

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

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M.S., Appellant)	
)	
and)	Docket No. 20-1617
)	Issued: July 15, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Tooele, UT, Employer)	
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Appearances: *Case Submitted on the Record*
David J. Holdsworth, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On September 3, 2020 appellant, through counsel, filed a timely appeal from a June 1, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than

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 an 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 appellant's oral argument request, he asserted, through counsel, that oral argument should be granted because OWCP's delay in processing his claim for reconsideration placed his claim outside the one-year time limitation under 5 U.S.C. § 8128(a) for obtaining a merit review. Appellant also contended that OWCP erred by according to the opinion of an impartial medical specialist the special weight of the medical evidence as it was speculative and based upon an incomplete medical history. The Board, in exercising its discretion, denies appellant's request for oral argument because the Board does not have jurisdiction over the merits of this case. As such, arguments on an 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.

180 days elapsed from OWCP's last merit decision, dated May 30, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation 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

On March 10, 2016 appellant, then a 45-year-old city letter carrier, filed an occupational disease claim (Form CA-2) alleging that on or before December 2, 2015 he sustained left shoulder and low back conditions due to factors of his federal employment, including repetitive lifting, bending, stooping, reaching, and climbing in and out of a delivery vehicle.

In a June 8, 2016 report, Dr. Javier Chavez, a Board-certified obstetrician and gynecologist, opined that strenuous repetitive lifting, pulling, pushing, overhead reaching, and grasping while in the performance of duty had aggravated appellant's preexisting lumbar conditions and caused new left shoulder conditions. He diagnosed lumbar radiculitis, a herniated lumbar disc, left shoulder impingement, and a left shoulder superior labrum anterior posterior lesion.

On September 6, 2016 OWCP referred appellant for a second opinion examination to Dr. Leslie J. Harris, a Board-certified orthopedic surgeon, who on September 22, 2016 noted appellant's history of a lumbar injury at age 13 in a skiing accident, and a second lumbar injury in a June 2015 due to a nonoccupational motor vehicle accident, after which he required work restrictions. Dr. Harris reviewed medical records and noted findings on examination. He diagnosed left shoulder impingement syndrome, chronic lumbosacral degenerative disc disease with multilevel facet arthropathy and foraminal stenosis, and a preexisting left-sided pars defect at L5. Dr. Harris opined that repetitive loading activities while in the performance of duty had probably caused a permanent aggravation of degenerative disc disease, but that the pars defect and left shoulder impingement were not work related.⁵

On October 26, 2016 OWCP accepted the claim for permanent aggravation of intervertebral disc degeneration, lumbar region, L2-3, L3-4, and L4-5. It paid appellant wage-loss

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that appellant submitted additional evidence to OWCP following the June 1, 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 In a January 10, 2017 supplemental report, Dr. Harris completed a Form OWCP-5c permanently restricting appellant to working eight hours a day, with pulling, pushing, and lifting limited to 40 pounds, and twisting, bending, and stooping limited to four hours a day.

compensation on the supplemental rolls commencing November 7, 2016. During this period, appellant performed modified work for one to two hours a day.

In reports dated December 28, 2016 and January 17, 2017, Dr. John A. Douglas, an osteopath Board-certified in orthopedic surgery, noted appellant's lumbar pain and provided work restrictions.

In a report dated January 24, 2017, Dr. Douglas provided a history of injury and treatment. On examination he noted tenderness to palpation of the paraspinal musculature at L1-2 and L2-3 bilaterally. Dr. Douglas diagnosed a lumbar ligament sprain and lumbar intervertebral disc degeneration. He restricted appellant to "office work only ... no delivery," with pushing, pulling, lifting, sitting, walking, standing, reaching limited to four hours, twisting and bending/stooping limited to one hour.

In reports dated January 26, 2017, Dr. Lincoln Holdaway, an osteopath, returned appellant to work for four hours a day with restrictions.

In reports dated January 26 through April 5, 2017, Dr. Eric M. Wood, Board-certified in family practice and occupational medicine, diagnosed thoracic back pain and unspecified back pain. He prescribed medication. Dr. Wood returned appellant to work for four hours a day with restrictions.

In reports dated March 28 and May 9, 2017, Dr. Pam Hansen, Board-certified in physiatry and sports medicine, diagnosed lumbar degenerative disc disease, a lumbar disc protrusion, chronic back pain, underlying degenerative disc disease, and facet arthropathy. She opined that appellant had attained maximum medical improvement. Dr. Hansen limited him to working four hours a day with restrictions.

On July 3, 2017 OWCP found that a conflict of medical opinion existed between appellant's treating physicians and Dr. Harris regarding the nature and extent of the accepted condition. To resolve the conflict, it referred appellant, the medical record, a series of questions, and a statement of accepted facts (SOAF) to Dr. Richard T. Knoebel, a Board-certified orthopedic surgeon, for an impartial opinion.

