

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

D.K., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Everson, WA, Employer)

Docket No. 19-0637
Issued: December 11, 2019

Appearances:

Howard L. Graham, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 28, 2019 appellant, through counsel, filed a timely appeal from a December 12, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated November 30, 2017 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 over the merits of this case.³

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.*

³ The Board notes that following the December 12, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 14, 2016 appellant, then a 52-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 13, 2016 she injured her right ring finger, hand, wrist, and arm while placing mail into a mailbox while in the performance of duty. She stopped work on January 14, 2016. On March 8, 2016 OWCP accepted the claim for right carpal tunnel syndrome. By decision dated June 3, 2016, it expanded acceptance of the claim to include strain of extensor muscle, fascia and tendon of right little finger, wrist and hand level.⁴ OWCP paid appellant wage-loss compensation on the supplemental rolls from February 29 until September 30, 2016.

In a September 30, 2016 report, Dr. Eric Rudd, a Board-certified orthopedic surgeon and second opinion examiner, noted that on January 13, 2016 appellant placed mail into a mailbox and in the process noted an "electrical shock" radiating from her hand up the dorsal radial forearm to her lateral elbow. He noted that while appellant had been diagnosed with a right arm strain related to the January 13, 2016 injury, her current diagnoses were stenosing tenosynovitis without triggering, right ring finger, milder dorsal and adjacent webspace tenderness without localized tenderness. Dr. Rudd indicated that appellant's complaints in the right ring finger did not correlate to her accepted work-related conditions. He concluded that appellant was capable of full-time, full-duty work without restrictions.

In October and November 2016, appellant filed claims for compensation (Form CA-7) for the periods October 1 through November 11, 2016 and continuing.

In a November 16, 2016 development letter, OWCP requested additional medical evidence establishing that appellant was totally disabled from work due to the accepted conditions during the claimed period. It afforded appellant 30 days to submit the necessary evidence. OWCP received additional evidence.

In a November 2, 2016 report, Dr. James H. Blackburn II, a Board-certified plastic surgeon, related that appellant could not lift 70 pounds, but that she could return to work as a rural mail carrier.

By decision dated December 19, 2016, OWCP denied appellant's claim for wage-loss compensation for disability during the period October 1 to November 11, 2016 and continuing. It found that the evidence of record did not establish that she was disabled from work due to the accepted employment-related conditions.

On January 20, 2017 appellant requested reconsideration and submitted additional medical evidence. By decision dated March 17, 2017, OWCP denied modification of its December 19,

⁴ Under OWCP master File No. xxxxxx638, appellant has an accepted bilateral carpal tunnel syndrome condition for an occupational disease claim arising January 20, 2005.

2016 decision. It found that weight of the medical evidence continued to rest with the second opinion physician, Dr. Rudd.

On April 17, 2017 appellant requested reconsideration of OWCP's March 17, 2017 decision and submitted additional evidence. In a duty status report (Form CA-17) dated April 10, 2017, Dr. Eric S. Smith, Board-certified in occupational medicine, related that appellant remained totally disabled due to weakness of her right and little fingers and a chronic right hand injury. In a narrative report of even date, he related that appellant had a problem with extensor tendon subluxation which impacted her ability to perform the work activities of a rural mail carrier.

By decision dated April 27, 2017, OWCP rescinded acceptance of appellant's entitlement to medical care for right carpal tunnel syndrome effective April 27, 2017 as it was based on error in the original decision.

By decision dated July 24, 2017, OWCP denied modification of its March 17, 2017 decision. It found that appellant's treating physician, Dr. Smith, provided employment restrictions for nonaccepted conditions, a right arm injury and right ring finger, and that he did not provide an opinion as to how the restrictions were related to the accepted employment-related conditions.

On August 20, 2017 appellant requested reconsideration of OWCP's July 24, 2017 decision. She submitted an August 18, 2017 medical report in which Dr. Smith opined that she could work effective September 1, 2017 with limitations. Dr. Smith also completed a duty status report (Form CA-17) on August 18, 2017 outlining the restrictions. On August 28, 2017 appellant accepted an August 18, 2017 light-duty assignment for four hours a day. She continued to file Form CA-7 claims for wage-loss compensation.

On October 2, 2017 OWCP determined that there was a conflict in medical opinion between Dr. Rudd, the second opinion physician, who opined in his September 30, 2016 report that appellant's accepted employment-related conditions had resolved and that she could return to full-time, full-duty work as of September 30, 2016 and Dr. Smith, the treating physician, who opined in his August 18, 2017 report that appellant's accepted employment-related conditions had not resolved and that she could only return to work with restrictions. OWCP selected Dr. Alfred Blue, a Board-certified orthopedic surgeon, as the impartial medical examiner (IME) to resolve the conflict in medical opinion.

