

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

J.R., Appellant

and

**U.S. POSTAL SERVICE, DOWNTOWN
BOYNTON BEACH POST OFFICE,
Boynton Beach, FL, Employer**

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**Docket No. 20-0887
Issued: May 26, 2021**

Appearances:
*Christopher Henwood, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 16, 2020 appellant, through his representative, filed a timely appeal from a January 15, 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 August 23, 2019 to

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.

the 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 to review the merits of this claim.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 30, 2013 appellant, then a 56-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 29, 2013 he injured his left ankle, right knee, and back when he was bitten by a dog and fell to his knees, twisting and turning to free himself from the dog's grasp, while in the performance of duty. OWCP assigned the claim File No. xxxxxx254 and accepted it for right knee sprain and open wound of the left leg, knee, and ankle. It paid appellant wage-loss compensation on the supplemental rolls for intermittent disability from January 17, 2014 through October 19, 2017.

On September 28, 2017 appellant filed a claim for compensation (Form CA-7) for intermittent disability from May 24 through August 19, 2017. In an attached time analysis form (Form CA-7a) he noted the specific hours and type of leave used on the claimed dates of disability.

On March 5, 2008 appellant, then a 50-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his left middle finger, arm, and wrist when delivering mail while in the performance of duty. OWCP assigned File No. xxxxxx439, accepted the claim for tendinitis of the left hand/wrist and thumb, and unilateral primary osteoarthritis of the first carpometacarpal joint of the left hand. It paid compensation benefits, including a schedule award for seven percent permanent impairment of the left thumb. On September 28, 2017 appellant filed a claim for compensation (Form CA-7) for intermittent disability from May 22 through August 18, 2017. On an attached Form CA-7a, he noted the specific hours and type of leave used on the claimed dates of disability.

On August 6, 2014 appellant, then a 57-year-old letter carrier, filed an occupational disease claim (Form CA-2), claiming that he developed bilateral carpal tunnel syndrome due to factors of his federal employment, including repetitive functions involving the hands and arms. OWCP assigned File No. xxxxxx319 and accepted the claim for bilateral carpal tunnel syndrome of the right and left upper extremities. On September 28, 2017 appellant filed a claim for wage-loss compensation (Form CA-7) for intermittent disability from May 31 through August 19, 2017. An attached Form CA-7a noted the specific hours and type of leave used on the claimed dates of disability.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 15, 2020 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.*

OWCP paid appellant wage-loss compensation on the supplemental rolls under OWCP File No. xxxxxx439 for the period May 22 through August 18, 2017. It also paid appellant wage-loss compensation on the supplemental rolls under OWCP File No. xxxxxx319 for the period May 31 through August 19, 2017.⁴

Under OWCP File No. xxxxxx254, on May 4, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for intermittent disability from July 12 through August 19, 2017. In an attached Form CA-7a, he noted the specific hours and type of leave used on the claimed dates of disability.

By decision dated July 17, 2018, under File No. xxxxxx254, OWCP denied appellant's claim for intermittent wage-loss compensation from July 12 through August 19, 2017. It found that the claim could not be paid under OWCP File No. xxxxxx254 because he had already been paid wage-loss compensation for the period July 12 through August 19, 2017 under OWCP File No. xxxxxx319.

Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review on August 6, 2018. The hearing was held on December 7, 2018.

By decision dated February 12, 2019, the hearing representative vacated the July 17, 2018 decision and remanded the case to OWCP for review of whether appellant was, in fact, previously paid wage-loss compensation under OWCP File Nos. xxxxxx319 and xxxxxx439 to ensure there was no duplication of disability payments, and to provide compensation for those periods claimed under OWCP File No. xxxxxx254 that had not been paid and were supported by the medical evidence of record.

By decision dated March 12, 2019, under File No. xxxxxx254, OWCP denied appellant's claim for wage-loss compensation for the following dates: two hours on July 17, 2017; three hours on July 18, 2017; two hours on July 21, 25, and 26, 2017; two hours on August 7, 8, 11, 12, and 14, 2017; three hours on August 15, 2017; two hours on August 16, 2017; and four hours on August 19, 2017. It found that he had previously been paid compensation for these dates and hours under the current claim or under OWCP File No. xxxxxx439.

Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review on April 1, 2019. He later requested that OWCP convert the oral hearing request to one for a review of the written record on July 19, 2019.

Appellant submitted an undated spreadsheet outlining his claimed outstanding entitlement to wage-loss compensation for the following dates and hours: four hours on July 12, 2017; two hours on July 17, 2017; three hours on July 18, 2017; two hours on July 25, 2017; two hours on July 26, 2017; two hours on July 29, 2017; one hour on August 2, 2017; two hours on August 7, 2017; two hours on August 8, 2017; two hours on August 11, 2017; two hours on August 12, 2017; two hours on August 14, 2017; one hour on August 15, 2017; two hours on August 16, 2017; and two hours on August 19, 2017.

