

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

_____)	
H.E., Appellant)	
)	
and)	Docket No. 19-1824
)	Issued: April 3, 2020
DEPARTMENT OF VETERANS AFFAIRS,)	
NEW YORK REGIONAL OFFICE,)	
New York, NY, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 23, 2019 appellant filed a timely appeal from a February 25, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated February 22, 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 over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the February 25, 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 evidence for the first time on appeal. *Id.*

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 January 24, 2017 appellant, then a 41-year-old veterans' service representative, filed a traumatic injury claim (Form CA-1) alleging that on January 18, 2017 he injured his neck and tailbone when he attempted to sit down and his chair slipped and he fell hitting the base of his "tailbone/back" while in the performance of duty. On the reverse side of the claim form the employing establishment noted that he stopped work on January 18, 2017 and resumed work on January 25, 2017.

Appellant was treated at an employing establishment facility on January 19, 2017 and was held off work for two days. A January 23, 2017 follow-up note containing an illegible signature indicated that appellant's diagnosis was mild cervical spine degenerative disc disease after a fall.

February 2, 2017 urgent care notes signed by Dr. Herman Chiu, Board-certified in internal medicine, indicated that appellant fell at work and presented with back pain, neck pain, right leg weakness, and intermittent loss of bowel sphincter function. Appellant related that he had a prior back injury from military service, a herniated disc, and a hemangioma near his spine. Dr. Chui conducted a physical examination and diagnosed lumbago, muscles spasms, and neuropathy.

February 6, 2017 urgent care notes signed by Dr. Faika Khan, an osteopath Board-certified in family medicine, indicated that appellant had a history of a herniated disc and back pain due to a prior injury. Dr. Khan conducted a physical examination and diagnosed neuropathy, muscle spasms, and lumbago.

A February 15, 2017 medical report from Dr. Eial Faierman, a Board-certified orthopedic surgeon, indicated that appellant presented with pain in his right hip radiating into his groin and bilateral upper and lower radiculopathy. Dr. Faierman reviewed appellant's history of injury and noted that he injured his lower back in 2006. Appellant related that his recent workplace injury exacerbated his prior lower back injury. Dr. Faierman conducted a physical examination and diagnosed cervical and lumbar spine strains. He opined that, if appellant's medical history was accurate, there was a causal relationship between appellant's complaints and his most recent injury.

In an April 13, 2017 development letter, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It explained that it reopened the claim for consideration because the medical bills exceeded \$1,500.00. OWCP related that additional evidence was required in support of appellant's claim for benefits. It requested additional factual and medical evidence and attached a questionnaire for his completion. OWCP afforded appellant 30 days for a response.

Numerous diagnostic studies dating from February 17, 2015 to May 30, 2017 were submitted to the record.

January 19, 2017 emergency room records by Dr. Shujun Xia, Board-certified in emergency medicine, indicated that appellant fell at work and complained of back pain. Appellant's history of lumbosacral radiculopathy was listed, a physical examination was conducted, and he was diagnosed with back pain. January 26, 2017 emergency room records signed by Dr. Xia indicated that he conducted a physical examination and diagnosed persistent lower back pain, which he noted that appellant started experiencing after his workplace fall.

An April 13, 2017 medical report from Dr. Faierman indicated that appellant complained of neck and back pain. Dr. Faierman reviewed appellant's recent magnetic resonance imaging (MRI) scans of the thoracic and cervical spines and electromyograms (EMGs), and nerve conduction velocity (NCV) studies, conducted a physical examination, and diagnosed a cervical spine strain, C5-6 disc herniation, C3-4 and C6-7 disc bulges, a lumbar spine strain/degenerative changes, and a T6-7 disc herniation.

An April 27, 2017 medical report by Dr. Ralph Napolitano, a chiropractor, indicated that appellant presented with neck and back pain. Dr. Napolitano noted that appellant's computerized tomography (CT) scan and x-rays were positive for subluxation and disc herniation. He noted that on January 24, 2017 appellant returned to work and reinjured himself when lifting up a box. Dr. Napolitano conducted a physical examination and diagnosed segmental and somatic dysfunction of the cervical, thoracic, and lumbar regions. He opined that appellant's January 18, 2017 workplace fall caused the subluxation in his cervical and thoracic spine and aggravated his preexisting lumbar spine injury.

On May 10, 2017 appellant signed OWCP's questionnaire's statement of certification and provided answers to its questions.

By decision dated June 22, 2017, OWCP denied appellant's traumatic injury claim, finding that the evidence of record failed to establish a causal relationship between his diagnosed conditions and the accepted January 18, 2017 employment incident. It concluded that the requirements had not been met to establish an injury or condition causally related to the accepted employment incident.

OWCP continued to receive medical evidence. A May 30, 2017 medical report by Dr. Tim Canty, Board-certified in pain medicine, indicated that appellant presented with neck and back pain, which started after his work injury. A physical examination was conducted by Dr. Canty who diagnosed displacement of cervical intervertebral disc, cervical radiculitis, thoracic spine pain, thoracic spine sprain, thoracic spine strain, thoracic or lumbosacral neuritis or radiculitis, and myalgia. Appellant continued to follow up with Dr. Canty who continued to diagnose displacement of cervical intervertebral disc, cervical radiculitis, thoracic spine pain, thoracic spine sprain, thoracic spine strain, thoracic or lumbosacral neuritis or radiculitis, and myalgia.

A June 12, 2017 medical report by Dr. Faierman indicated that appellant presented with back pain with lower extremity radiculopathy and neck pain with right extremity radiculopathy. Dr. Faierman repeated the same diagnoses as in his previous report. Appellant continued to follow

up with Dr. Faierman regarding his neck and back pain, and Dr. Faierman continued to diagnose appellant with the same diagnoses of a cervical spine strain/C5-6 disc herniation, C3-4 and C6-7 disc bulges, a lumbar spine strain/degenerative changes, and T6-7 disc herniation.

A June 26, 2017 “ancillary medical report” by Dr. Richard DeNise, a Board-certified radiologist, diagnosed segmental and somatic dysfunction of the cervical and lumbar regions after interpreting various ultrasounds.

On October 3, 2017 appellant requested reconsideration. By decision dated February 22, 2018, OWCP denied modification of its June 22, 2017 decision.

On February 19, 2019 appellant requested reconsideration. By decision dated February 25, 2019, OWCP denied his reconsideration request.

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 payment of compensation at any time on his own motion or on application.³

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.⁴

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.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3); *see also B.W.*, Docket No. 18-1259 (issued January 25, 2019).

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. *Id.* at Chapter 2.1602.4b.

⁶ *Id.* at § 10.608(a); *see also A.P.*, Docket No. 19-0224 (issued July 11, 2019).

⁷ *Id.* at § 10.608(b); *A.G.*, Docket No. 19-0113 (issued July 12, 2019).

ANALYSIS

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

In his timely reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant argument not previously considered. Accordingly, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Appellant failed to submit any evidence in support of his request for reconsideration. Therefore, OWCP was not required to open his claim for reconsideration of the merits in accordance with the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

As appellant's request for reconsideration did not meet any of the three requirements enumerated under 20 C.F.R. § 10.606(b)(3), the Board finds that OWCP properly denied his request for reconsideration without reopening the case for review on the merits.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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