

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

M.D., Appellant)	
)	
and)	Docket No. 19-0725
)	Issued: December 23, 2019
DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Key West, FL, Employer)	
)	

Appearances:
Wayne Johnson, 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 February 18, 2019 appellant, through counsel, filed a timely appeal from an August 22, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 4, 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.

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 8, 2016 appellant, then a 52-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on January 7, 2016 he sustained abrasions to his right leg and right arm, and injured his right hip while in the performance of duty. He related that he started to black-out and fell on a rescue saw in the public works stock area. Appellant stopped work on January 7, 2016.³

OWCP subsequently received a January 7, 2016 medical referral report, wherein appellant's supervisor related that on January 7, 2016 appellant had a slip and fall at work. An unknown care provider completed the form and indicated that appellant had not suffered significant injuries from the fall at work aside from abrasions and contusions.

In a January 20, 2016 statement, R.C., appellant's supervisor, noted that he was having doubts about appellant's numerous injuries and the extent of his condition. He explained that appellant underwent a fitness-for-duty examination on January 20, 2016 and was found fit for duty with no evidence of appellant having a cracked rib or collapsed lung.

In a January 22, 2016 letter, the employing establishment controverted appellant's claim, contending that he had not established fact of injury nor entitlement to continuation of pay (COP).

In a January 25, 2016 development letter, OWCP advised appellant that, when his claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work. It explained that because the employing establishment had controverted appellant's claim, it was now formally adjudicating the merits of the claim. OWCP requested that he submit additional factual and medical evidence and provided a questionnaire for his completion. It afforded him 30 days to provide the necessary evidence.

Appellant submitted January 7, 2016 hospital emergency room records, which indicated that appellant was treated by Dr. Cheryl Lund, a Board-certified internist, for a fall-related injury. Dr. Lund discussed appellant's medical history, including chronic back pain, fibromyalgia, and coronary artery disease. She recounted that two days prior, appellant was undergoing physical therapy and experienced new cervical pain and numbness in both arms. Dr. Lund related that he was at work when his head, neck, and back became too painful that he passed out and fell down. Upon examination of appellant's lumbar spine, she observed right costovertebral angle tenderness and right flank pain. Neurological examination was limited due to pain from his herniated disc. Dr. Lund assessed right flank pain, chronic back pain, and coronary artery disease.

In a January 9, 2016 consultation report, Dr. Joan Homan, a Board-certified internist specializing in cardiovascular disease, discussed appellant's medical history and related that

³ Appellant has a prior claim for a December 29, 2014 traumatic injury accepted under OWCP File No. xxxxxx348 for lumbar sprain and left sacroiliitis. OWCP has not administratively combined appellant's claims.

appellant was seen for a syncopal episode. She conducted an examination and reviewed appellant's diagnostic results. Dr. Homan noted that there was no evidence of cardiac abnormalities on appellant's echocardiogram or on telemetry. She diagnosed syncope, likely due to severe pain, fibromyalgia, and significant disc disease.

OWCP received diagnostic test results dated January 7 and 20, 2016.

By decision dated March 3, 2016, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that the January 7, 2016 employment incident occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Following the decision, appellant submitted additional medical evidence. In a March 18, 2016 progress note, Dr. Robert Catana, an orthopedic surgeon, noted appellant's complaints of left arm, right arm, and back pain. He provided examination findings and diagnosed lumbosacral disc degeneration and cervical disc displacement.

In a March 24, 2016 narrative report, Dr. Helder Gomez, a Board-certified neurosurgeon, noted appellant's complaints of cervical, trapezius, and interscapular pain since a December 29, 2014 "slip and fall" incident. He examined appellant's spine and diagnosed cervical stenosis at C3-4, C5-6, and C6-7, cervicobrachial syndrome, cervicgia, and cervical radiculitis at C5-6 and C6-7. Dr. Gomez concluded that appellant was a candidate for cervical decompression, fusion, and anterior instrumentation surgery. In an April 11, 2016 work status note, he related that appellant could not work until further notice.

In an April 11, 2016 prescription note, Dr. Julie Ann Floyd, a Board-certified physiatrist, recommended that appellant be off work until May 30, 2016.

Appellant submitted hospital records dated May 25, 2016, which revealed that he was treated by Dr. Horacio Reinoso, an emergency medicine physician, for complaints of confusion and weakness. He reviewed appellant's history and noted that he underwent a cervical fusion the prior Tuesday. Dr. Reinoso provided examination findings and appellant was discharged from the hospital.

