United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 19-0873**
	)	**Issued: January 27, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Delray Beach, FL, Employer	)	

Appearances:
Joanne Wright, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On March 19, 2019 appellant, through counsel, filed a timely appeal from an October 10, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 15, 2018, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.[3]

[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.*

[3] The Board notes that following the October 10, 2018 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 additional 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 her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 11, 1997 appellant, then a 31-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she hurt her lower back when she lifted a bucket out of the back of her mail truck while in the performance of duty. She worked limited duty with restrictions. OWCP accepted appellant's claim for lumbar sprain, herniated nucleus pulposus (HNP) at L5-S1, and displacement of lumbar intervertebral disc without myelopathy. On July 21, 1999 appellant underwent a microsurgical discectomy at L5-S1 with a hemilaminotomy. She stopped work and OWCP paid wage-loss compensation for total disability on the daily rolls beginning July 19, 1999. On September 24, 2010 appellant returned to work in a full-time, limited-duty capacity.[4]

Appellant continued to receive medical treatment. In a May 15, 2014 report, Dr. Lichtblau indicated that appellant was evaluated for complaints of continued flare-ups of chronic low back pain. Upon examination of appellant's lumbar spine, he observed tenderness to light palpation along her lumbar paraspinal muscles. Dr. Lichtblau listed diagnoses of HNP at L5-S1, secondary to injuries sustained in a work-related September 19, 1997 accident, history of recurrent HNP at L5-S1, status post microdiscectomy at L5-S1, status post anterior cervical discectomy and fusion at L5-S1 on July 21, 1999, history of L5-S1 radiculopathy, history of lumbar myofascial pain syndrome, history of postoperative changes at her L5-S1 spinal level bilaterally with neural foraminal narrowing and an annual tear, history of chronic left L4 and L5 radiculopathy, history of bulging disc at L3-4, history of broad-based disc protrusion at L4-5, and history of mild grade 1 retrolisthesis with spondylolytic bulge and central canal stenosis at L5-S1. He indicated that appellant was able to continue to work with restrictions.

On August 12, 2014 appellant was treated in a hospital emergency department and submitted hospital records by Dr. Steven Bradley Keehn, an osteopathic physician specializing in emergency medicine. Dr. Keehn recounted that on that day appellant was bending over doing dishes when she hurt her lower back. He noted appellant's history of chronic back pain and reported examination findings of decreased range of motion, midline tenderness, and muscle spasm of the lumbar spine. Dr. Keehn indicated impressions of status post anterior fusion of the L5-S1 space, and grade 1 retrolisthesis L5 and S1.

An August 12, 2014 lumbar spine computerized tomography (CT) scan report revealed status post anterior fusion at L5-S1 disc space and grade 1 retrolisthesis unchanged from prior study.

In an August 19, 2014 report, Dr. Lichtblau recounted that approximately one week ago, appellant bent over to get something from the dishwasher when she felt a severe, sharp pain in her

[4] In a March 30, 2000 functional capacity evaluation report, Dr. Craig H. Lichtblau, Board-certified in physical medicine and rehabilitation, indicated that appellant could work full time with restrictions of lifting up to 50 pounds infrequently and 25 pounds frequently, no kneeling, squatting, running, or jumping, and ability to take breaks in order to change positions as needed.

lower lumbar region. He conducted an examination and indicated that appellant was excused from work for the next two weeks. Dr. Lichtblau also completed an attending physician's report (Form CA-20) and duty status report (Form CA-17), which noted the September 11, 1997 work-related injury and diagnoses of HNP at L5-S1, status post lumbar fusion at L5-S1, and status post dorsal column stimulator.

On August 27, 2014 appellant began physical therapy treatment and submitted several physical therapy treatment notes.

In an October 1, 2014 report, Dr. Jason Billinghurst, a Board-certified orthopedic surgeon, related appellant's complaints of back pain. He reviewed appellant's history and noted lumbar examination findings of decreased ROM. Dr. Billinghurst diagnosed lumbago and thoracic/lumbar radiculitis. He indicated that appellant continue working light duty.

