

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

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| C.B., claiming as widow of S.B., Appellant |) | |
| |) | |
| and |) | Docket No. 19-0866 |
| |) | Issued: September 17, 2019 |
| DEPARTMENT OF VETERANS AFFAIRS, |) | |
| WAINWRIGHT MEMORIAL MEDICAL |) | |
| CENTER, Walla Walla, WA, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 18, 2019 appellant, through counsel, filed a timely appeal from a February 20, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision on the schedule award claim, dated March 26, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation

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.

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 the employee's schedule award claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 10, 2013 the employee, then a 45-year-old housekeeping aid supervisor, filed a traumatic injury claim (Form CA-1) for a lower back injury that he allegedly sustained when lifting a desk while in the performance of duty on March 19, 2013. On March 4, 2014 OWCP accepted the employee's claim for left thoracic or lumbosacral neuritis.

The employee underwent several OWCP-approved back surgeries, including L2-3 microdiscectomy with L3-4 laminectomy in October 2014, anterior lumbar interbody and posterolateral arthrodesis at L1-2, L2-3, and L3-4, posterior spinal instrumentation at L1-S1, laminectomies at L1-L5 to S1 for decompression in January 2016; and hardware removal and revision with posterolateral fusion at L4-5, L5-S1 in August 2016.

OWCP subsequently expanded acceptance of the claim to include postlaminectomy syndrome.

The employee received wage-loss on the supplemental rolls for intermittent periods of total disability beginning February 5, 2016 until he returned to part-time limited duty for six hours per day on October 27, 2016.

On August 1, 2017 the employee filed a claim for a schedule award (Form CA-7).

OWCP received an April 4, 2017 note by Dr. John B. Hoehn, a family practitioner. Dr. Hoehn reported that the employee had reached maximum medical improvement (MMI).

The employee also submitted a June 29, 2017 electromyography (EMG) and nerve conduction velocity (NCV) study by Dr. Michael Turner, Board-certified in physical medicine and rehabilitation. Dr. Turner reported normal studies with no evidence of peripheral neuropathy.

In reports dated August 15, 2017 to February 19, 2018, Dr. Craig Flinders, a Board-certified anesthesiologist, related the employee's complaints of chronic back pain for many years. He indicated that the employee had three surgical procedures over the last two and one-half years with only minimal improvement in pain and function. Upon examination of the employee's back,

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 20, 2019 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.*

Dr. Flinders observed moderate paraspinous tenderness in the same region and positive Patrick's test bilaterally. He diagnosed genetically predisposed degenerative joint disease with discogenic lumbar radiculopathy. Dr. Flinders opined that the employee had maximized conservative treatment and recommended surgery to decompress the spine.

On February 27, 2018 the employee underwent OWCP-approved decompression of spinal cord, nerve root, including laminotomy, partial facetectomy, foraminotomy, discectomy, and/or excision of herniated intervertebral disc. He stopped work and OWCP paid the employee wage-loss compensation on the supplemental rolls for total disability beginning February 27, 2018.

By decision dated March 26, 2018, OWCP denied the employee's schedule award claim. It found that the medical evidence of record was insufficient to establish that his accepted March 19, 2013 employment injury had reached MMI. OWCP noted that the evidence of record indicated that the employee needed surgery.

Following the decision, OWCP received reports dated March 1 to 21, 2018 from Dr. Andrew Park, a Board-certified family practitioner, who related the employee's complaints of persistent low back pain, left testicle pain, and numbness and pain in his left thigh. Examination of the employee's back revealed decreased range of motion and mild tenderness in the lower paraspinal area. Dr. Park diagnosed lumbar radiculopathy, thoracolumbar radiculopathy, and myofascial pain syndrome.

In an April 16, 2018 report, Dr. Flinders reported examination findings of marked tenderness at the right sacroiliac (SI) region and into the right paraspinous musculature. He diagnosed postlaminectomy pain syndrome with chronic back pain, left T12 radicular pain, and myofascial pain.

On April 17, 2018 the employee resumed work in a full-time, limited-duty capacity.

In reports dated May 2 to August 2, 2018, Dr. Park recounted the employee's medical treatment for his complaints of persistent low back pain, left testicle pain, and left thigh pain and numbness. He provided examination findings and diagnosed thoracolumbar radiculopathy, lumbar radiculopathy, and myofascial pain syndrome.

