

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

Y.T., Appellant)	
)	
and)	Docket No. 19-0234
)	Issued: July 3, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Douglasville, GA, Employer)	
)	

Appearances: *Case Submitted on the Record*
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 9, 2018 appellant, through counsel, filed a timely appeal from a May 16, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated July 18, 2017 to the filing of this appeal,

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.

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

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 July 2, 2015 appellant, then a 35-year-old rural carrier, filed a traumatic injury claim (Form CA-1), alleging that she sustained injuries to her right arm and shoulder on June 15, 2015 when using a vehicle with a defective steering wheel while in the performance of duty. She stated that the wheel of her long-life vehicle (LLV) pulled and strained her arm and shoulder while on her mail route. OWCP accepted the claim for right shoulder sprain and right cervical strain and placed appellant on the periodic compensation rolls effective March 6, 2016.⁴ Appellant's medical history included a nonwork-related right shoulder surgery, which she underwent on February 10, 2016. She returned to limited-duty work on July 25, 2016.

On February 24, 2017 appellant filed a claim for disability compensation (Form CA-7) for the period October 15 to 28, 2016.

By decision dated July 18, 2017, OWCP denied appellant's claim finding that the evidence of record failed to establish disability for the claimed period.

OWCP later referred appellant to Dr. Michael Andrew McHenry, a Board-certified physiatrist, for a second opinion evaluation to determine the nature and extent of her accepted employment-related conditions. In his October 19, 2017 report, Dr. McHenry reviewed a statement of accepted facts (SOAF), history of the injury, and the medical evidence of record. He conducted a physical examination and found that appellant had reached maximum medical improvement (MMI) as it related to her accepted cervical strain, but her right shoulder condition was still ongoing. Dr. McHenry opined that appellant was not capable of performing the physical

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 16, 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.*

⁴ On December 11, 2015 appellant filed a claim for disability compensation (Form CA-7) for the period November 14 to December 11, 2015. By decision dated February 8, 2016, OWCP denied the claim finding that the evidence of record failed to establish disability for the period claimed. On February 12, 2016 appellant filed a claim for disability compensation (Form CA-7) for the period February 8 to 9, 2016. By decision dated April 19, 2016, OWCP denied the claim finding that the evidence of record failed to establish disability for the period claimed. Appellant requested reconsideration and in a decision dated May 2, 2017, OWCP denied modification of the prior decisions finding that the new evidence she submitted failed to address why she was unable to work from November 20, 2015 to February 9, 2016, the date prior to her surgery.

requirements of a letter carrier as indicated in the SOAF without restrictions. He advised that she was only capable of performing modified-duty activities. Dr. McHenry opined that she was limited to pushing, pulling, and lifting up to 20 pounds and she could operate a vehicle for no more than two hours per day.

Appellant subsequently submitted reports dated June 23, July 14, and August 10, 2017 and February 22, 2018 from Dr. Eric S. Furies, a family practitioner, who diagnosed right bicep tendinitis, right rotator cuff tendinitis, and tear of right glenoid labrum.

Appellant also submitted a February 13, 2018 report from Dr. Trevor C. Smith, an emergency medicine specialist, who saw appellant in the emergency department for nausea and right shoulder pain.

Appellant, through counsel, requested reconsideration on May 2, 2018 and submitted a work capacity evaluation form (Form OWCP-5c) dated October 17, 2017 from Dr. McHenry in support of her claim.

By decision dated May 16, 2018, OWCP denied appellant's request for reconsideration of the merits of the claim finding that she failed to advance a relevant legal argument or submit any relevant and pertinent new evidence.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ 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.⁷ A timely application 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.⁸ When a timely application for reconsideration does not meet at least one

⁵ 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).

⁶ 20 C.F.R. § 10.607.

⁷ *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.

⁸ 20 C.F.R. § 10.606(b)(3).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁹

It is well established that OWCP must review all evidence submitted by a claimant and received by OWCP prior to issuance of its final decision.¹⁰ As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim, which was properly submitted to OWCP prior to the time of issuance of its final decision, be addressed by OWCP.¹¹

ANALYSIS

The Board finds that the case is not in posture for decision. Prior to the issuance of OWCP's May 16, 2018 decision, appellant submitted a work capacity evaluation form (OWCP-5c) completed by Dr. McHenry on October 17, 2017 where he opined that she was not capable of performing her usual job without restriction. Dr. McHenry asserted that appellant was limited to pushing, pulling, and lifting up to 20 pounds and she could operate a vehicle for no more than two hours per day. Additionally, appellant submitted reports dated June 23, 2017 through February 22, 2018 from Dr. Furie and a February 13, 2018 report from Dr. Smith where she was diagnosed with right bicep tendinitis, right rotator cuff tendinitis, tear of right glenoid labrum, and right shoulder pain. Although appellant submitted this report prior to the issuance of the May 16, 2018 decision, there is no evidence that OWCP reviewed it.

As OWCP did not review all of the evidence of record prior to issuing its May 16, 2018 decision, the Board finds that the case is not in posture for decision. For this reason, the case will be remanded to OWCP to enable it to properly consider all the evidence submitted at the time of the May 16, 2018 decision. Following such further development as OWCP deems necessary, it shall issue an appropriate merit decision on appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

CONCLUSION

The Board finds that this case is not in posture for decision regarding appellant's request for reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

⁹ *Id.* at § 10.608(a), (b).

¹⁰ *See A.C.*, Docket No. 16-1670 (issued April 6, 2018); *William A. Couch*, 41 ECAB 548 (1990).

¹¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 16, 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 of the Board.

Issued: July 3, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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