

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

K.J., Appellant)	
)	
and)	Docket No. 19-0146
)	Issued: July 10, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Long Beach, CA, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 26, 2018 appellant filed a timely appeal from a May 30, 2018 nonmerit decision of the Office of Workers' Compensation Program (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 17, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the May 30, 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 his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On November 21, 2015 appellant, then a 56-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained a dog bite to his left hand while in the performance of duty. He stopped work immediately after his injury. OWCP accepted the claim for open bite of left hand and paid wage-loss compensation benefits on the supplemental rolls from March 19, 2016 until appellant returned to limited-duty work as a lobby host on December 12, 2016.

OWCP referred appellant for a second opinion evaluation with Dr. Steven M. Ma, a Board-certified orthopedic surgeon, on April 14, 2016. In a report dated May 16, 2016, Dr. Ma diagnosed a resolved open bite of left hand and nonindustrial Dupuytren's contracture of both hands. He opined that the initial medical treatment allowed the dog bite to heal on its own and that was the typical medical course for that type of injury. However, when appellant received treatment his diagnoses expanded. Dr. Ma indicated that their initial x-rays showed no fractures. However, when a magnetic resonance imaging (MRI) scan of the left hand was compared to a February 15, 2011 MRI scan of the left hand, a "small cortical fracture" was noted. Dr. Ma opined that if there was a small cortical fracture, it was not medically significant as it was not visualized on x-ray and that, if present, it would have already healed. He concluded that, other than the puncture scar from the 2015 dog bite, there were no residuals of the accepted condition and that appellant could resume his usual job without restriction. Dr. Ma also indicated that the only current objective finding of palpable cords in the palm of both hands was unrelated to the accepted dog bite and was nonindustrial in nature.

Additional medical reports were received. In a June 29, 2016 report, Dr. Basimah Khulusi, a Board-certified physiatrist, diagnosed multiple wounds of the left hand and anxiety as a result of the dog bite. In a July 12, 2016 report, Dr. Charles Herring, a Board-certified orthopedic surgeon, diagnosed: dog bite, left hand; left hand metacarpal cortical fracture, healed; left partial ulnar collateral ligament tear, second metacarpophalangeal (MCP) joint; and sensory nerve injury, left hand. He noted some inflammatory process and opined that appellant could work light duty. In an August 8, 2016 report, Dr. Hosea Brown, III, a Board-certified internist, diagnosed open bite of left hand. He reported slightly diminished grip strength in the left hand, no evidence of swelling, but tenderness along the left third digit with numbness. A functional capacity evaluation (FCE) was recommended.

By letter dated September 16, 2016, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, finding that he no longer had any disability or residuals due to his accepted open bite of left hand.

In response to the notice of proposed termination, OWCP received medical progress reports dated August 30, October 12, 25, and 31, and November 23, 2016. Dr. Herring, in his August 30, 2016 report, opined that appellant was capable of returning to light-duty work. A September 27, 2016 electromyogram/nerve conduction velocity (EMG/NCV) study indicated mild-to-moderate

bilateral carpal tunnel syndrome. Dr. Khulusi, in an October 12, 2016 report, questioned Dr. Ma's findings as to appellant's employment capacity. She recommended an FCE based on appellant's inability to make a full grip of his left hand.

By decision dated December 22, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that day, finding that the weight of the medical opinion evidence rested with the report of the second opinion examiner, Dr. Ma.

On January 13, 2017 appellant requested reconsideration. OWCP received a January 5, 2017 report from Dr. Khulusi, who summarized the findings of a November 8, 2016 FCE. In a December 20, 2016 report, Dr. Herring reviewed the FCE results and indicated that appellant could work with restrictions. He noted that appellant may have permanent injury of the sensory nerves of the dorsum of the hand. Dr. Herring opined that the weakness and other impairments noted during appellant's FCE were due to the carpal tunnel syndrome and not related to the dog bite. A copy of the FCE report was not submitted to the record.

In a January 3, 2017 report, Dr. Steven N. Brouman, an orthopedic hand surgeon, diagnosed status post dog bite left hand with index metacarpal head fracture and rule out radial digital nerve injury of the left hand. He recommended a repeat MRI scan and ultrasound evaluation of the left hand. A February 1, 2017 MRI scan of appellant's left hand noted mild degenerative changes of the first CMC joint, but otherwise the MRI scan was negative.

By decision dated April 17, 2017, OWCP denied modification of the December 22, 2016 termination decision.

On May 4, 2017 appellant requested reconsideration. A copy of the November 8, 2016 FCE was received along with an April 27, 2017 letter from Dr. Khulusi requesting that appellant be referred for a referee examination. An undated and unsigned duty status report (Form CA-17) was also submitted.

