

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

J.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Salt Lake City, UT, Employer**

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**Docket No. 20-0053
Issued: January 8, 2021**

Appearances:

*David J. Holdsworth, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On October 8, 2019 appellant, through counsel, filed a timely appeal from a June 3, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days elapsed from OWCP's last merit decision, dated May 10, 2018, to the filing of this appeal,

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 Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of her oral argument request, appellant asserted issues of fairness and due process with regard to requests for reconsideration. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is hereby denied and this decision is based on the case record as submitted to the Board.

pursuant to the Federal Employees' Compensation Act³ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.⁴

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 10, 2015 appellant, then a 57-year-old health technician, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a sprain/strain to her right wrist when she reached for a laundry bag and twisted her right wrist while in the performance of duty. OWCP initially accepted the claim for right wrist sprain, and subsequently expanded acceptance of the claim to include aggravation of a right triangular fibrocartilage complex (TFCC) tear and right tendon strain; strain of the right extensor muscle of the right arm, right hand synovitis/tenosynovitis; and sequela of a specified sprain of the right wrist. It paid appellant intermittent wage-loss compensation on the supplemental rolls as of February 10, 2016 and on the periodic rolls as of April 28, 2018.

On February 10, 2016 appellant underwent an OWCP-authorized arthroscopic right extensor carpi ulnaris tendon centralization procedure.

On March 17, 2016 Dr. Donald Coleman, an orthopedic hand surgery specialist, reviewed a limited-duty assignment for appellant as a receptionist and checked a box indicating that he found the light-duty job offer to be suitable regarding appellant's restrictions. Appellant returned to work on March 21, 2016 at full-time limited duty.

In a note dated April 7, 2016, Dr. Coleman stated that appellant presented on that date with complex regional pain syndrome (CRPS).

On July 20, 2016 OWCP referred appellant's medical record to a district medical adviser (DMA) along with a statement of accepted facts (SOAF) for consideration of whether appellant's diagnosed CRPS was causally related to the accepted work injury of September 10, 2015, and whether the accepted aggravation of appellant's right triangular fibrocartilage had resolved.

In a report dated September 1, 2016, Dr. Taisha S. Williams, Board-certified in physical medicine and rehabilitation, serving as OWCP's DMA, explained that the diagnosis of CRPS could not be accepted until at least May 10, 2017, because the condition would have to be present for at least one year. She stated that appellant's aggravation of right triangular fibrocartilage ceased as

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the June 3, 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 additional evidence for the first time on appeal. *Id.*

of April 5, 2016. Dr. Williams advised that additional diagnostic testing was required to substantiate appellant's diagnosis of CRPS.

By letter dated September 13, 2016, the employing establishment informed OWCP that appellant had accepted a temporary alternate-duty offer effective June 10, 2016 for the period through September 13, 2016, but she had thereafter resigned her appointment effective August 11, 2016.

By letter dated September 29, 2016, counsel requested that appellant's claim be accepted for CRPS as work related, and that appellant receive ongoing temporary total disability compensation benefits on the periodic rolls.

In a report dated October 31, 2016, Dr. Lingaiah Janumpally, a Board-certified neurologist, examined appellant for an initial neurology consultation. He noted that appellant was a "nurse" at the employing establishment and that appellant could not return to work due to her inability to write, document, or administer intravenous fluids. Dr. Janumpally noted that, while he agreed with the diagnosis of CRPS, appellant did not have any atrophy or wasting of the thenar or hypothenar eminence, he also concurred with the disability status as stated by Dr. Coleman.

Appellant filed claims for compensation (Forms CA-7) for disability from August 8, 2016 through April 7, 2017.

By letter dated November 17, 2016, the employing establishment requested that OWCP deny appellant's continued submission of Form CA-7 claims for compensation, as she had voluntarily resigned from her position in August 2016.

On December 27, 2016 appellant notified OWCP that her last day of work at the employing establishment would be August 11, 2016. She explained that she was resigning due to "medical/health not permitting to perform job standards or duties properly" and that her "husband's job [was] moving to California."⁵

By letter dated December 29, 2016, the employing establishment explained that appellant had voluntarily chosen to resign her on August 11, 2016. A supervisor submitted an accompanying statement in which she noted that the employing establishment was fully able and willing to accommodate appellant's work restrictions, but that she resigned to care for family in California.

On January 25, 2017 OWCP referred appellant, along with a SOAF, to a second opinion physician, Dr. Michael M. Bronshvag, a Board-certified internist and neurologist, in order to determine if appellant's diagnosis of CRPS was work related and whether appellant was totally disabled from work subsequent to August 2016 due to her work-related conditions.

In a report dated February 16, 2017, Dr. Bronshvag concluded that there were no demonstrated physical findings enabling him to diagnose CRPS. He opined that appellant was capable of continuing work in her light-duty position as of August 2016.

⁵ A notification of personnel action (Form SF-50) dated August 11, 2016 documented appellant's resignation from her position at the employing establishment. Appellant stated that she resigned for health reasons.

By decision dated April 6, 2017, OWCP denied appellant's claim for disability compensation commencing August 8, 2016 and continuing. It found that Dr. Bronshvag's opinion that she was not temporarily totally disabled when she stopped working in August 2016 represented the weight of the medical evidence.

On July 17, 2017 appellant, through counsel, requested reconsideration. Counsel argued that despite OWCP's determination that she did not meet the diagnostic criteria for CRPS and lacked a definitive diagnosis, she should receive wage-loss compensation due to her inability to hold, grasp, write, keyboard, lift, carry, push, and pull.

