



## 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

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case, as set forth in the Board's prior decision, are incorporated herein by reference. The relevant facts are as follows.

On August 30, 2011 appellant, then a 28-year-old transitional employee (TE) carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his back on August 25, 2011 while in the performance of duty. He indicated that he was attacked by a dog, and that he stumbled and fell over a car. Appellant stopped work on August 26, 2011 and returned to work on August 30, 2011. OWCP accepted the claim for lumbar back sprain.

Appellant filed claims for compensation (Form CA-7) for wage loss from October 3, 2011 through January 6, 2012.

By decision dated July 18, 2016, OWCP denied appellant's claim for wage-loss compensation for disability for the period October 3, 2011 through January 6, 2012. It found that because his attendance was irregular even before the August 25, 2011 employment injury, it could not authorize payment of compensation as appellant failed to show that the removal was a result of disability after the employment injury. OWCP further found that the medical evidence of record around the time of the alleged September 25, 2011 recurrence failed to provide a rationalized explanation as to how the work stoppage was caused by a spontaneous change or worsening in the accepted lumbar strain without an intervening injury. It also noted that there was a gap in medical evidence from 2011 through 2013 and that most of the medical evidence received was from 2015 and 2016.<sup>5</sup>

On June 21, 2017 appellant requested reconsideration of OWCP's July 18, 2016 decision denying compensation for the period October 3, 2011 through January 6, 2012. By decision dated October 13, 2017, OWCP denied modification of its July 18, 2016 decision. It found that the medical evidence submitted was insufficient to establish that the accepted employment injury caused, contributed to, or aggravated the diagnosed conditions to the point of total disability for the claimed period of October 3, 2011 through January 6, 2012. OWCP additionally found that the evidence supported that appellant was terminated for cause due to attendance issues that

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<sup>4</sup> Docket No. 17-1860 (issued January 11, 2018).

<sup>5</sup> By separate decision also dated July 18, 2016, OWCP denied appellant's claim for recurrence of disability due to a change in the nature and extent of his light-duty job requirements or withdrawal of a light-duty assignment made specifically to accommodate appellant's work-related injury without misconduct. It found that appellant was removed from the job he held because his attendance was not irregular and for other causes, not because of his employment injury. On June 29, 2017 appellant requested reconsideration of OWCP's July 18, 2016 decision denying his recurrence claim.<sup>5</sup> By decision dated August 1, 2017, OWCP denied appellant's request for reconsideration. Appellant appealed to the Board. By decision dated January 11, 2018, the Board affirmed OWCP's August 1, 2017 nonmerit decision. *Id.*

occurred prior to the employment incident and was not due to disability as a result of the accepted employment incident.

On May 30, 2018 appellant requested reconsideration of the October 13, 2017 decision. Evidence received in support of his request included requests for authorization, physical therapy notes, notes regarding the scheduling of medical treatment or evaluation, and diagnostic testing. An August 7, 2017 magnetic resonance imaging (MRI) scan of the lumbosacral spine, reported small central disc protrusion at L5-S1 and loss of the normal lumbar lordosis, an August 14, 2017 MRI scan of the cervical spine noted abnormal findings, and a March 25, 2016 electromyogram and nerve conduction velocity (EMG/NCV) study, indicated abnormal findings with evidence of right sided acute to chronic C5-6 polyradiculopathy.

In a September 1, 2017 report, Dr. Ivette Ostolaza, a family practitioner, noted the history of the August 25, 2011 employment incident, appellant's medical course, and presented examination findings. A diagnosis of lumbar disc derangement, lumbar disc herniations and lumbar radiculopathy was provided.

In medical reports dated February 19, March 7, April 2, May 3, July 9, and December 6, 2018 and January 17, 2019, Dr. Mark A. Seldes, a Board-certified family practitioner, were received. He noted the August 25, 2011 employment incident, appellant's medical history, and his examination findings and diagnosed lumbar radiculopathy with bilateral lower extremity radicular symptoms in an L5-S1 distribution, cervical radiculopathy with bilateral C5-C6 radicular distribution, and bilateral carpal tunnel syndrome. Dr. Seldes also presented treatment plans.