In reports dated October 14, 2014 to January 29, 2015, Dr. Lichtblau indicated that appellant was working four hours a day secondary to her "exacerbated low back pain." He conducted an examination and listed his diagnostic impressions similar to his May 15, 2014 report. Dr. Lichtblau recommended that appellant continue working with restrictions. In January 22 and 29, 2015 reports, he noted that appellant had been able to work five hours per day. Dr. Lichtblau indicated that appellant could continue working with restrictions up to five hours per day.

In a January 26, 2015 progress note and state workers' compensation form, Dr. David R. Campbell, a Board-certified orthopedic surgeon, discussed appellant's history of injury and noted lumbar examination findings of tenderness to palpation and restricted extension and flexion. He diagnosed lumbago, spasm of muscle, thoracic or lumbosacral radiculitis, degeneration of lumbosacral intervertebral disc, and lumbosacral spondylosis without myelopathy. Dr. Campbell reported that appellant could continue working with restrictions.

In reports dated February 16 to March 4, 2015, Dr. Lichtblau related appellant's complaints of continued lower back pain and recommended that appellant remain out of work until February 26, 2015 due to an exacerbation. In a March 4, 2015 progress note, he related that appellant had been out of work secondary to an "acute exacerbation of pain."

Appellant underwent additional diagnostic testing, including a March 31, 2015 lumbar spine magnetic resonance imaging scan, which showed interbody hardware at L5-S1 and L4-5 mid disc bulge with annular tear and no significant canal stenosis and an April 2, 2015 lumbar spine x-ray scan, which revealed postsurgical changes at L5-S1.

In progress notes dated April 3 and 7, 2015, Dr. Campbell conducted an examination and diagnosed thoracic or lumbosacral neuritis, lumbago, muscle spasms, and displacement of lumbar intervertebral disc without myelopathy.

In reports dated May 5 to July 17, 2015, Dr. Lichtblau reviewed appellant's recent diagnostic testing and related her complaints of continued chronic low back pain. He noted that appellant had been out of work since February 2015 due to chronic low back pain.

On August 19, 2015 appellant underwent lumbar fusion and decompression surgery by Dr. Campbell.

On October 12, 2015 appellant filed a claim for compensation (Form CA-7) for total disability for the period August 13 through September 26, 2014. On the subsequent time analysis form (Form CA-7a), she reported that she used eight hours of leave without pay (LWOP) from August 13 to September 6, 2014 and from September 9 to 18, 2014. Appellant noted that she worked for approximately four hours and used LWOP for approximately three hours on September 8, 22, 23, 24, and 25, 2014. She indicated that she was "out because of back."

Appellant submitted an emergency department certificate of treatment signed by an unknown provider, which indicated that appellant was treated in the emergency room on August 12, 2014 and was advised to return to light-duty work.

In an August 19, 2014 handwritten prescription note, Dr. Lichtblau recommended that appellant be excused from work for two weeks due to a "severe exacerbation of lumbar pain."

Appellant filed additional CA-7 forms for continuing disability from September 27, 2014 to February 10, 2015. In the CA-7a form dated October 21, 2015, she noted that she worked for approximately four to five hours and claimed LWOP for the remaining hours. Appellant indicated that her reason for using leave was "limited duty." She reported that she used eight hours of LWOP on October 28 and 29, 2014, from November 5 to 8, 2014, on December 2, 18, 19, and 29, 2014, and on January 26 and 27, 2015. In the November 3, 2015 CA-7a form, appellant claimed eight hours of LWOP for total disability beginning February 11, 2015. She noted her reason for leave use was "out due to back waiting on surgery."

In a November 13, 2015 development letter, OWCP informed appellant that it had received her claims for a recurrence of disability beginning August 13, 2014. It informed her that the evidence of record was insufficient to establish that she was unable to work full-time, limited duty during the claimed period and advised her of the type of medical and factual evidence needed to establish her recurrence of disability claim. OWCP afforded appellant 30 days to submit the requested information.

In a November 23, 2015 examination report, Dr. Lichtblau noted that appellant was out of work since her surgery.

In a December 15, 2015 report, Dr. Campbell conducted an examination and indicated that appellant could work part time beginning January 2016.

