

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

_____)	
T.K., Appellant)	
)	
and)	Docket No. 19-1700
)	Issued: April 30, 2020
U.S. POSTAL SERVICE, POST OFFICE,)	
Jenison, MI, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 8, 2019 appellant filed a timely appeal from a June 6, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated April 12, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of the claim.

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).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² 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 September 30, 2013 appellant, then a 53-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 25, 2013 he injured his right thigh and upper leg when he missed a step and jammed his leg while in the performance of duty. He stopped work on September 28, 2013.

By decision dated December 4, 2013, OWCP denied appellant's claim. It found that he had established that the incident occurred as alleged, however, the medical evidence of record did not contain a medical diagnosis in connection with the incident. OWCP concluded that the requirements had not been met to establish an injury as defined by FECA.

On December 19, 2013 appellant requested reconsideration and submitted additional evidence.

By decision dated February 20, 2014, OWCP modified of its December 4, 2013 decision finding that the medical evidence provided a diagnosis of a medical condition. However, the claim remained denied as the medical evidence of record was insufficient to establish that the diagnosed condition was causally related to the accepted employment incident.

On March 20, 2014 appellant requested reconsideration and submitted additional evidence.

In a March 10, 2014 report, Dr. Brian P. Giersch, a Board-certified physiatrist, noted appellant's history of injury. He related that appellant was descending a short series of stairs while working, he missed one of the steps, lost his balance, and experienced a jolt to his right leg and back as he caught himself from falling. Dr. Giersch provided appellant's physical examination findings and diagnosed "status post near fall with resultant right paralumbar, gluteal, and right lower extremity discomfort/sensory disturbance."

By decision dated June 2, 2014, OWCP denied modification of the February 20, 2014 decision. It found that the medical evidence of record was insufficient to establish that appellant's diagnosed condition was causally related to the accepted employment incident.

On June 9, 2014 appellant requested reconsideration.

Dr. Giersch continued to treat appellant and submit progress reports.

² Docket No. 15-1248 (issued June 14, 2016).

In a June 6, 2014 report, Dr. Giersch provided an opinion on causal relationship, relating that:

“Review of my notes would in fact, suggest that my differential diagnosis includes a lateral femoral cutaneous neuropathy and perhaps referred phenomenon from the back or hip. My ongoing diagnosis at this point is that of lateral femoral cutaneous neuropathy. Again, this would be the most likely etiology for his symptoms, which remains fairly well confined to the lateral thigh region at this time. This is related, by history provided by [appellant], to his near fall injury, which originally brought him to my medical attention.”

By decision dated August 25, 2014, OWCP denied modification of the prior decision. It found that, while Dr. Giersch attempted to satisfy the issue of causal relationship by opining that the condition was related “to the near fall injury,” he failed to explain how he arrived at this conclusion.

On December 11, 2014 counsel requested reconsideration.

In a November 20, 2014 report, Dr. Giersch indicating that appellant had a “misstep while working on September 25, 2013.” He advised that a magnetic resonance imaging scan of the lumbosacral spine revealed moderate congenital stenosis, superimposed degenerative changes, facet arthrosis, disc bulging, epidural lipomatosis, and possible ankylosing spondylitis. Dr. Giersch further advised that electromyography (EMG) scan studies were mildly abnormal with mild irritability in the paraspinal muscles. He diagnosed lateral femoral cutaneous neuropathy. Dr. Giersch opined that, “In my medical opinion, the facts of injury are the direct and proximate cause of the diagnosis that I cited above. This is based on reasonable medical probability. There may be other causes for this medical problem, but one of the causes is clearly the activities of work described [by] the patient and described above.”

By decision dated March 5, 2015, OWCP denied modification of its prior decision.

On May 13, 2015 appellant, through counsel, timely appealed to the Board.

By decision dated June 14, 2016, the Board affirmed the March 5, 2015 OWCP decision, finding that the medical evidence of record was insufficient to establish causal relationship between appellant’s medical condition and the accepted September 25, 2013 employment incident.³

On December 19, 2016 appellant, through counsel, requested reconsideration and submitted new medical evidence.

In a December 1, 2016 report, Dr. Giersch indicated that he would like to clarify his prior reports. He indicated that, “It is my opinion that [appellant] did in fact sustain a work-related injury while at work back in 2014 when [appellant] had a misstep while walking down a short series of stairs. This resulted in a sudden onset of symptoms not only in the right thigh, but also

³ *Id.*

the buttock, and low back area. I am unable to provide further details or specifics about precise mechanisms of injury. This would require significant speculation on my part.” Dr. Giersch explained that appellant had ongoing symptomatology. He further opined that “[p]rior to the onset of these symptoms, [appellant] was not experiencing any of these symptoms, and I have no reason to question the veracity of his statements up until this day.”