In his February 19, 2018 report, Dr. Seldes opined that appellant was disabled from work on January 11, 2012 due to the injuries he had from the pit bull attack as well as the injury of falling into his vehicle during the attack. In his April 2 and May 3, 2018 reports, he opined that appellant was disabled on January 11, 2012 due to the injuries he suffered while at work. In his July 9, 2018 report, Dr. Seldes requested that the diagnoses of cervical radiculopathy, which occurred on the date of injury, and carpal tunnel syndrome be accepted. He explained that the carpal tunnel syndrome developed over the course of appellant's employment as a city letter carrier and his symptoms had worsened by the time of his employment incident.

By decision dated January 30, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

### **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.<sup>6</sup>

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

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<sup>6</sup> 5 U.S.C. § 8128(a); *see also A.B.*, Docket No. 18-0596 (issued August 5, 2019); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

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.<sup>7</sup>

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.<sup>8</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>9</sup> 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.<sup>10</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision.

The last merit decision in this case was OWCP's October 13, 2017 decision, which found that the medical evidence of record did not establish that the accepted employment injury caused disability during the claimed period of October 3, 2011 through January 6, 2012, and that appellant was terminated for cause due to attendance issues that occurred prior to the accepted employment incident.

Following the October 13, 2017 decision appellant requested reconsideration on May 30, 2018 and submitted additional medical evidence.

By decision dated January 30, 2019, 245 days after the reconsideration request, OWCP found that the evidence submitted with the May 30, 2018 request for reconsideration was irrelevant or immaterial to the underlying disability issue. OWCP's procedures provide a timeliness goal for issuing reconsideration decisions within 90 days from the receipt of the request.<sup>11</sup> As OWCP's January 30, 2019 decision was issued more than 90 days after it received appellant's request for reconsideration, the question becomes whether the delay has impacted appellant's ability to file a timely request for reconsideration of the merits of his case under 5 U.S.C. § 8128(a).<sup>12</sup> Had OWCP issued the reconsideration decision within its 90-day timeliness goal, appellant would have had an additional 46 days to seek review under the criteria set forth for a timely request for reconsideration with OWCP. Here, the delay has impacted appellant's ability to bring a timely request for reconsideration of OWCP's October 13, 2017 merit decision. Any further requests for reconsideration would be untimely as they would be filed more than one year following the October 13, 2017 merit decision. The standard of review for an untimely request for

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<sup>7</sup> 20 C.F.R. § 10.606(b)(3); *see A.B., id., L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>8</sup> 20 C.F.R. § 10.607(a).

<sup>9</sup> *Id.* at § 10.608(a); *see D.L.*, Docket No. 18-0449 (issued October 23, 2019); *see also M.S.*, 59 ECAB 231 (2007).

<sup>10</sup> *Id.* at § 10.608(b); *see D.L., id.; E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.2(c) (October 2011).

<sup>12</sup> *E.I.*, Docket No. 18-0634 (issued January 23, 2019) (the Board ordered a merit review where OWCP delayed its reconsideration decision more than 90 days from the receipt of the request).

reconsideration requires appellant to demonstrate clear evidence of error. The Board has repeatedly held that clear evidence of error is intended to represent a difficult standard.<sup>13</sup>

Therefore, the Board finds that this case is not in posture for decision. To preserve appellant's right to file a timely request for reconsideration this case will be remanded to OWCP for a merit review of the evidence of record followed by an appropriate decision.

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2019 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further action consistent with this decision.

Issued: January 16, 2020  
Washington, DC

Patricia H. Fitzgerald, 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

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<sup>13</sup> *P.L.*, Docket No. 18-0813 (issued November 20, 2018); *W.R.*, Docket No. 09-2336 (issued June 22, 2010).