

FACTUAL HISTORY

On May 31, 2018 appellant, then a 47-year-old engineer, filed a traumatic injury claim (Form CA-1) alleging that, on May 18, 2018, he sustained injuries to his lower back and thighs when he was rear-ended by a third party while returning to the employing establishment while in the performance of duty. On the reverse of the claim form the employing establishment acknowledged that its knowledge of the facts about the injury agree with the statement of appellant. Appellant did not stop work.

OWCP received a May 18, 2018 police report regarding the motor vehicle incident. The report provided that appellant was involved in a hit and run caused by a third-party driver who was later arrested for driving under the influence (DUI). An attached witness statement from J.G., another driver present at the time, supported appellant's statement in the police report.

In a May 24, 2018 report, Dr. Stephanie Allen, a chiropractor, noted that appellant presented with increased pain with segmental and somatic dysfunction throughout his lower thoracic and lumbar spine, as well as sciatic-type radiating pain in his left buttock.

In a May 28, 2018 medical report, Dr. Timothy Lan, Board-certified in family medicine, noted that appellant presented with radiating pain in his lower back, buttocks, and legs related to the May 18, 2018 employment incident. He diagnosed lower back pain, muscle spasms, and left leg paresthesias. Dr. Lan recommended that appellant undergo physical therapy for treatment and estimated that his muscle strains would take four to eight weeks to improve.

In a June 6, 2018 development letter, OWCP notified appellant that the information he submitted was insufficient to support his claim. It advised him of the type of factual and medical evidence required to establish his traumatic injury claim and provided a factual questionnaire for his completion. OWCP also requested a narrative medical report from appellant's physician. It afforded appellant 30 days to respond.

Appellant provided June 12 and July 6, 2018 therapy notes from Brittney Damaceno, a physical therapist, in which she detailed appellant's treatment plan for the muscle tension in his back.

In response to OWCP's questionnaire, appellant submitted a June 19, 2018 statement in which he again explained the circumstances of the May 18, 2018 motor vehicle incident. He explained that a few days after the incident, on May 22, 2018, he began to experience tightness and soreness in his back, as well as shooting pain down his left leg. After visiting a chiropractor, the shooting pain in his leg eventually went away, however the tightness in his back remained.

By decision dated July 16, 2018, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record failed to provide a medical diagnosis causally related to the accepted employment incident. It concluded, therefore, that the requirements had not been met to establish an injury as defined under FECA.

On July 23, 2018 appellant requested reconsideration. He submitted a copy of Dr. Lan's May 28, 2018 medical report with a July 19, 2018 addendum in which he changed appellant's primary diagnosis to left lumbar radiculopathy.

By decision dated October 10, 2018, OWCP denied modification of its July 16, 2018 decision, finding that a diagnosis of lumbar radiculopathy was insufficient to establish appellant's burden of proof.

Appellant submitted a copy of the July 6, 2018 physical therapy note from Ms. Damaceno.

On April 30, 2019 appellant, through a representative of the employing establishment, requested, on behalf of appellant and the employing establishment, reconsideration of OWCP's October 10, 2018 decision. The representative contended that a medical report should not have been required pursuant to OWCP's procedures as he was "involved in a clear-cut traumatic injury" in the performance of duty, the incident resulted in a minor injury, and he did not miss time from work. She further contended that its procedures also provide that, in such claims, where fact of injury is established and is clearly competent to cause the condition described and there is no underlying condition involving the same body part, a rationalized opinion is not needed and a physician's affirmative statement is sufficient to accept the claim.

By decision dated May 30, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that he had not submitted new or relevant evidence and that section 2.805.3(c) of its procedures did not apply as there was no identifiable and visual injury.

LEGAL PRECEDENT

Section 8128(a) of FECA² 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 under 5 U.S.C. § 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received by OWCP within one year of the date of its 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

² *Supra* note 1.

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.608(b)(3); *see also H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

for reconsideration, OWCP will deny the request for reconsideration without reopening the case for 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).

In the April 30, 2019 reconsideration request, the representative of appellant and the employing establishment requested acceptance of the claim because a medical report should not have been required pursuant to OWCP's procedures as he was involved in a clear-cut traumatic injury in the performance of duty, fact of injury has been established and was competent to cause injury, and a physician supported the claim.⁸ The Board finds that this is a relevant legal argument made for the first time on reconsideration, under criteria number two under 20 C.F.R. § 10.606(b)(3). The representative set forth the facts of the claim and made citation to two provisions of the FECA procedure manual not previously asserted in support of appellant's claim. As she advanced a legal argument relevant to the claim which had not previously been considered by OWCP, she has met one of the standards for obtaining merit review of her case.⁹ Accordingly, appellant is entitled to a merit review of his claim.

The Board will therefore set aside the May 30, 2019 decision and remand the case to OWCP to properly consider appellant's claim and issue 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).

⁷ *Id.* at § 10.608(b); *H.H.*, *supra* note 4; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ OWCP procedures provide that if all of the following criteria are satisfied, a claim may be accepted without a medical report: (1) The condition reported is a minor one which can be identified on visual inspection by a lay person (*e.g.*, burn, laceration, insect sting or animal bite); (2) The injury was witnessed or reported promptly, and no dispute exists as to the fact of injury; and (3) No time was lost from work due to disability. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3(c) (January 2013). Its procedures further provide that where the fact of injury is established and is clearly competent to cause the condition described (for instance, a worker falls from a scaffold and breaks an arm), a fully rationalized medical opinion is not needed and a physician's diagnosis and an affirmative statement are sufficient to accept the claim. *Id.* at Chapter 2.805.3(d).

⁹ *See M.C.*, Docket No. 17-1983 (issued August 17, 2018); *S.H.*, No. 17-1101 (issued August 3, 2017); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 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: January 6, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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