

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

A.J., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
HUNTER HOLMES McGUIRE VA MEDICAL
CENTER, Richmond, VA, Employer**

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**Docket No. 20-0926
Issued: January 26, 2021**

Appearances:

*Gloria Dunham-Anderson, for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 17, 2020 appellant, through his representative, filed a timely appeal from a February 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 July 31, 2019, to the

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.

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.³

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 November 2, 2018 appellant, then a 58-year-old laundry worker, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a broken nose, broken eye socket bone, busted lip, swollen right elbow, and head injury due to being punched in the left eye, and being continuously stomped on, punched, and kicked by a coworker while in the performance of duty. He indicated that he fell to the ground and hit his head due to the assault. Appellant stopped work on that same date. On the reverse side of the form appellant's immediate supervisor, E.W., checked a box marked "Yes" to indicate that appellant was in the performance of duty at the time of the "physical assault."

In a November 6, 2018 statement, appellant asserted that on November 2, 2018 he was gathering laundry when he was approached by a coworker, I.W., who was yelling and screaming at him. He advised that I.W. punched him in the left eye, thereby knocking him to the ground, and then proceeded to punch him and stomp on him. Appellant explained that, as he fell to the ground, his head hit a metal lift cart. He noted that his injuries included a broken nose, broken left eye socket bone, busted lip, swollen right elbow, back pain, gash in the back of his head, and facial scratches.

Appellant submitted several medical reports describing the injuries he sustained on November 2, 2018, including reports from an emergency room visit on that date during which his injuries were assessed and a posterior scalp laceration was repaired.

In a November 14, 2018 development letter, OWCP requested that appellant submit additional factual and medical evidence in support of his traumatic injury claim. In a separate November 14, 2018 development letter, it requested that the employing establishment provide additional information. OWCP afforded both parties 30 days to respond.

In an undated statement received by OWCP on December 13, 2018, appellant recounted that at 11:30 a.m. on November 2, 2018 I.W. knocked him out, causing him to fall to the ground

² 5 U.S.C. § 8101 *et seq.*

³ Appellant, through his representative, 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 appellant's oral argument request, his representative asserted that oral argument should be granted in order to explain how the employing establishment failed to protect appellant from a coworker who assaulted him on November 2, 2018. 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 denied and this decision is based on the case record as submitted to the Board.

and hit his head on a metal bucket. He asserted that there was no animosity between him and I.W. because of a personal association away from the workplace. Appellant noted that charges were filed against I.W. and indicated that, although a police investigation was carried out, he had not been provided with a copy of the investigation report. He also submitted additional medical evidence.

The employing establishment also responded to OWCP's request for additional information. In a December 5, 2018 statement, received by OWCP on December 6, 2018, E.W. indicated that at 11:30 a.m. on November 2, 2018 he observed I.W. in an angry state and as the immediate supervisor had blocked his entrance into the soiled area of the laundry in an attempt to calm him down. However, when I.W. would not calm down, he entered the soiled area of the laundry. When E.W. saw "things get out of hand" he contacted a doctor on premises and then saw coworkers running in and out of the laundry area. He noted that there was prior conflict between I.W. and appellant because I.W. had lent appellant money and appellant had not paid him back. He indicated that he had not observed the actual physical conflict between I.W. and appellant, but he saw appellant holding the back of his head with blood coming out. E.W. noted that, prior to the November 2, 2018 incident, he had prevented I.W. and appellant from conflict regarding the subject of the lending of money.

In a November 2, 2018 statement, received by OWCP on December 6, 2018, a coworker of appellant, J.P., indicated that on November 2, 2018 appellant and I.W. were having a verbal disagreement in moderately elevated tones. She noted that she was facing away from appellant and I.W. and advised that, when she turned back towards them, she heard I.W. say something about appellant getting his gun. J.P. indicated that she then saw appellant reach for his cell phone. She noted that she thought that I.W. shoved appellant and saw appellant fall flat to the floor. J.P. also noted that after appellant fell to the floor and was not moving, I.W. placed his foot onto appellant's chest until she told him to stop it.

In a statement dated November 2, 2018 from S.O., a coworker, she noted that she witnessed appellant following his injury as he was bleeding and required medical attention. She also noted that as she was assisting appellant, I.W. returned to the location and twice attempted to come into the area to do more harm to appellant so she restrained the doors so he could not enter. S.O. further noted that I.W. had "rage in his eyes," he was out of control, and he appeared very angry.

In a statement dated November 2, 2018, E.W. provided additional details regarding the date of the assault. He noted that he had encountered I.W. prior to the start of his shift and I.W. stated that he was in a "[expletive] mood" and later, upon supervising the start of the shift he noted that I.W. appeared very angry. When E.W. asked him what was wrong he replied that he was "going to kill this [expletive]". He then grabbed I.W. and took him to his office, but as he tried to talk I.W. ran away from him. E.W. returned to his office to call his superior and was thereafter notified that appellant had been assaulted by I.W.

In an undated statement, received by OWCP on December 6, 2018, L.W., a coworker, recounted that I.W. hit appellant unexpectedly as he was not looking and then hit him again while he was on the floor. L.W. stated that he had stop I.W. twice before in his workplace during working hours.

By decision dated December 20, 2018, OWCP denied appellant's November 2, 2018 traumatic injury claim finding that he had failed to establish that he was in the performance of duty at the time of the claimed injury. It found that the conflict that occurred on that date was imported into the workplace from appellant's personal life and, therefore, was not sufficiently related to his work to require coverage under FECA.

On December 28, 2018 appellant requested a hearing with a representative of OWCP's Branch of Hearings and Review.