By decision dated March 7, 2017, OWCP denied appellant’s request for reconsideration of the merits of his claim. It found that Dr. Giersch’s December 1, 2016 report was speculative and repetitive of his previous reports.

On June 13, 2017 appellant, through counsel, again requested reconsideration and submitted a copy of a June 6, 2014 report from Dr. Giersch, which was previously of record and reviewed by OWCP.

By decision dated September 8, 2017, OWCP denied modification, finding that the medical evidence of record was insufficiently rationalized to establish causal relationship.

On January 22, 2018 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a January 3, 2018 report, Dr. Giersch noted that he had previously provided an incorrect date of injury in his December 1, 2016 report. He explained that he reviewed his notes from the initial consultation on March 10, 2014 and that the “injury did in fact as indicated by the patient on our evaluation form occurred on September 24, 2013.”

By decision dated April 12, 2018, OWCP denied modification of the September 8, 2017 decision.

On August 13, 2018 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a May 18, 2018 report, Dr. Min Zhu, a Board-certified neurologist, indicated that she had performed nerve conduction velocity and EMG testing, which was within normal limits.

By decision dated November 9, 2018, OWCP denied appellant’s request for reconsideration of the merits of his claim. It found that the report of Dr. Zhu had no bearing on the issue and therefore was irrelevant and immaterial.

On April 11, 2019 appellant again requested reconsideration and submitted additional medical evidence.

In an April 3, 2019 report, Dr. Giersch repeated appellant’s history of injury. He related that appellant was felt to have probable right femoral cutaneous neuropathy as well as back pain, with intermittent sensory symptoms in his foot of unclear significance. Dr. Giersch opined that it was his opinion “within a reasonable degree of medical probability, that these ongoing symptoms are a direct result of the injuries sustained while working on September 25, 2013 when [appellant] sustained a near fall and misstep. He explained: “Specifically, [appellant] perhaps sustained some type of stretch injury to the right lateral femoral cutaneous nerve, as well as some jarring of the

low back which likely aggravated some underlying degenerative changes which has resulted in some back discomfort.” Dr. Giersch further explained that appellant was not experiencing any of these symptoms prior to this work-related injury from September 25, 2013.

By decision dated June 6, 2019, OWCP denied appellant’s request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right. OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.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 A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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 When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁷ In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant’s application for reconsideration and any evidence submitted in support thereof.¹⁰

⁴ 20 C.F.R. § 10.607.

⁵ *Id.* at § 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). *Id.* at Chapter 2.1602.4b.

⁶ *Id.* at § 10.606(b)(3).

⁷ *Id.* at § 10.608(a), (b).

⁸ *See S.F.*, Docket No. 18-0516 (issued February 21, 2020); *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *S.S.*, Docket No. 18-0647 (issued October 15, 2018).

¹⁰ *P.L.*, *supra* note 8; *Annette Louise*, 54 ECAB 783 (2003).

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Thus, he is not entitled to a review of the merits based on the first and second requirements under 20 C.F.R. §10.606(b)(3).

However, with respect to the third above-noted requirement under 20 C.F.R. § 10.606(b)(3), appellant submitted pertinent new and relevant medical evidence in support of his request for reconsideration in the form of an April 3, 2019 report from Dr. Giersch. In addition to his consistent conclusions that appellant's ongoing symptoms were causally related to the accepted September 25, 2013 employment incident, he added the following explanation: "Specifically, he perhaps sustained some type of stretch injury to the right lateral femoral cutaneous nerve, as well as some jarring of the low back which likely aggravated some underlying degenerative changes which has resulted in some back discomfort."

The Board has held that, in support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof. He or she need only submit relevant and pertinent evidence not previously considered by OWCP.¹¹ The Board finds that Dr. Giersch's April 3, 2019 report constitutes pertinent new and relevant evidence, which directly addresses the issue of causal relationship.¹² Appellant's request for reconsideration therefore met the third standard for obtaining merit review of his case under 20 C.F.R. § 10.606(b)(3). Accordingly, he is entitled to a merit review.

The Board will set aside OWCP's June 6, 2019 decision denying appellant's request for reconsideration and will remand the case for a merit review. After any necessary further development, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

¹¹ See *Helen E. Tschantz*, 39 ECAB 1382 (1988); see also *C.L.*, Docket No. 19-1440 (issued March 19, 2020) n.14; *S.H.*, Docket No. 17-1101 (issued August 3, 2017).

¹² See *H.D.*, Docket No. 18-0865 (issued February 10, 2020); *S.H.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT the June 6, 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 30, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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