

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

A.G., Appellant)	
)	
and)	Docket No. 18-1720
)	Issued: May 7, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Portland, OR, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 13, 2018 appellant, through counsel, filed a timely appeal from a June 27, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed since the last merit decision, dated July 20, 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 to review 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

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 23, 2015 appellant, then a 37-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that, while in the performance of duty, he developed a left hand and elbow injury due to repetitive duties which required pinching and grabbing mail. His supervisor noted on the claim form that he had stopped work on May 30, 2015.

In support of his claim, appellant submitted reports from Dr. Paul K. Won, Board-certified in family medicine.

By decision dated July 23, 2015, OWCP denied appellant's claim, finding that he had not met his burden of proof to establish that the occupational exposure occurred as alleged.

On August 3, 2015 appellant requested reconsideration of OWCP's decision. In support of his claim, he submitted a narrative statement describing his occupational duties, as well as diagnostic reports, and medical reports dated July 14 to September 15, 2015 from Dr. Won.

By decision dated October 1, 2015, OWCP affirmed the July 23, 2015 decision, as modified. It found that, although appellant had provided sufficient evidence to establish the alleged factors of his federal employment, the medical evidence of record was insufficient to establish that his diagnosed condition was causally related to the accepted employment factors.

On November 19, 2015 appellant appealed to the Board. By decision dated April 11, 2016, the Board affirmed OWCP's October 1, 2015 decision, finding that appellant had not met his burden of proof to establish that his left lateral epicondylitis was causally related to the accepted factors of his federal employment.

On April 10, 2017 appellant, through counsel, requested reconsideration and noted submission of a March 28, 2017 report not previously considered from Dr. Neil Allen, Board-certified in internal medicine and neurology.

In a March 28, 2017 medical report, Dr. Allen reported that appellant's medical records were reviewed in order to establish whether causal relationship existed between his left elbow condition and work-related trauma sustained prior to and on April 1, 2015. He described appellant's repetitive employment duties as a letter carrier, reviewed diagnostic testing, and diagnosed left lateral epicondylitis. Dr. Allen discussed tennis elbow research, explaining that the

³ Docket No. 16-0232 (issued April 11, 2016).

extensor carpi radialis brevis muscle helps to stabilize the wrist when the elbow was straight, but becomes weakened from overuse, resulting in microscopic tears in the tendon where it attaches to the lateral epicondyle. He further reported that extensor carpi radialis brevis muscle was also at increased risk for damage because of its position, noting that as the elbow bends and straightens, the muscle rubs against bony bumps which can cause gradual wear and tear over time. Dr. Allen reported that it was well documented in literature that repetitive activity, specifically elbow extension, was the most common cause of lateral epicondylitis. He explained that as a rural letter carrier, appellant performed repetitive reaching (end range elbow extension) for seven to nine hours per day in order to complete the casing, sorting, and delivery of mail required by his position. Dr. Allen noted that this repetitive activity precipitated a symptomatic lateral epicondylitis, as documented on a September 3, 2015 magnetic resonance imaging (MRI) scan, which was supported by the accepted medical facts described in the literature.

By decision dated July 20, 2017, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decision, finding that the new evidence submitted was of insufficient probative value to modify the April 11, 2016 decision. It found Dr. Allen's report was of no probative value because it was not based on examination. OWCP further found that the evidence was insufficient to modify the prior decision because Dr. Allen was not the physician of record and had not based his opinion on examination.

By letter dated March 21, 2018, appellant, through counsel, requested reconsideration of the July 20, 2017 decision. Counsel argued that the decision was not based on any legal or statutory authority. He asserted that the claims examiner incorrectly found that Dr. Allen's report was of no probative value because he did not examine appellant. Counsel noted that OWCP district medical adviser's (DMA) routinely provided opinions without examination.

By decision dated June 27, 2018, OWCP denied appellant's request for reconsideration finding that he neither raised substantive legal questions, nor included relevant and pertinent new evidence sufficient to warrant a merit review. It found that counsel failed to establish that OWCP erroneously applied or interpreted a point of law. OWCP noted that counsel failed to cite specific OWCP regulations in regard to physical examinations to establish that the July 20, 2017 decision was improper.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁴ 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.⁵

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 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). Chapter 2.1602.4b.

To require OWCP to reopen a timely application for merit review under section 8128(a) of FECA,⁶ 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.⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁸ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.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).¹⁰

The underlying issue in this case was whether appellant's left lateral epicondylitis was causally related to factors of his federal employment. In its July 20, 2017 decision, OWCP denied modification of the prior decision, finding that Dr. Allen's report was of no probative value because it was not based on actual examination and because he was not the physician of record.

On reconsideration, counsel argued that there was no legal or statutory authority to support OWCP's finding that Dr. Allen's report was of no probative value because he did not examine appellant. He asserted that OWCP's procedures routinely allowed OWCP's district medical advisers to offer opinions without physical examination.

The Board finds that counsel's argument on reconsideration is new and relevant to the underlying issue of causal relationship and therefore the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim constituted an abuse of discretion.¹¹

Thus, the Board will set aside OWCP's June 27, 2018 decision and remand the case for merit review of appellant's claim. After such further development as is deemed necessary, OWCP shall issue an appropriate merit decision.

⁶ *Supra* note 4.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

¹⁰ *C.F.*, Docket No. 18-0583 (issued October 16, 2018).

¹¹ *L.N.*, Docket No. 12-1326 (issued November 21, 2012); *see also* Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.810.6 (September 2010) (to obtain merit review, a claimant need not submit all evidence that may be necessary to discharge his burden of proof); *Helen E. Tschantz*, 39 ECAB 1382 (1988); *V.B.*, Docket No. 12-1057 (issued October 23, 2012).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2018 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this opinion.

Issued: May 7, 2019
Washington, DC

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

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

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