In a November 8, 2017 report, Dr. Blue noted his review of the statement of accepted facts (SOAF) and the medical record. He provided his examination findings and opined that appellant's accepted employment-related conditions had resolved, that there was no objective medical evidence that she continued to suffer residuals due to the January 13, 2016 employment injury, and that she could return to full-time full-duty work without restrictions. Dr. Blue however also related that: "It is difficult to provide an appropriate date of resolution. I cannot identify a condition related to the trauma, which was reported. [As] stated previously, this should have resolved by 6 to 12 weeks."

By decision dated November 30, 2017, OWCP denied modification of the March 17, 2017 decision. It found that the special weight of the medical evidence rested with Dr. Blue, the IME.

On or about December 14, 2017 appellant stopped work as the employing establishment withdrew her limited-duty assignment. She continued to file Form CA-7 claims for wage-loss compensation.

On September 16, 2018 appellant, through counsel, requested reconsideration of OWCP's November 30, 2017 decision. In an accompanying undated letter, counsel contended that the November 8, 2017 IME report from Dr. Blue was not well rationalized as it was speculative and contradictory. He argued that Dr. Blue opined that appellant's accepted condition had resolved, but gave a speculative answer regarding when appellant's condition resolved as he opined "It is difficult to provide an appropriate date of resolution ... this should have resolved by 6 to 12 weeks." Counsel also contended that the second opinion physician and the IME were not the appropriate physicians to evaluate appellant, and OWCP failed to send appellant the medical conflict statement.

Evidence OWCP received in support of appellant's reconsideration request included duty status reports (Form CA-17) dated September 8, September 22, November 20, 2017 pertaining to appellant's disability status; a November 14, 2017 magnetic resonance imaging (MRI) scan report of right hand, which noted mild changes of arthritis at the first carpometacarpal joint and at the first metacarpal joint and mild bone marrow edema at the proximal ulnar corner of the lunate; and a March 20, 2018 e-mail from the employing establishment, which noted that appellant filed an application for disability retirement on March 15, 2018.

OWCP also received a January 16, 2017 report, wherein Dr. Smith set forth examination findings. Dr. Smith provided an impression of "injury to right hand leading to, more or less, permanent adductor weakness." He indicated that appellant could not do her usual and regular work activities without restrictions and that he was taking her off work. Dr. Smith also indicated that appellant would benefit from a functional capacity evaluation (FCE). In a January 16, 2017 letter, he indicated that he reviewed and disagreed with Dr. Rudd's September 30, 2016 second opinion releasing appellant for full and regular work activities as a rural carrier without restrictions. Dr. Smith recommended that an FCE be performed by an occupational therapist. He also opined that the providers of record, including appellant's primary care provider, were not familiar with the specific job duties required of a rural carrier.

In a November 10, 2017 letter, Dr. Smith indicated that appellant would remain disabled from work until she returned for evaluation in approximately one month.

In a December 8, 2017 letter, Dr. Smith indicated that appellant could not perform her full and regular work activities due to the repetitive nature of her work and her difficulty with abduction and adduction. He recommended that appellant see a hand surgeon. In a February 2, 2018 letter, Dr. Smith indicated that the orthopedic specialists that appellant had seen were dismissive of her persistent discomfort in her right hand which impacted her ability to forcefully grasp and pinch. He indicated that further investigation was needed to find out why her right hand was so dysfunctional. In an April 17, 2018 medical report, Dr. Smith indicated that appellant's intermetacarpal strain continued to cause discomfort and weakness in power grip and pinch. He advised that her injury was now a chronic defect which interfered with her ability to fully perform the duties of a rural mail carrier.

In an April 17, 2018 report, Dr. Blackburn diagnosed strain of extensor muscle, fascia, and tendon of right little finger at wrist and hand level and right hand pain.

By decision dated December 12, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review of the claim.

LEGAL PRECEDENT

Section 8128(a) of FECA⁵ 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 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, it will deny the request for reconsideration without reopening the case for review on the merits.¹⁰

ANALYSIS

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

In a letter accompanying the September 16, 2018 reconsideration request, counsel argued that Dr. Blue's November 8, 2017 IME report was not well rationalized as it was speculative as to when appellant's accepted conditions resolved and no longer caused disability. The Board finds that counsel's argument is a new legal argument relevant to the underlying issue of whether the employee was disabled as of October 1, 2016. As counsel did advance a relevant legal argument not previously considered by OWCP, such argument warrants further merit review of appellant's claim.¹¹

Thus, the Board will remand the case to OWCP for further review. After such further development as deemed necessary, OWCP shall issue an appropriate merit decision.

⁵ *Supra* note 2.

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b)(3); *see also T.H.*, Docket No. 19-0436 (issued August 13, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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

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

¹⁰ *Id.* at § 10.608(b); *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *See Q.M.*, Docket No. 18-0345 (issued May 17, 2019); *D.M.*, Docket No. 16-1754 (issued January 10, 2018).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 11, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board