During the hearing held on May 31, 2019, appellant testified that on November 2, 2018 he hit his head on the machine that he was using to perform his laundry tasks. He further indicated that I.W. was harassing him and trying to argue with him about money that he owed to I.W. for a few months. Appellant testified that "the guys" harassed him and that he tried to continue with his work, but that I.W. continued to harass him. He indicated that he turned his back to the machine that he was working on and advised that I.W. then hit him, causing him to hit his head on the machine as he fell. Appellant noted that he was knocked unconscious. He asserted that, although the issue discussed on November 2, 2018 was money that he owed I.W., there was no discussion that he had to pay I.W. on that date or any other specific time. Appellant testified that he went to federal court regarding the matter and that I.W. went to jail as a result of the attack.

After the hearing, a November 2, 2018 report of the employing establishment's police force was submitted into the record. In this report, the investigating officer noted that I.W. appeared at the central police station at 2:30 p.m. on November 2, 2018 and requested to tell his version of the events that had occurred that day. I.W. was read his Miranda Rights and acknowledged that he understood that there was an investigation regarding an assault for which he was accused. The investigating officer noted that I.W. indicated that he and appellant were arguing over money that he had lent to appellant when appellant's brother died. I.W. indicated that appellant made some comments to him which caused him to feel threatened and he struck appellant with an open hand as the two walked towards each other, causing appellant to fall and hit his head. The investigating officer noted that another witness, the laundry department leader, reported that appellant and I.W. were overheard arguing about money that appellant owed I.W. The witness advised that both men were heard talking about guns that they owned and hurting each other, at which time I.W. punched appellant in the face, causing him to fall and hit his head on the bar of the laundry cart dumping machine. I.W. stomped appellant in his chest after he fell. The investigating officer noted that I.W. was given a December 20, 2018 court date to appear in U.S. District Court. The report also noted that I.W. had a criminal record and had a "pending disorderly conduct case" for "fighting and threatening behavior" that occurred on September 16, 2018 at the employing establishment. The court date for the prior criminal charge was November 15, 2018.⁴

After the hearing, appellant submitted additional medical documentation in support of his claim.

⁴ The Board notes that the record presented to the Board on appeal does not contain documentation regarding the prior disorderly conduct case or its disposition, or any employing establishment documentation regarding the factual background of that prior charge and whether I.W. had threatened or committed physical harm against employees other than appellant.

By decision dated July 31, 2019, OWCP's hearing representative affirmed the December 20, 2018 decision, noting that appellant had not established that he was in the performance of duty at the time of the alleged injury on November 2, 2018.

On November 5, 2019 appellant and his representative jointly requested reconsideration of OWCP's "denial of FECA benefits." In a November 5, 2019 statement, they asserted that appellant's claim had been denied because he failed to submit sufficient medical evidence to establish that he sustained an injury as defined by FECA. Appellant and his representative requested that OWCP reconsider the decision and award appellant FECA benefits.

On November 7, 2020 OWCP requested that appellant and his representative clarify the OWCP decision for which he was requesting reconsideration.

On January 29, 2020 appellant, through his representative, requested reconsideration of the July 31, 2019 decision. They argued that appellant had provided medical evidence and documentation to support that appellant was brutally assaulted while performing his job. Appellant and his representative asserted that the employing establishment had been provided documentation indicating that I.W. had harassed, bullied, and intimidated other employees before being terminated from his job. They requested that OWCP reconsider the case and award appellant FECA benefits.

By decision dated February 10, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 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 or her own motion or on application.⁵

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

⁵ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *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).

⁶ 20 C.F.R. § 10.606(b)(3); *see M.S.*, Docket No. 18-1041 (issued October 25, 2018); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

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

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁰ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹

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).

On January 29, 2020 appellant, through his representative, filed a timely request for reconsideration of a July 31, 2019 merit decision, but the request was denied without merit review. In that request the representative asserted that reconsideration was warranted as OWCP had failed to consider evidence of record which established that I.W. had previously harassed, bullied, and intimidated other employees while at work in the employing establishment in addition to his assault of appellant. The underlying issue on reconsideration is whether appellant's injury due to an assault occurred in the performance of duty. The record contains a police report establishing that I.W. had recently been criminally charged with disorderly conduct for conduct at work against other employees and that there had been a November 15, 2018 court date in relation to that pending charge.¹² As OWCP did not address whether the evidence of record (*i.e.*, I.W.'s prior acts of serious misconduct) was sufficient to establish that the employment had become a contributing factor in the assault, the Board finds that reconsideration of the merits of the claim is warranted.

⁷ 20 C.F.R. § 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 (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.608(a); *see D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, 59 ECAB 231 (2007).

⁹ 20 C.F.R. § 10.608(b); *see T.V.*, Docket No. 19-1504 (issued January 23, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹¹ *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹² *See F.B.*, Docket No. 19-0683 (issued September 11, 2019); *J.G.*, Docket No. 17-1948 (issued September 13, 2018); *S.S.*, Docket No. 13-0318 (issued March 26, 2013) (Assaults arise out of employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origin in the work. Under FECA, assaults for private reasons do not arise out of the employment unless, by facilitating an assault that would not otherwise be made, the employment becomes a contributing factor.)

This legal argument requires reopening of appellant's claim for merit review pursuant to the second prong of section 10.606(b).¹³

The Board accordingly finds that appellant has met the second prong of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP improperly denied merit review.

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).

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for a further proceedings consistent with this decision of the Board.¹⁴

Issued: January 26, 2021
Washington, DC

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

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

¹³ See *M.E.*, Docket No. 20-0067 (issued October 15, 2020); *C.H.*, Docket No. 17-1065 (issued December 14, 2017); *J.W.*, Docket No. 18-0822 (issued July 1, 2020); *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

¹⁴ Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.