

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

G.Q., Appellant)	
)	
and)	Docket No. 18-1697
)	Issued: March 21, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Stockton, CA, Employer)	
)	

Appearances:
Sally F. LaMacchia, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 10, 2018 appellant, through counsel, filed a timely appeal from a May 24, 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 February 23, 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 August 20, 2015 appellant, then a 51-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 17, 2015 he sustained injuries to his head and left elbow when he tripped and fell while in the performance of duty. He indicated that he was fending off an attacking dog when he tripped and fell backwards, hitting his head on the road. Appellant also indicated that he scraped his left elbow. He did not stop work.

On August 17, 2015 Dr. Brad D. Tourtlotte, a family practitioner specializing in occupational medicine, treated appellant for his head and left elbow injuries. He recounted that appellant was attacked by a dog, and while fending off the dog, he backed into the base of a basketball hoop and fell backwards, hitting his head on the street. Dr. Tourtlotte diagnosed head bruise and elbow contusion, and released appellant to full-duty work.

On November 11, 2015 appellant filed a claim for a recurrence of medical condition (Form CA-2a). He claimed to have sustained a recurrence on August 31, 2015, which was causally related to the August 17, 2015 injury. Appellant related that approximately two weeks after he fell his lower back started bothering him. The lower back pain progressively worsened and radiated to his foot. On or about November 14, 2015, the pain increased to the point where appellant almost could not walk. He further indicated that, following the August 17, 2015 incident, he had been told he had a contusion and a back strain. Appellant acknowledged, and the employing establishment confirmed, that he returned to full-duty work at the time of the August 17, 2015 incident.

In a November 30, 2015 development letter, OWCP noted that when appellant's claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work and was, therefore, administratively approved for payment of a limited amount of medical expenses. It reported that the medical evidence addressing his claim had not been formally considered and that his claim was being reopened for consideration because he had filed a recurrence claim. OWCP requested that appellant provide additional factual and medical evidence to establish his claim and also provided a questionnaire for his completion. It afforded him 30 days to respond.

On December 7, 2015 OWCP received appellant's completed questionnaire dated December 3, 2015. Appellant explained that immediately after the August 17, 2015 employment incident he experienced pain on the left side of his lower back. He reported that the lower back pain progressively worsened and began to radiate down his left side. Appellant responded "no" to the question regarding whether he had sustained any other injury between the date of injury and the date he first sought medical treatment.

OWCP received a November 16, 2015 progress note by Dr. Velarde Raras, a Board-certified internist. Dr. Raras related that, two months prior, appellant had fallen backwards and

hit the left side of his head on the pavement when he was fending off a dog at work. He reported that appellant complained of low back pain, but the lower back pain had worsened two weeks after the fall and also radiated down the lateral left leg. Dr. Raras noted that appellant had a prior history of back problems. Examination of appellant's lumbar spine showed no local tenderness or mass and painful and reduced range of motion. He diagnosed hypertension, diabetes mellitus, and low back pain. Dr. Raras conducted follow-up examinations and submitted progress notes dated November 18 and 30, 2015.

OWCP also received various hospital records dated November 17, 2015. In a November 17, 2015 emergency room note, Paula Davis, a physician assistant, related appellant's complaints of left lower back pain radiating to the left leg for the past several weeks. She described that he fell three months prior at work and hit his head. Ms. Davis reviewed appellant's history and conducted an examination. She diagnosed back pain and left sciatica. Appellant was authorized to return to work in a full-duty capacity on November 19, 2015.

A November 17, 2015 lumbar spine x-ray examination report showed mild degenerative changes and no acute pathology.

In a December 16, 2015 work status report, Dr. Raras placed appellant on "modified activity" at work and home from December 16, 2015 to January 16, 2016.

By decision dated January 11, 2016, OWCP accepted appellant's claim for the conditions of contusion of scalp (resolved), contusion of unspecified part of the neck (resolved), and contusion of left elbow (resolved).

By separate decision dated January 11, 2016, OWCP denied appellant's claim for a lumbar condition. It found that the medical evidence of record was insufficient to establish his claim as it did not provide a lumbar-related diagnosis in connection with the accepted August 17, 2015 employment incident.

On February 1, 2016 appellant, through counsel, requested a hearing before an OWCP hearing representative. By decision dated April 11, 2016, the hearing representative informed appellant that he had no basis for an appeal at this time because his claim had been accepted on January 11, 2016.

Following the decision, OWCP received a report dated November 30, 2016 by Dr. F. Karl Gregorius, a Board-certified neurological surgeon, who performed a records review. Dr. Gregorius indicated that he had reviewed appellant's medical records and provided a detailed discussion of his history of injury. He reported that appellant's lumbar diagnosis was lumbar radiculopathy secondary to a herniated disc at L5-S1 impinging on the left S1 nerve root, as confirmed by a January 25, 2016 lumbar spine magnetic resonance imaging (MRI) scan report. Dr. Gregorius opined: "It is feasible that [appellant] could have injured himself while suffering the fall after the dog attack, but it is notable that he did not seek medical treatment for his lumbar spine until approximately three months to the day after he was attacked." He explained that if appellant had complained of low back pain within the three-month period, it was more likely that appellant's lumbar injury resulted from the August 17, 2015 work injury.