On January 5, 2016 appellant accepted a part-time, limited-duty job offer as a modified city letter carrier working four hours per day.

In a January 7, 2016 report, Dr. Lichtblau reviewed appellant's history and conducted an examination. He indicated that appellant could continue working four hours per day.

In a January 15, 2016 report, Dr. Campbell noted appellant's complaints of continued low back pain and left lower leg discomfort. He indicated that appellant was tolerating work for four hours per day.

On January 19, 2016 OWCP received appellant's completed questionnaire form. Appellant explained that on August 12, 2014 her back went out when she was putting a spoon in the dishwasher. She noted that she was told a few days later that her back went out because the

fusion surgery that she had in the 1990s had failed. Appellant related that she stayed home for one month before returning to part-time, limited-duty work for four hours per day.

By decision dated January 26, 2016, OWCP denied appellant's recurrence claim commencing August 12, 2014. It found that the medical evidence submitted was insufficient to establish that she was disabled due to a material change/worsening of her employment-related conditions as a result of her accepted September 11, 1997 employment injury.

On February 23, 2016 appellant requested a hearing before an OWCP hearing representative. A telephonic hearing was held on October 6, 2016.

Appellant submitted additional reports from Dr. Lichtblau dated January 28 to November 7, 2016. Dr. Lichtblau related appellant's complaints of continued, intermittent lower back pain and noted that appellant was working light duty for four hours per day.

On April 14 and 18, 2016 appellant filed CA-7 forms for wage-loss compensation for the period September 1, 2015 to January 29, 2016. In the Form CA-7a, she claimed eight hours of LWOP until January 4, 2016 and noted that she was recovering from back surgery. Appellant indicated that on January 5, 2016 she returned to work part time for four hours per day and claimed wage-loss compensation for the remaining hours.

In an October 18, 2016 letter, Dr. Lichtblau reviewed the history of injury and noted that appellant underwent L5-S1 spinal fusion surgery on July 21, 1999. He explained that, after returning to limited-duty work, appellant experienced "recurrent, acute intermittent exacerbations" of pain and discomfort and would miss work. Dr. Lichtblau recounted that in August 2014 appellant had an "episode of exacerbated, increased pain" after bending over. He indicated that a lumbar spine CT scan showed a failed fusion lumbar surgery at L4-S1. Dr. Lichtblau opined that appellant's intermittent episodes of "chronic pain and discomfort" over the years was secondary to her failed fusion. He concluded that appellant's complaints of pain and duress were a direct result of the September 19, 1997.

In a December 8, 2016 decision, an OWCP hearing representative affirmed the January 26, 2016 decision.

OWCP received medical reports and forms from Dr. Lichtblau dated December 12, 2016 to September 19, 2017, regarding his treatment of appellant for continued complaints of achiness and pain along her lower back. Dr. Lichtblau indicated that appellant was currently working part-time limited duty for five hours per day.

In a May 25, 2017 addendum letter, Dr. Lichtblau reported that appellant had developed adjacent segment disease over time after her initial September 19, 1997 surgery. He explained that Dr. Billinghurst had noted that appellant had a "nonunion of her fusion." Dr. Lichtblau clarified that on August 12, 2014 appellant sustained an exacerbation of her preexisting lumbar myofascial pain when she bent over in the kitchen, but the bending over did not cause the nonunion or the adjacent segment disease. He further explained that adjacent segment disease is a condition in which a patient showed relief of symptoms for a period of time and then developed new symptoms over time. Dr. Lichtblau reported that appellant had temporary total disability and other related symptoms, such as increased pain and nerve root irritation, as a result of the development

of her adjacent segment disease. He included medical literature regarding the development of adjacent segment degeneration of the lumbar spine.

In an October 11, 2017 decision, OWCP denied modification of the December 8, 2016 hearing representative's decision.

Appellant submitted additional medical reports from Dr. Lichtblau dated October 17 to December 19, 2017. In an October 17, 2017 report, Dr. Lichtblau related that appellant had informed him that she had missed the past few days of work due to an acute spasms and exacerbation of low back pain. In a November 16, 2017 report, he noted that appellant had increased her work week to six hours per day. Appellant also resubmitted Dr. Lichtblau's March 10 and May 25, 2017 letters.