On March 2, 2017 appellant, through counsel, requested reconsideration and submitted additional medicine evidence. He indicated that appellant had a previously accepted claim under OWCP File No. xxxxxx348 and was authorized to receive treatment for manipulation of the spine. Counsel reported that during a January 5, 2016 physical therapy appointment, the therapist manipulated appellant's cervical spine and caused him immediate pain and numbness. He indicated that on January 7, 2016 appellant experienced intense cervical and lumbar pain, which caused him to black out and fall down at work. Counsel asserted that an injury that occurs while receiving authorized medical care is compensable and that a fall at work is also compensable. He submitted physical therapy progress notes dated January 5 and 19, 2016.

A March 2, 2016 cervical spine MRI scan revealed right paracentral posterior disc herniation and associated radial tear at C3-4, disc bulging at C5-6, C6-7, and C7-T1, and posterior disc herniation at T2-3.

In a November 28, 2016 narrative report, Dr. Catana indicated that appellant had been under his care for a work-related injury as of December 29, 2014 under File No. xxxxxx348. He related that appellant's claim was accepted for lumbar sprain and left sacroiliitis and reported that appellant had significant limitations following the injury, but he was able to return to work. Dr. Catana described that on January 5, 2016 appellant underwent physical therapy for his cervical condition and that on January 7, 2016 he passed out at work due to severe pain. He opined that appellant's cervical condition, surgery, and disability were a consequence of his accepted December 29, 2014 employment injury.

By decision dated May 4, 2017, OWCP modified the March 3, 2016 decision. It accepted that the January 7, 2016 employment incident occurred as alleged. However, OWCP denied appellant's claim finding that the medical evidence of record was insufficient to establish that appellant's medical conditions were causally related to the accepted employment incident.

On May 4, 2018 appellant, through counsel, requested reconsideration. Counsel contended that the Board had previously ruled in *R.O.*, Docket No. 16-1516 (issued August 28, 2017), that an injury that developed during therapy from a compensable original injury is a consequential injury, which is compensable.

In a narrative report signed on August 22, 2017, Dr. Catana indicated that he reviewed OWCP's May 4, 2017 decision and provided this narrative report to clarify OWCP's questions regarding appellant's cervical condition. He noted that appellant had no cervical complaints prior to the January 5, 2016 employment incident. Dr. Catana related that during a January 5, 2016 physical therapy appointment, appellant injured his neck. He explained that on January 7, 2016 appellant passed out at work because of the pain and landed on a rescue saw. Dr. Catana noted that appellant was evaluated in the emergency room and a cervical MRI scan showed paracentral disc herniation with radial tear at C3-4, bulging discs at C5-C6, C6-C7, and C7-T1, and a disc herniation at C7-T1. He noted that the emergency room provider ruled out cardiac issues as the cause of appellant's syncopal episode. Dr. Catana explained that appellant's passing out was consistent with the pain he experienced. He further opined that the mechanisms of injury were consistent with a cervical injury being caused in the therapy session and the subsequent fall at work. Dr. Catana concluded that appellant's cervical conditions were directly related to the January 7, 2016 "industrial accident" and that the January 7, 2016 incident permanently aggravated appellant's asymptomatic cervical conditions.

By decision dated August 22, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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

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).

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 request 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 request 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

ANALYSIS

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).

In the May 4, 2018 request for reconsideration and accompanying statement, counsel contended that appellant sustained a compensable injury during a physical therapy appointment. However, this is not a new legal argument not previously considered by OWCP. As the request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Along with his May 14, 2018 reconsideration request, appellant submitted a narrative report by Dr. Catana signed on August 22, 2017. He explained that on January 7, 2016 appellant passed out at work because of severe pain after a physical therapy appointment. Dr. Catana reported that appellant's passing out was consistent with the pain he experienced and further opined that the mechanisms of injury was consistent with a cervical injury being caused in the therapy session and the subsequent fall at work. He concluded that appellant's cervical conditions were directly related to the January 7, 2016 "industrial accident." The Board finds, however, that this report is substantially similar to Dr. Catana's November 28, 2016 report, which was previously considered by OWCP. Dr. Catana did not provide pertinent new or relevant evidence explaining how appellant's cervical conditions were causally related to the accepted January 7, 2016 employment incident. The Board has held that the submission of evidence which duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening

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. *Id.* at Chapter 2.1602.4b.

⁷ *Id.* at § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

a case.⁹ Therefore, he was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review. On appeal counsel contends that OWCP improperly denied merit review even though appellant submitted a new medical report linking his medical condition to the accepted employment incident. As explained above, Dr. Catana's August 22, 2017 medical report was substantially similar to his previous November 28, 2016 report, and accordingly, did not warrant further merit review of appellant's claim.

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).

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 23, 2019
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

⁹ *T.W.*, Docket No. 19-0786 (issued September 18, 2019); *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).