By decision dated May 17, 2017, OWCP denied modification of its April 17, 2017 decision.

On July 7, 2017 appellant requested reconsideration.

In an April 25, 2017 progress report, Dr. Brown noted appellant's subjective complaint of numbness in the dorsum of his hand at the base of the fourth and fifth digits, but indicated that there were no gross abnormalities noted. He noted that the left hand MRI scan study of January 13, 2016 revealed evidence of a small cortical fracture due to the trauma incurred by the dog bite. Dr. Brown also indicated that there was edema at that location with evidence of a partial tear of the ulnar collateral ligament at the second MCP joint, which was consistent with appellant's complaints of persistent symptomatology of his left hand status post dog bite. He diagnosed open bite of left hand, partial tear of the ulnar collateral ligament of the second MCP joint, as documented by a January 13, 2016 MRI scan study, and localized peripheral neuropathy, left hand status post dog bite. Dr. Brown related that appellant could return to modified work on April 25, 2017 with restrictions.

In a June 29, 2017 letter, Dr. Khulusi opined that appellant required work restrictions since he had injured the second metacarpal bone, which caused cellulitis with inflammation in the dorsal aspect of his hand that in turn caused swelling and restriction on the movements of the joints of the lateral aspect of his hand. She also noted that appellant could perform activities prior to the injury that he could not perform at the FCE. Dr. Khulusi continued to note that the case should be referred for a referee examination.

By decision dated October 2, 2017, OWCP denied reconsideration of the merits of appellant's claim as the medical evidence submitted was cumulative and repetitious.

On May 14, 2018 appellant requested reconsideration. In a May 14, 2018 letter, counsel indicated that Dr. Khulusi had corrected the defect noted in OWCP's May 17, 2017 decision, as she clearly explained why the FCE and appellant's work restrictions had applied to the dog bite injury and not the carpal tunnel syndrome condition. Counsel indicated that Dr. Khulusi's June 29, 2017 letter was therefore new and relevant. He concluded that a conflict in medical opinion existed between Dr. Khulusi and Dr. Ma and appellant should be referred for a referee examination. Alternatively, OWCP should reinstate appellant's benefits.

OWCP also received a February 28, 2017 report, wherein Dr. Brouman indicated that appellant had decreased range of motion to the left index finger. Dr. Brouman also reviewed the February 1, 2017 MRI scan of the left hand and diagnosed status post dog bite left hand with index metacarpal head fracture and left hand tendinitis. He opined that appellant likely had scar tissue and low level tendinitis that was causing the persistent discomfort in his hand.

OWCP received copies of a November 8, 2016 upper extremity range of motion testing and a position description for a letter carrier.

By decision dated May 30, 2018, OWCP denied reconsideration without conducting a merit review. It found that appellant had not submitted new and relevant evidence or argument in support of his claim. OWCP noted that he had been seen by Dr. Brouman, but that a report had not been received. It also noted that argument regarding an unresolved conflict in the medical opinion evidence had been previously raised and considered.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application

³ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 20 C.F.R. § 10.606(b)(3).

for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for review without reopening the case for a review on the merits.⁶

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁷ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.⁸ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set for at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁹

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).

Along with his May 14, 2018 request for reconsideration, appellant submitted a February 28, 2017 report from Dr. Brouman, who noted objective findings and diagnosed status post dog bite left hand with index metacarpal head fracture and left hand tendinitis. Dr. Brouman opined that appellant likely had scar tissue and low level tendinitis that was causing persistent discomfort in his hand. His report is relevant as it raises the question of whether appellant had continuing residuals of the accepted condition of open bite of the left hand. OWCP did not consider Dr. Brouman's report as it specifically advised that no such report had been received. Thus, he is entitled to a review of the merits of his claim under section 10.606(b)(3) of OWCP's regulations.¹⁰

The case will be remanded to OWCP to conduct a merit review of the claim. Following this and such other development as deemed necessary, it shall issue an appropriate merit decision.¹¹

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).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

⁷ *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

⁸ *Id.*; see also *Mark H. Dever*, 53 ECAB 710 (2002).

⁹ *Supra* note 7; *Annette Louise*, 54 ECAB 783 (2003).

¹⁰ See *W.D.*, Docket No. 18-1530 (issued February 14, 2019); *L.Y.*, Docket No. 15-1344 (issued March 10, 2016).

¹¹ In light of the disposition of the claim, appellant's arguments on appeal will not be addressed.

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision.

Issued: July 10, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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