In a June 19, 2018 hospital record, Dr. Christopher Romey, a Board-certified emergency medicine physician, indicated that the employee was treated in the emergency room for complaints of back pain and sciatica. Examination of the employee's lumbar spine demonstrated paraspinal muscle spasm and tenderness to palpation. Dr. Romey diagnosed lumbar strain and left side sciatica.

In a June 20, 2018 urgent care note, Dr. Eric R. Schwartzkopf, a Board-certified internist, described the employee's history of chronic back issues after an acute back strain injury at work. He reported examination findings of mild lumbosacral midline tenderness and mild bilateral lumbar paraspinous tenderness to palpation. Dr. Schwartzkopf diagnosed acute midline low back pain with left-sided sciatica.

On August 7, 2018 the employing establishment informed OWCP that the employee had died on August 6, 2018.

By letter dated August 10, 2018, OWCP requested that the employee's estate complete an enclosed questionnaire in order to determine to whom the amount in disability compensation due to the employee should be paid.

On August 28, 2018 appellant filed a claim for continuance of compensation under FECA (Form CA-12) requesting that OWCP provide continuance of compensation benefits on behalf of the deceased employee to her as the surviving spouse.⁴

By letter dated November 15, 2018, counsel contended it was his belief that appellant was entitled to proceed with the employee's schedule award claim.

By letters dated November 21, 2018, OWCP informed counsel that the employee's schedule award claim was denied on March 26, 2018. It noted that the employee had failed to obtain a rating examination in support of his schedule award claim. OWCP enclosed a copy of the February 16, 2018 development letter and March 26, 2018 denial decision.

By letter dated January 2, 2019, counsel asserted that since the employee was now deceased, his death was "absolute proof" that he had reached MMI.

On February 6, 2019 appellant, through counsel, requested reconsideration of the March 26, 2018 decision. He alleged that the death of the employee placed him at MMI and argued that OWCP had a duty to develop the schedule award. Counsel noted that he was enclosing a MMI statement and EMG findings, not previously submitted.

OWCP received an April 4, 2017 note by Dr. Hoehn and a June 29, 2017 EMG/NCV study report by Dr. Turner.

By decision dated February 20, 2019, OWCP denied appellant's request for reconsideration of the merits under 5 U.S.C. § 8128(a). It found that appellant's reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review of the schedule award claim.

LEGAL PRECEDENT

Section 8128(a) of FECA 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 compensation at any time on his own motion or on application.⁵

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

⁴ Appellant filed a claim for compensation by widow, widower, and/or children (Form CA-5) on September 17, 2018.

⁵ 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

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 also 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 OWCP improperly denied appellant's request for reconsideration of the merits of the employee's schedule award claim pursuant to 5 U.S.C. § 8128(a).

In her February 6, 2019 reconsideration request, counsel argued that the employee's death placed him at MMI and that OWCP had a duty to develop the schedule award. The Board initially notes that in its March 26, 2018 decision, OWCP denied the employee's schedule award finding that the medical evidence of record was insufficient to establish that the employee had reached MMI. Accordingly, appellant's first opportunity to address OWCP's reasoning was in her February 6, 2019 reconsideration request. The Board finds that counsel's argument that the employee's death demonstrated that his condition had reached MMI and that OWCP should, therefore, develop the medical record relates to the underlying issue of whether the employee is entitled to a schedule award for his March 19, 2013 employment injury. The Board finds that this is a relevant legal argument made for the first time on reconsideration. As appellant advanced a legal argument relevant to her claim and not previously considered by OWCP, such argument warrants further merit review of appellant's claim.¹⁰

Thus, the Board will remand the case to OWCP to properly consider appellant's claim and issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of the employee's schedule claim pursuant to 5 U.S.C. § 8128(a).

⁶ 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).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *See* *Q.M.*, Docket No. 18-0345 (issued May 17, 2019); *D.M.*, Docket No. 16-1754 (issued January 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2019 decision of the Office of Workers' Compensation Programs is set aside, and this case is remanded for further action consistent with this opinion.

Issued: September 17, 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