

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

G.L., Appellant)	
)	
and)	Docket No. 19-0620
)	Issued: September 3, 2019
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION, Seattle, WA,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Jeffrey B. Tuttle, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 29, 2019 appellant, through counsel, filed a timely appeal from a September 20, 2018 nonmerit decision² of the Office of Workers' Compensation Programs (OWCP).³ As more than 180 days has elapsed since OWCP's last merit decision, dated March 15,

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 Counsel's appeal to the Board notes an appeal from a March 15, 2018 merit decision. However, on April 11, 2018 appellant filed a request for reconsideration of OWCP's March 15, 2018 decision, which was the basis of OWCP's September 20, 2018 decision. Therefore, the only OWCP decision over which the Board has jurisdiction is the September 20, 2018 denial of merit review.

³ The Board notes that, following the September 20, 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.*

2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act⁴ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.⁵

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 February 9, 2018 appellant, then a 49-year-old investigative specialist, filed a traumatic injury claim (Form CA-1) alleging that on December 9, 2017 he sustained a low back injury when he was involved in a motor vehicle accident while driving in the performance of duty. The Form CA-1 was signed by appellant on February 9, 2018 and requested continuation of pay (COP).

By decision dated March 15, 2018, OWCP accepted the claim for strain of muscle, fascia, and tendon of lower back. Acceptance of the claim was later expanded to include the additional condition of subluxation of L4-5 lumbar vertebra.

In a separate decision dated March 15, 2018, OWCP denied appellant's claim for COP, finding that the injury was not reported on an appropriate form within 30 days of the injury.

On April 11, 2018 appellant requested reconsideration of OWCP's March 15, 2018 decision relative to the issue of COP. He provided an accompanying statement, alleging that he did initiate his workers' compensation claim in a timely manner, just four days following the December 9, 2017 employment injury. Appellant reported that he used the Employees' Compensation Operations and Management Portal (ECOMP) to file his claim. He completed an Occupational Safety and Health Administration (OSHA) Injury and Illness Incident Report (OSHA Form 301) *via* ECOMP on December 14, 2017 and received a seven-digit ECN number, which he believed was his OWCP claim number. Appellant explained that he was not familiar with the online process and had not realized that he had not filed the Form CA-1 until he was informed by one of his medical providers that OWCP's claim number is nine digits long. He contacted his OWCP representative who informed him that he had filed the OSHA Form 301, but still needed to file a Form CA-1. Appellant filed the Form CA-1 on February 9, 2018 and received his OWCP claim number. He argued that the ECOMP filing process was very confusing and that he did initiate his workers' compensation claim within 30 days of the original injury. In support of his claim, appellant submitted e-mails, which showed his inquiries regarding the filing process, as well as ECOMP notification receipts for the filing of his OSHA Form 301 on December 14, 2017 and subsequent filing of his Form CA-1 on February 9, 2018.

By decision dated September 20, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁴ 5 U.S.C. § 8101 *et seq.*

⁵ 20 C.F.R. § 501.3(e).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.⁹

ANALYSIS

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

The last merit decision of record was OWCP's March 15, 2018 decision which denied appellant's request for continuation of pay. Following the March 15, 2018 decision appellant requested reconsideration on April 11, 2018 -- a period of 27 days after the merit decision.

By decision dated September 20, 2018, OWCP found that the evidence of record was insufficient to warrant merit review of the decision dated March 15, 2018 as the evidence of record was irrelevant or immaterial and had no bearing on the issue of payment of COP benefits. This decision was issued 162 days after appellant's request for reconsideration. In order to preserve a claimant's right to timely request reconsideration, OWCP has a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.¹⁰ Its procedures provide that when a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to a review of the merits of the case by the Board, OWCP should conduct a merit review.¹¹

As OWCP's September 20, 2018 decision was issued more than 90 days after it received appellant's request for reconsideration, the question becomes whether the delay has jeopardized his right to a review of the merits of the case by the Board.¹² OWCP has determined that there is

⁶ 20 C.F.R. § 10.606(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ 20 C.F.R. § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also D.P.*, Docket No. 19-0001 (issued June 13, 2019); *M.S.*, 59 ECAB 231 (2007).

⁹ 20 C.F.R. § 10.608(b); *S.M.*, Docket No. 18-1158 (issued January 16, 2019); *J.F.*, Docket No. 17-1508 (issued March 28, 2018); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2 (October 2011).

¹¹ *Id.* at Chapter 2.1602.7.

¹² *See L.T.*, Docket No. 18-1311 (issued April 19, 2019).

no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board would have expired within the 90-day period following its receipt of the claimant's reconsideration request.¹³ The Board has considered whether the 180-day time limit for requesting review by the Board expired within the 90-day period following OWCP's receipt of appellant's reconsideration request.¹⁴

Appellant filed his request for reconsideration on April 11, 2018 and 162 days lapsed from the date of his request to the date of OWCP's nonmerit decision. As appellant's request for reconsideration was made 27 days following the last merit decision, the total period from the last merit decision to the September 20, 2018 nonmerit decision was 189 days. Therefore, the Board finds that because OWCP issued its decision more than 90 days after receipt of the reconsideration request, and because a total of 189 days had passed from the last merit decision, appellant was denied the right to an appeal to the Board based upon a merit review.

The Board finds that this case shall be remanded to OWCP to conduct a review of the merits of appellant's claim to be followed by the issuance of an appropriate decision.

CONCLUSION

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

¹³ *Id.*; see also *C.L.*, Docket No. 10-1483 (issued May 12, 2011).

¹⁴ See *G.B.*, Docket No. 16-1485 (issued January 6, 2017).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: September 3, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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