

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

O.C., Appellant)	
)	
and)	Docket No. 20-1124
)	Issued: December 14, 2020
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PATROL,)	
Hebbronville, TX, Employer)	
)	

Appearances:
Aaron B. Lomax, Esq., 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On May 5, 2020 appellant, through counsel, filed a timely appeal from a January 10, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 5, 2019, 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 June 8, 2016 appellant, then a 44-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that on June 7, 2016 he sustained neck, middle back, left shoulder, and left elbow injuries when he tried to prevent a large printer on a cart he was moving from falling. He did not stop work following the injury. OWCP accepted the claim for traumatic symphysis rupture, cervical strain, cervical radiculopathy, left shoulder joint sprain, thoracic spine ligaments sprain, left elbow tendon sprain, other specified disorders of left elbow tendon, cervical spine sprain, and lumbar spine sprain. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning October 3, 2015 and on the periodic rolls beginning December 11, 2016.

On July 12, 2018 OWCP referred appellant for a second opinion evaluation, together with a statement of accepted facts (SOAF), list of questions, and medical evidence, to Dr. Douglas Porter, a Board-certified orthopedic surgeon. In a July 19, 2018 report, Dr. Porter opined that all of appellant's accepted conditions due to the June 7, 2106 employment injury had resolved and that no further medical treatment was necessary. He also indicated that appellant's accepted conditions of cervical strain and radiculopathy, thoracic sprain, and lumbar sprain had been temporarily aggravated. Dr. Porter opined that appellant had permanent work restrictions due to unrelated preexisting bilateral shoulder and left elbow conditions.

On August 17, 2018 OWCP issued a notice of proposed termination of compensation finding that the weight of the medical evidence of record established that appellant no longer suffered from any residuals or continuing disability from work stemming from his June 7, 2016 employment injury. It afforded him 30 days to submit additional evidence to refute the proposed termination of benefits.

By decision dated September 19, 2018, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective September 20, 2018, based on Dr. Porter's opinion that his accepted conditions had resolved.

In a letter dated September 25, 2018, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 5, 2019.

By decision dated April 5, 2019, OWCP's hearing representative affirmed the September 19, 2018 termination decision.

On January 3, 2020 appellant, through counsel, requested reconsideration and submitted an August 1, 2019 report from Dr. Kevin T. Smith, a Board-certified anesthesiologist, in support of his request. Dr. Smith noted appellant's history of injury, summarized diagnostic tests reviewed, performed a physical examination, and diagnosed lumbar and cervical radiculopathy,

cervicalgia, cervical spondylosis, post-traumatic stress disorder, severe supraspinatus tendinopathy tendinosis, multilevel degenerative mid and lower lumbar spine facet hypertrophy, bilateral knee pain, moderate lateral epicondylitis, moderate C5-6 joint space narrowing, patellofemoral joint chondromalacia, and right shoulder complex superior labral tear with tiny adjacent paralabral cyst. He disagreed with the conclusion that the accepted employment conditions had resolved without disability. Specifically, Dr. Smith disagreed with Dr. Porter's opinion that the June 7, 2016 employment injury caused a temporary rather than permanent aggravation of preexisting conditions and that the accepted conditions had resolved without residuals or disability.

By decision dated January 10, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.³ 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

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).

³ *Supra* note 2 at § 8128(a).

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); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

⁷ *Id.* at 10.608

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a new and relevant legal argument not previously considered. Accordingly, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).⁸

On reconsideration counsel submitted new medical evidence from Dr. Smith, which addressed the relevant issue of whether appellant's has continuing disability and the need for medical treatment on or after the termination of his wage-loss compensation and medical benefits.

The Board finds that the findings and opinions expressed in Dr. Smith August 1, 2019 report constitutes relevant and pertinent new evidence not previously considered by OWCP. This report directly addresses whether appellant has residuals or continuing disability following the termination of his wage-loss compensation and medical benefits on or after September 20, 2018.⁹ Dr. Smith provided a supportive medical opinion in favor of appellant's claim for continuing wage-loss compensation and medical benefits, and is thus relevant and pertinent new evidence in support of his claim. Appellant's request for reconsideration therefore met one of the standards for obtaining merit review of his case. Accordingly, the Board finds that he is entitled to a merit review.

The Board will therefore set aside OWCP's January 10, 2020 decision and remand the case for an appropriate merit decision.

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).

⁸ *Id.* at § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

⁹ 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. A claimant need only submit relevant and pertinent evidence not previously considered by OWCP. *See J.W., id.; M.C.*, Docket No. 17-1983 (issued August 17, 2018); *S.H.*, Docket No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this order of the Board.

Issued: December 14, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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