reopen appellant's case for further review of the merits, as the evidence he submitted in support of his reconsideration request is relevant and pertinent new evidence not previously considered.[13] Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his burden of proof.[14] If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[15]

As appellant has submitted pertinent new and relevant evidence not previously considered by OWCP, he is entitled to a review of the merits of his claim under section 10.606(b)(3) of OWCP's regulations.[16] The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue an appropriate merit decision on the claim.[17]

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).

[11] The July 19 and September 6, 2017 reports from Dr. Hatfield indicated that they were "[c]omposed by the [physician], signed by his secretary to expedite mailing." The reports are not signed. *See Y.S.*, Docket No. 16-0882 (issued August 19, 2016) in which the Board found that reports printed on a physician's letterhead and which contained a signature line with his printed name were sufficient to constitute competent medical evidence.

[12] *See M.C.*, Docket No. 17-1983 (issued August 17, 2018).

[13] *Id.* at § 10.606(b)(3); *see also G.G.*, Docket No. 17-1666 (issued August 21, 2018).

[14] *See S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[15] *See Dennis J. Lasanen*, 41 ECAB 933 (1990).

[16] *See L.K.*, Docket No. 15-0659 (issued September 15, 2016); *T.L.*, Docket No. 16-0536 (issued July 6, 2016).

[17] Although the Board does not have jurisdiction over the merits of appellant's claim, it should be noted that appellant submitted a Form CA-16 executed by the employing establishment on January 18, 2017. Where an employing establishment properly executes a Form CA-16 authorizing medical treatment related to a claim for a work injury, the form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination/treatment regardless of the action taken on the claim. *See N.B.*, Docket No. 17-0927 (issued April 18, 2018); *Tracy P.Spillane*, 54 ECAB 608 (2003). The period for which treatment is authorized by a Form CA-16 is limited to 60 days from the date of issuance, unless terminated earlier by OWCP. *See* 20 C.F.R. § 10.300(c).

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 24, 2018
Washington, DC

Christopher J. Godfrey, 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