On July 25, 2017 Dr. Justin Heller, a Board-certified plastic surgeon, examined appellant for complaints of right wrist pain. He diagnosed unilateral primary osteoarthritis of the first carpometacarpal joint of the right hand, type 1 CRPS of the right upper limb, and a traumatic rupture of a ligament of the right wrist.

By decision dated August 16, 2017, OWCP denied modification of its April 6, 2017 decision. It found that appellant had not submitted contemporaneous medical evidence supporting a medical worsening as of August 8, 2016 prohibiting her from performing duties of her federal employment.

On October 10, 2017 appellant requested reconsideration of OWCP's August 16, 2017 decision.

OWCP subsequently received a September 19, 2017 report, wherein Dr. Heller diagnosed traumatic rupture of the right wrist, scapholunate ligament tear, CRPS type 1 of the right upper limb, and unilateral primary osteoarthritis of the first carpometacarpal joint of the right hand. Dr. Heller stated that appellant had been unable to work since August 11, 2016 due to her work-related injury.

By decision dated October 30, 2017, OWCP denied modification of its August 16, 2017 decision. It noted that the contemporaneous medical record demonstrated that Drs. Coleman and Janumpally had concurred that she should continue light-duty work.

On December 21, 2017 appellant, through counsel, requested reconsideration of OWCP's October 30, 2017 decision.⁶

By decision dated May 10, 2018, OWCP denied modification of its October 30, 2017 decision. It found that the weight of the medical evidence remained with the second opinion physician's opinion that CRPS was not a consequence of the accepted September 10, 2015 traumatic injury. OWCP further noted that there was no contemporaneous medical evidence supporting her inability to work commencing August 8, 2016 and ongoing.

OWCP continued to receive progress reports from Dr. Heller.

On July 2, 2018 OWCP referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and second opinion physician for determination of appellant's diagnoses

⁶ On January 12, 2018 appellant underwent OWCP-approved right wrist repair/revision surgery performed by Dr. Heller.

connected to the work injury, whether her work-related conditions had resolved, and whether her present level of disability was a direct result of accepted work-related conditions.

On August 29, 2018 OWCP received a report dated August 14, 2018 from Dr. Hanley, diagnosing a series of conditions including: triangular fibrocartilage tear of the right wrist, surgically treated; tenosynovitis of the extensor tendon, surgically treated; and a ganglion cyst of the volar surface, surgically treated. Dr. Hanley opined that appellant was still recovering from her most recent surgical procedure and that her work-related condition had not resolved. He noted that the initial work-related condition was a wrist sprain/strain and possibly a triangular fibrocartilage tear, that she had two procedures on the wrist that disrupted the overall mechanics and dynamics of the wrist, and that these were permanent changes that would never resolve. Dr. Hanley opined that her disability was a direct result of the accepted work-related condition. He further opined that appellant had retired from her job, but that, if she was still in the work force, she would have work limitations related to the upper right extremity.

On May 10, 2019 appellant, through counsel, requested reconsideration of OWCP's May 10, 2018 decision. Counsel argued that the lack of contemporaneous medical evidence was due to Dr. Coleman abandoning appellant; that appellant's list of accepted conditions needed to be updated; that the issue was not whether CRPS was a consequential work condition, but that whether the injuries sustained on September 10, 2015, as complicated by the 2016 surgery, rendered her unable to complete duties of her employment, whether or not those injuries developed into CRPS.

By decision dated June 3, 2019, OWCP denied appellant's request for reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁷ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁸ 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.⁹ A timely request 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.¹⁰ When a timely request for reconsideration does not meet at least one of the above-noted

⁷ This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607.

⁹ *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.

¹⁰ *Id.* at § 10.606(b)(3).

requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS

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

In the June 3, 2019 decision, OWCP reviewed a statement from counsel dated May 22, 2019, which was submitted on reconsideration. Counsel alleged that OWCP should accept CRPS as causally related to the accepted injury, and accept appellant's outstanding claims for periods of disability, even if the case was not expanded for acceptance of CRPS. The case record also indicates that OWCP directed appellant to attend a second opinion examination on August 14, 2018 with Dr. Hanley. In his August 14, 2018 report, Dr. Hanley offered an opinion regarding appellant's disability status. However, OWCP referenced, but did not review Dr. Hanley's second opinion report on reconsideration.

Because Board decisions are final with regard to the subject matter appealed,¹² it is crucial that OWCP address all relevant evidence received prior to the issuance of its final decision.¹³ The Board thus finds that this case is not in posture for decision, as OWCP did not review the second opinion report of Dr. Hanley, which was of record prior to OWCP's June 3, 2019 decision, on reconsideration.¹⁴ Once OWCP undertook development of the evidence by referring appellant to Dr. Hanley, the second opinion physician, it had the responsibility to do so in a manner that would resolve the relevant issues in the claim.¹⁵ The case shall therefore be remanded to OWCP to properly consider all the evidence submitted at the time of the June 3, 2019 decision. Following this and other such further development as deemed necessary, it shall issue an appropriate merit decision.

CONCLUSION

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

¹¹ *Id.* at § 10.608(a), (b).

¹² 20 C.F.R. § 501.6(d).

¹³ *See B.C.*, Docket No. 15-1222 (issued October 20, 2015); *William A. Couch*, 41 ECAB 548, 553 (1990).

¹⁴ *See Order Remanding Case, E.D.*, Docket No. 20-0260 (issued November 18, 2020).

¹⁵ *D.M.*, Docket No. 17-1832 (issued March 14, 2018); *Peter C. Belkind*, 56 ECAB 580 (2005).

ORDER

IT IS HEREBY ORDERED THAT the June 3, 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 8, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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