

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

_____)
R.G., Appellant)

and)

DEPARTMENT OF AGRICULTURE, APHIS)
PLANT PROTECTION & QUARANTINE)
SERVICE, Tampa, FL, Employer)
_____)

Docket No. 21-0120
Issued: October 6, 2021

Appearances:
Alan J. Shapiro, 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 November 4, 2020 appellant, through counsel, filed a timely appeal from a July 17, 2020 nonmerit decision of the Office of Workers’ Compensation Programs (OWCP). The most recent merit decision was a Board decision dated March 9, 2020, which became final 30 days after issuance, and is not subject to further review.² As there was no merit decision issued by OWCP within 180 days of the filing of this appeal, pursuant to the Federal Employees’ Compensation

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 20 C.F.R. § 501.6(d); *see T.N.*, Docket No. 18-1613 (issued April 29, 2020); *see P.H.*, Docket No. 19-1354 (issued March 13, 2020); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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

This case has previously been before the Board.⁵ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On November 23, 2015 appellant, then a 34-year-old plant protection quarantine officer, filed a traumatic injury claim (Form CA-1) alleging that on November 12, 2015 he experienced a sharp pain in his lower back as he climbed into a government vehicle following a nursery inspection in the performance of duty. He stopped work on November 18, 2015. By decision dated January 7, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted employment incident. It concluded that appellant had submitted insufficient evidence to establish a work-related injury as defined by FECA.

On January 19, 2016 counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on September 12, 2016.

By decision dated November 28, 2016, OWCP's hearing representative affirmed the January 7, 2016 decision.

On November 15, 2017 appellant, through counsel, requested reconsideration and submitted new evidence.

In a November 8, 2017 report, Dr. Neil Allen, a Board-certified neurologist and internist, noted that appellant's medical records were reviewed to determine whether a causal relationship existed between appellant's lumbar spine condition and work-related trauma sustained on November 12, 2015. He noted that appellant's diagnoses included lumbar spine strain and aggravation of degenerative disc disease, lumbar region, and that appellant denied symptoms prior to the November 12, 2015 work incident. Dr. Allen referred to a medical reference manual,

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence following the July 17, 2020 decision. 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.*

⁵ Docket No. 18-0917 (issued March 9, 2020).

Functional Anatomy of the Spine, 2nd Edition, which explained that even though “a patient might describe an isolated flexion movement causing injury to the lumbar spine, in many cases, the offending movement was probably the last in a succession of repeated flexion movement.” The manual advised that muscle fibers are subjected to the same stress and damage as the fibers of the disc, these injuries were referred to as muscle strains, and typical symptoms in a case of symptomatic disc pathology and/or muscle strain included low back pain. Dr. Allen noted that appellant’s records indicated that he had findings of tenderness, painful and reduced range of motion (ROM) and muscle weakness. He indicated that these findings were both reasonable and expected based upon the mechanism described by appellant and documented within his medical records. Dr. Allen opined that the traumatic event on November 12, 2015, compounded by the repetitive flexion required by appellant’s position to inspect plants and climb into and out of his vehicle, was the direct cause of the manifestation of symptomatic lumbar disc herniation(s).

By decision dated February 14, 2018, OWCP modified the November 28, 2017 decision, finding that Dr. Allen provided a diagnosis; however, he did not provide a well-rationalized medical opinion supporting causal relationship between the diagnosed conditions and the accepted employment incident.

On March 26, 2018 appellant, through counsel, filed a timely appeal from the February 14, 2018 merit decision. By decision dated March 9, 2020, the Board affirmed the February 14, 2018 decision, finding that appellant had not met his burden of proof to establish a lumbar condition causally related to the accepted November 12, 2015 employment incident.

On May 28, 2020 appellant, through counsel, requested reconsideration and submitted a new report from Dr. Allen dated May 20, 2020.

In his May 20, 2020 report, Dr. Allen noted that he had reviewed the Board’s March 9, 2020 decision. He advised that appellant’s claim should be updated to include lumbar spine strain and aggravation of degenerative disc disease, lumbar region. Dr. Allen explained that in an isolated flexion event there was posterior (backward) movement of the nucleus pulposus (gel-like center of the disc) into the inner margins of the annulus fibrosis (fibrous outer layer of the disc). This force was carried through the width of the annulus fibrous resulting in tearing of the fibrous layers. As the outer layers weaken from said tearing, the disc begins to bulge and protrude into the central canal and neuroforaminal spaces. When appellant climbed into his work vehicle, he flexed forward. This action resulted in the forceful posterior movement of the nucleus pulposus against the annulus fibrosis at the L4-L5 and L5-S1 levels. The strength of the posterior movement exceeded the strength of the annulus fibrosis, resulting in annular tearing and extrusion of disc material at L4-L5 and L5-S1, as demonstrated on appellant’s magnetic resonance imaging (MRI) scan dated November 24, 2015.

By decision dated July 17, 2020, OWCP denied appellant’s request for reconsideration of the merits of the claim, pursuant to 5 U.S.C. § 8128(a), finding that the evidence submitted on reconsideration was cumulative and substantially similar to evidence already of record and 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.⁶

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.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ 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.¹⁰

ANALYSIS

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

The Board notes that the underlying issue in this case is whether appellant met his burden of proof to establish causal relationship between the accepted November 12, 2015 employment incident and his claimed lumbar condition. That is a medical issue which, on reconsideration, must be addressed by relevant medical evidence not previously considered.¹¹

In support of his May 28, 2020 reconsideration request, appellant submitted a May 20, 2020 report in which Dr. Allen explained that when appellant climbed into his work vehicle, he

⁶ 5 U.S.C. § 8128(a); *see A.T.*, Docket No. 19-1632 (issued February 17, 2021); *M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

⁷ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *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 (iFECS). *Id.* at Chapter 2.1602.4b.

⁹ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ *W.N.*, Docket No. 19-0690 (issued August 16, 2019); *G.T.*, Docket No. 18-1506 (issued April 24, 2019); *Bobbie F. Cowart*, 55 ECAB 746 (2004).

flexed forward and this action resulted in the forceful posterior movement of the nucleus pulposus against the annulus fibrosis at the L4-L5 and L5-S1 levels, which exceeded the strength of the annulus fibrosis, resulting in annular tearing and extrusion of disc material at L4-L5 and L5-S1, as demonstrated on appellant's MRI scan dated November 24, 2015. The Board finds that this opinion is new and relevant as it provided further explanation regarding causal relationship between appellant's diagnosed lumbar condition and the accepted November 12, 2015 employment incident.

Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his or her burden of proof.¹² Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹³ Appellant's request for reconsideration, therefore, met the third standard for obtaining merit review of his case under 20 C.F.R. § 10.606(b)(3).¹⁴ Accordingly, he is entitled to a merit review.

The Board will therefore set aside OWCP's July 17, 2020 decision and remand the case for an appropriate merit decision on appellant's claim.

CONCLUSION

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

¹² *P.M.*, Docket No. 19-1253 (issued January 23, 2020); *R.T.*, Docket No. 18-1263 (issued February 7, 2019).

¹³ *F.E.*, Docket No. 20-0070 (issued August 4, 2020); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁴ *H.D.*, Docket No. 18-0865 (issued February 10, 2020); *M.C.*, Docket No. 17-1983 (issued August 17, 2018); *Helen E. Tschantz, id.*

ORDER

IT IS HEREBY ORDERED THAT the July 17, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with the decision of the Board.

Issued: October 6, 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