In a January 8, 2018 letter appellant, through her union representative, requested that the acceptance of appellant's claim be expanded to include adjacent segment disease. By decision dated March 15, 2018, OWCP denied expansion of appellant's claim to include adjacent segment disease as causally related to her accepted September 11, 1997 employment injury.

OWCP received additional medical reports, CA-17 forms, and CA-20 forms from Dr. Lichtblau dated January 16 to August 14, 2018. He indicated that appellant continued to have good and bad days, depending on her level of activity. Dr. Lichtblau noted his examination findings and listed his diagnostic impressions similar to his previous reports. In a May 21, 2018 CA-17 and CA-20 forms, he indicated that appellant could work limited duty. In a July 17, 2018 report, Dr. Lichtblau opined that appellant could not have sustained adjacent segment disease from bending over in her kitchen in August 2014.

On September 21, 2018 appellant, through her representative, requested reconsideration of the October 11, 2017 decision denying appellant's recurrence claim.

Appellant submitted a September 13, 2018 report by Dr. Lichtblau. Dr. Lichtblau noted no overall significant change in appellant's condition and recounted her complaints of intermittent low back pain. He indicated that appellant was working six hours per day on average, and up to eight hours per day depending on her level of low back pain. Dr. Lichtblau noted lumbar examination findings and listed his diagnostic impressions.

In an October 10, 2018 decision, OWCP denied appellant's request for reconsideration of the merits of the 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.[5]

[5] 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).

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.[6]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[7] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[8] 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.[9]

ANALYSIS

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

Appellant disagreed with the October 11, 2017 decision and timely requested reconsideration on September 21, 2018. The underlying issue is whether appellant has met her burden of proof to establish a recurrence of total disability commencing August 12, 2014. This is a medical question. Thus, the Board must determine if appellant presented sufficient evidence or argument regarding causal relationship to warrant a merit review pursuant to 5 U.S.C. § 8128(a).[10]

In her September 21, 2018 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advanced a new and relevant legal argument not previously considered. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).[11]

Along with her reconsideration request, appellant submitted medical evidence not previously considered by OWCP. In reports dated October 17, 2017 to September 13, 2018, Dr. Lichtblau noted appellant's ongoing lumbar back symptoms and recounted that she had good and bad days, depending on her level of activity. He noted his examination findings and listed his

[6] 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).

[7] *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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. Chapter 2.1602.4b.

[8] *Id*. at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[9] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[10] *S.W.*, Docket No. 18-1261 (issued February 22, 2019); *S.V.*, Docket No. 17-2012 (issued October 18, 2018).

[11] 20 C.F.R. § 10.606(b)(3)(i), (ii); *T.B.*, Docket No. 18-1214 (issued January 29, 2019); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

diagnostic impressions. In a July 17, 2018 report, Dr. Lichtblau opined that appellant could not have sustained adjacent segment disease from bending over in her kitchen in August 2014.

The Board finds that Dr. Lichtblau's reports did not include any discussion regarding whether appellant sustained a recurrence of disability beginning August 12, 2014 due to her accepted September 11, 1997 employment injury. Dr. Lichtblau did not otherwise address appellant's inability to work during the claimed period of disability. The Board notes that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case. As appellant did not submit any medical evidence to establish that she sustained a recurrence of disability on August 12, 2014 causally related to her accepted September 11, 1997 employment injury, she is not entitled to further merit review under the third requirement of 20 C.F.R. § 10.606(b)(3).

On appeal counsel asserted that Dr. Lichtblau provided a rationalized medical opinion that appellant sustained a recurrence of disability causally related to the September 11, 1997 employment injury. As explained above, however, the Board lacks jurisdiction to review the merits of the claim. The only decision properly before the Board on this appeal is the October 10, 2018 nonmerit decision, which denied appellant's request for further merit review.

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 her request for reconsideration without reopening the case for review on the merits.[12]

CONCLUSION

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

[12] *R.C.*, Docket No. 17-0595 (issued September 7, 2017); *M.E.*, 58 ECAB 694 (2007).

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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