⁴ OWCP administratively combined File Nos. xxxxxx254, xxxxxx319, and xxxxxx439, with the latter serving as the master file number.

By decision dated August 23, 2019, OWCP's hearing representative affirmed the decision of March 12, 2019. The hearing representative found that the submitted spreadsheet of appellant's claimed outstanding entitlement to wage-loss compensation did not accurately reflect actual hours recorded as LWOP and personal leave for the disputed dates and hours from July 12 through August 19, 2017. The hearing representative found that appellant had received a total of 8 hours of compensation for each of the disputed dates in a combination of wages, personal leave, and wage-loss compensation, calculating that appellant had received 2 hours under OWCP File No. xxxxxx254, 12 hours under OWCP File No. xxxxxx319, and 16.01 hours under OWCP File No. xxxxxx439. The hearing representative noted that appellant had worked 22.99 hours during the disputed period and used 68 hours of personal leave. The hearing representative calculated that appellant had received wages or compensation benefits totaling 121 hours during the period July 12 through August 19, 2017, spanning the disputed workdays, which exceeded his actual scheduled hours of 120 by an hour. The hearing representative affirmed the March 12, 2019 decision on the basis that no outstanding wage-loss compensation was due because there was no date on which the combined wages, leave usage, and compensation benefits fell below eight hours.

On January 9, 2020 appellant, through his representative, requested reconsideration of the August 23, 2019 decision. With the request for reconsideration, the representative argued that the hearing representative erroneously totaled all of the leave from submitted CA-7 forms for the disputed workdays, in finding that he used 68 hours of personal leave during the period, because appellant had submitted claims for wage-loss compensation under multiple claims for the same day and different hours. He noted that appellant received physical therapy for multiple claims per day. The representative explained that appellant indicated use of leave other than sick or annual leave on those dates when submitting the hours under a different claim to avoid duplication of payment, and that these hours of leave were not necessarily paid sick or annual leave. He noted that the multiple submissions for different hours on the same day were the reason this case was complex. The representative argued that an attached absence analysis form (PS Form 3972) for 2017 demonstrated that appellant used a total of 44 hours of paid sick and annual leave over the disputed 15 days, which showed that the hearing representative's calculation was in error. The representative further requested that OWCP consider entitlement to partial compensation on July 12 and 13, 2017.

Attached to appellant's request for reconsideration were an absence analysis form (PS Form 3972) for the leave year 2017, showing leave usage from August 5 through December 8, 2017; a pay, leave, or other hours adjustment requested (PS Form 2240) dated August 16, 2017; pay stubs dated July 28, August 11 and 25, and September 8, 2017, showing leave use over pay periods 15 through 18; and an employing establishment pay period calendar for 2017.

By letter dated January 15, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). OWCP noted that appellant's representative's letter was not relevant evidence or a legal contention not previously considered.

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

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 this case is not in posture for decision.

Appellant's representative argued in his reconsideration request submitted on January 9, 2020 that the hearing representative erroneously totaled all of the leave from submitted CA-7 forms for the disputed work period in finding that he used 68 hours of personal leave during the period, because appellant had submitted claims for wage-loss compensation under multiple claims for the same day and different hours. Appellant's representative argued that appellant received physical therapy for multiple claims per day, explaining that appellant indicated use of leave other than sick or annual leave on those dates when submitting the hours under a different claim to avoid duplication of payment, and that these hours of leave were not necessarily paid sick or annual leave.

In the January 15, 2020 decision, OWCP provided only that the reconsideration request "does not consist of relevant evidence, not previously considered or present legal contentions not

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).

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. 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.

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).

previously considered.” Their conclusory decision did not explain specifically on what basis the argument and evidence was irrelevant, nor did it point to evidence or argument previously of record that was substantially similar to that which was submitted on reconsideration. OWCP summarily denied appellant’s request for reconsideration without complying with the review requirements of FECA and its implementing regulations.¹⁰

Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹¹ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹² As well, OWCP’s procedures provide that the reasoning behind OWCP’s evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹³

The Board therefore finds that this case is not in posture for decision because OWCP failed to make findings regarding the argument and evidence submitted in support of the reconsideration request.¹⁴ The case shall therefore be remanded to OWCP for an appropriate decision.

CONCLUSION

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

¹⁰ *Id.*; see also 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.3d (February 2016).

¹¹ 5 U.S.C. § 8124(a).

¹² 20 C.F.R. § 10.126.

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

¹⁴ *C.R.*, Docket No. 17-0964 (issued September 9, 2019).

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2020 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: May 26, 2021
Washington, DC

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

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

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