

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

M.S., Appellant)	
)	
and)	Docket No. 19-1450
)	Issued: April 14, 2020
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Nashua, NH,)	
Employer)	
)	

Appearances:
Paul Bureau, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 24, 2019 appellant, through his representative, filed a timely appeal from a January 17, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from OWCP's last merit decision, dated June 25, 2018, 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 December 26, 2017 appellant, then a 34-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 19, 2017 he injured his back when he was lifting, bending, and twisting when emptying cans while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant was injured in the performance of duty and had stopped work on December 21, 2017.

A December 23, 2017 state workers' compensation medical form by Dr. Peter Gould, an osteopath specializing in family medicine, noted that appellant reported low back pain due to an injury, which was listed as December 20, 2017. Dr. Gould diagnosed an acute low back strain. He also indicated that appellant should not work until December 25, 2017.

In a December 26, 2017 note, Dr. Shanta Mahmudi, Board-certified in family medicine, noted that appellant should be excused from work until "January 5, 201[8]."³

In a January 17, 2018 development letter, OWCP advised appellant that when his claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work, and since the employing establishment had not controverted continuation of pay or challenged the case, a limited amount of medical expenses were administratively approved and paid. It noted that it had reopened the claim for formal consideration because he had not returned to work in a full-time capacity. OWCP informed him that additional factual and medical evidence was required to establish his claim. It advised appellant of the type of factual and medical evidence necessary to establish his claim and attached a questionnaire for his completion. OWCP afforded him 30 days to submit the requested evidence.

A January 5, 2018 duty status report (Form CA-17) containing an illegible signature noted an injury date of December 18, 2017 and diagnoses of low back pain and muscle spasm.

A January 10, 2018 x-ray of appellant's lumbar spine interpreted by Dr. Fred Riester, a Board-certified diagnostic radiologist, noted that there was no evidence of a fracture or subluxation. Dr. Riester observed that there was congenital wedging of vertebrae of the lower thoracic spine and incidental pelvic phleboliths. No significant arthritic changes were identified, and there were no significant changes compared to appellant's December 21, 2015 diagnostic imaging.

A January 22, 2018 note from Dr. Mahmudi noted that appellant should perform light-duty work until February 10, 2018.

³ Although the December 26, 2017 report included a return to work date of January 5, 2017, the Board concludes that this is a typographical error and should read January 5, 2018.

Dr. Mahmudi indicated in a February 16, 2018 letter that she was aware that appellant was lifting heavy weights during the course of his workday when he began to feel pain in his back, and that for several weeks prior to the date of his injury he had not performed physical work as a part of his regular job duties. She diagnosed back pain related to his injury. Dr. Mahmudi further indicated that appellant had symptoms of lumbar radiculopathy from a probable disc injury. She explained that the type of injury that appellant sustained was commonly caused by the kind of physical exertion he engaged in when lifting heavy weights and pushing heaving containers, and that there was no other compelling cause of his injury. Dr. Mahmudi concluded that the diagnosis of appellant's injury was consistent with appellant's work activities on the date of his injury.

On February 16, 2018 appellant completed OWCP's questionnaire and provided a narrative statement detailing his low back symptoms following December 19, 2017.

By decision dated February 26, 2018, OWCP denied appellant's traumatic injury claim finding that the evidence of record failed to establish a causal relationship between the accepted December 19, 2017 employment incident and his medical condition. It explained that it had received and reviewed Dr. Mahmudi's February 16, 2018 report, but that report had diagnosed pain, which was a symptom, and was thus insufficient to establish causal relationship.

On March 20, 2018 appellant requested a review of the written record by an OWCP hearing representative.

In a March 12, 2018 letter, Dr. Mahmudi noted that in her February 16, 2018 letter she inadvertently erred as she diagnosed back pain. She noted that the correct diagnosis was lumbar radiculopathy, which she had listed as a symptom in her previous letter.

By decision dated June 25, 2018, the hearing representative affirmed the February 26, 2018 OWCP decision finding that the evidence of record failed to establish a causal relationship between appellant's accepted December 19, 2017 employment incident and his diagnosed conditions. She noted that OWCP's prior decision had noted the evidence of Dr. Mahmudi only diagnosed pain and that pain is not a diagnosis. The hearing representative noted that on reconsideration new evidence included a March 12, 2018 report by Dr. Mahmudi, but found that the report was insufficient to establish the claim as it merely corrected the error as to the proper diagnosis and did not provide medical rationale on the issue of causal relationship.

Appellant submitted a January 5, 2018 order from Dr. Mahmudi for a lumbar spine x-ray. OWCP also received February 23, 2018 physical therapy records.

On October 23, 2018 appellant requested reconsideration. In his reconsideration request he indicated that he had previously provided a letter on the issue of causal relationship, dated February 16, 2018, from Dr. Mahmudi, but that report had not been cited to or considered by the hearing representative in her decision. Appellant explained that he was resubmitting the February 16, 2018 report and asked that OWCP consider both of Dr. Mahmudi's reports on reconsideration.

By decision dated January 17, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim finding that his argument that evidence had been omitted from review

by the hearing representative was insufficient to warrant a merit review as the evidence submitted on reconsideration was repetitious of evidence previously of record and considered.

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.⁴

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.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 it 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 improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In support of his reconsideration request appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he submit relevant and pertinent new evidence not previously considered by OWCP. Therefore, appellant is not entitled to a merit review based on the first or third requirements under 20 C.F.R. § 10.606(b)(3).⁹

⁴ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *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). The one-year period begins on the next day after the date of the original contested decision. 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.

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).

⁹ *Supra* note 5.

In his October 23, 2018 reconsideration request appellant argued that the hearing representative failed to cite to or consider Dr. Mahmudi's February 16, 2018 report. He explained that he was resubmitting the February 16, 2018 report and asked that OWCP consider both of Dr. Mahmudi's reports on reconsideration. The Board finds that this argument is new and relevant. The underlying issue on reconsideration of appellant's claim was causal relationship. The initial denial of his claim cited to and considered Dr. Mahmudi's February 16, 2018 report, but found it lacked probative value as did not contain a medical diagnosis. However, the February 16, 2018 report contained Dr. Mahmudi's opinion as to causal relationship, but the opinion was not considered in the initial denial because the report in which the opinion was contained was found deficient on the sole basis that it failed to contain a proper medical diagnosis. The hearing representative indicated in her decision that Dr. Mahmudi's evidence of record at the time of the initial denial had been found insufficient, but she did not cite to a specific report in making her finding. Thus, as asserted by appellant, it is not specifically set forth in the last merit decision whether the hearing representative considered the merits of the February 16, 2018 report as amended by the March 12, 2018 report on the issue of causal relationship. As the February 16, 2018 report provided an opinion on the issue of causal relationship, the sufficiency of which had not been ruled upon, appellant's argument that the two reports should have been read together and adjudicated such that the basis for the hearing representative's findings on the issue of causal relationship were clear to appellant, is a new and relevant legal argument. Thus, the Board finds that appellant is entitled to a merit review based on the second requirement under 20 C.F.R. § 10.606(b)(3).¹⁰

CONCLUSION

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 *Supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 14, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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