On January 6, 2017 appellant, through counsel, requested reconsideration of the January 11, 2016 decision. In the reconsideration request counsel discussed Dr. Raras' progress notes and Dr. Gregorius' November 30, 2016 narrative report. She alleged that appellant's statements on the Form CA-2a and response to OWCP's development letter substantiate that he began to experience low back pain approximately two weeks after the August 17, 2015 employment incident. Counsel asserted that his statements and Dr. Gregorius' narrative medical report establish that appellant's claim should be expanded to include lumbar radiculopathy and herniated disc at L5-S1 with left nerve root impingement.

In a sworn declaration, appellant related that he had injured his back in the 1980's while on active military duty and he believed that he had fully recovered from that back injury. He described that when he fell backwards on August 17, 2015 he felt a sharp wave of pain. Appellant explained that, after that injury, he was no longer able to participate in karate lessons because of low back pain. He indicated that he took pain medication, but the pain continued to worsen and caused him to go to the emergency room in November 2015.

By decision dated February 23, 2017, OWCP affirmed the denial of appellant's claim, as modified to accept with the diagnoses of lumbar radiculopathy and herniated disc at L5-S1 with left S1 nerve root impingement. The claim remained denied, however, as the medical evidence of record was insufficient to establish causal relationship between his diagnosed conditions and the accepted August 17, 2015 employment incident.

On February 23, 2018 appellant, through counsel, requested reconsideration. Counsel indicated that she was submitting a January 19, 2016 report from Dr. Raras and a January 28, 2016 report from Dr. Michael J. Song, an osteopath specializing in physical medicine and rehabilitation, which had not been previously submitted. She contended that the factual and medical evidence in appellant's case file was sufficient to require OWCP to further develop the medical evidence, including referral of him to an appropriate medical specialist in order to determine whether the fall at work on August 17, 2015 resulted in a low back injury.

OWCP also received a copy of a January 25, 2016 lumbar spine MRI scan, which showed small left paracentral disc protrusion at L5-S1, impinging left S1 nerve root.

In progress notes dated December 16, 2015 to October 23, 2017, Dr. Raras indicated that, in August 2015, appellant fell on his buttocks and injured his lower back. He related that appellant had left radicular symptoms and low back pain starting three weeks post-incident. Examination of appellant's lumbar spine showed full range of motion and no tenderness, palpable spasm, or pain with motion. Dr. Raras diagnosed lumbar radiculopathy, hypertension, and diabetes mellitus. He reported that appellant could engage in modified activity at work and at home for the period December 16, 2015 through March 19, 2016. On March 16, 2016 Dr. Raras released appellant to work without restrictions.

In a January 28, 2016 report, Dr. Song related that appellant presented with a five-month history of low back pain radiating down the left leg. He noted that appellant reported pain and symptoms two months after falling backwards while avoiding an attacking dog at work. Dr. Song reviewed diagnostic records and conducted an examination. He reported moderate tenderness to palpation of appellant's left lower lumbar paravertebral musculature. Sensory examination

showed decreased sensation to light touch in the left S1 dermatomal distribution. Straight leg raise testing was negative bilaterally. Dr. Song diagnosed lumbar radiculopathy.

By decision dated May 24, 2018, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found that his reconsideration request neither raised substantive legal questions, nor included new and relevant evidence sufficient to warrant further merit review of his claim. OWCP noted that the additional medical reports submitted were cumulative and substantially similar to medical evidence previously considered.

LEGAL PRECEDENT

Section 8128(a) of FECA³ 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.⁴

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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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.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 support of appellant's February 23, 2018 reconsideration request, counsel submitted a brief arguing that OWCP failed to properly develop the evidence when it did not contact him about medical evidence that was not included in the case file. Although counsel accurately noted that OWCP shares responsibility in the development of a claim, she has failed to show that OWCP's responsibility includes contacting him about medical reports not in his case file. On the contrary,

³ *Id.*

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

the Board has found that the burden of proof is on the claimant to submit probative medical evidence to establish that an employment incident caused a personal injury.⁹ The Board, therefore, finds that, in his February 23, 2018 reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered.

Dr. Raras' January 19, 2016 report and Dr. Song's January 28, 2016 report, which were not previously submitted, were supportive of appellant's case and that OWCP should have referred him to a specialist for further medical development. The Board finds, however, that these reports are substantially similar to medical reports by Dr. Gregorius, which were previously reviewed and considered by OWCP. Furthermore, the January 28, 2016 report by Dr. Song did not provide an opinion regarding causal relationship. The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

Likewise, the January 25, 2016 lumbar spine MRI scan is also not relevant to the issue of causal relationship as the diagnostic report did not provide an opinion on the cause of appellant's lumbar condition.¹¹

Appellant also submitted additional progress notes by Dr. Raras dated December 16, 2015 to October 23, 2017. Dr. Raras described the August 17, 2015 employment incident, provided examination findings, and diagnosed lumbar radiculopathy, hypertension, and diabetes mellitus. The Board finds that he merely repeated his previous diagnoses and history of injury regarding the August 17, 2015 employment incident. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹² Thus, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Accordingly, 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.¹³

On appeal counsel contends that OWCP failed to address the factual finding of whether appellant first reported complaints of back pain. The Board does not have the merits of the case

⁹ *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *Id.*

¹² *E.M.*, Docket No. 09-0039 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

¹³ *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

on this appeal and, as explained above, the evidence submitted on reconsideration was insufficient to warrant a review of the merits of the 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 May 24, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2019
Washington, DC

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

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

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