In a September 20, 2017 report, Dr. Knoebel, serving as the impartial medical examiner (IME) opined that the accepted lumbar condition had ceased without residuals.

In a December 15, 2017 supplemental report, Dr. Knoebel opined that the accepted aggravation had not caused permanent impairment.

In a notice dated March 5, 2018 and finalized April 17, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 18, 2018, finding that the special weight of the medical evidence rested with Dr. Knoebel's report.

On April 26, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.⁶ By decision dated July 30, 2018, the hearing representative

⁶ Appellant separated from the employing establishment effective July 17, 2018.

reversed the April 17, 2018 termination decision, finding that there had been no conflict of opinion between Dr. Harris and appellant's treating physicians. Dr. Knoebel, therefore, functioned as a second opinion physician. The hearing representative found that Dr. Knoebel's opinion was sufficient to create a conflict with the opinions of Drs. Douglas, Hansen, and Wood. The case was then remanded for referral to a new IME to resolve the conflict.

On remand OWCP prepared an updated SOAF and referred it, appellant, and the medical record to Dr. Scott Knorpp, a Board-certified physiatrist, for an impartial medical opinion on the nature and extent of the accepted conditions. In a January 9, 2019 report, Dr. Knorpp reviewed the SOAF and medical record. On examination he found tenderness to palpation along the right paraspinous muscles at T12/L1 through L4. Dr. Knorpp noted that unspecified diagnostic studies and medical reports had not been made available to him. He diagnosed chronic thoracolumbar backache, unrelated to the accepted lumbar condition. Dr. Knorpp opined that appellant could return to full, unrestricted duty.

In a March 26, 2019 letter, appellant, through counsel, contended that Dr. Knorpp's opinion was conclusory, and based on an incomplete history as he noted that no diagnostic studies were made available to him.

By notice dated April 25, 2019, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as the accepted condition had ceased without residuals, based on Dr. Knorpp's opinion as the special weight of the medical evidence. It afforded appellant 30 days to submit additional evidence or argument. In response, counsel submitted a copy of his March 26, 2019 letter.

By decision dated May 30, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It accorded the special weight of the medical evidence to Dr. Knorpp as the IME.

On April 1, 2020 appellant, through counsel, requested reconsideration. In a March 25, 2020 statement, counsel contended that Dr. Knorpp's opinion could not represent the special weight of the medical evidence as it was based on an incomplete medical record since Dr. Knorpp noted that he did not have diagnostic studies to review.

Additional evidence was received, including a May 15, 2017 report, wherein Dr. Charles Smith, an osteopathic physician, noted a three-year history of lumbar pain. He diagnosed lumbar disc degeneration from L2 through S1 and nerve root impingement at multiple levels. Dr. Smith recommended a surgical evaluation.

In a December 19, 2018 report, Dr. David W. Stevens, a Board-certified orthopedic surgeon, noted appellant's three-year history of lumbar and lumbosacral back pain without radicular symptoms. On examination he observed painful lumbar flexion, extension, bilateral later flexion, and right rotation. Dr. Stevens diagnosed lumbago and lumbar stenosis with neurogenic claudication. He ordered imaging studies and prescribed physical therapy.

In a January 7, 2019 report, Dr. R. Pepper Murray, a Board-certified orthopedic surgeon, noted that appellant had retired from federal employment after 23 years due to lumbar and left shoulder pain. He noted that appellant had worked as a letter carrier for 13 years, with heavy lifting and carrying of mail. Dr. Murray noted findings on examination of the left shoulder. He

obtained x-rays demonstrating a type III acromion and modest acromioclavicular joint arthrosis. Dr. Murray diagnosed chronic impingement with a possible labral tear and paralabral cyst.

In reports dated from January 29 through March 21, 2019, Dr. Raul K. Weston, Board-certified in anesthesiology and pain medicine, noted that appellant's low back pain developed several years ago while delivering mail and lifting cartons of mail. He administered a series of multi-level lumbar medial branch blocks, followed by radiofrequency ablation of the medial branch nerves bilaterally from L2 through L5. Dr. Weston diagnosed lumbar spondylosis, lumbar degenerative disc disease, lumbar facet arthropathy, and low back pain.

By decision dated June 1, 2020, OWCP denied appellant's request for reconsideration, 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 own motion or on application.⁷

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ 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.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 reconsideration appellant submitted a January 7, 2019 report by Dr. Murray, which addressed the accepted conditions and appellant's ongoing symptoms. The Board finds that, as Dr. Murray addressed the accepted medical conditions and appellant's ongoing symptoms, his

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608(a).

¹¹ *Id.* at § 10.608(b).

opinion is new, relevant medical evidence warranting a review of the merits of appellant's claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹²

As OWCP did not properly review this new, relevant medical evidence, the Board finds that appellant is further entitled to a review of the merits of his claim based on the third standard under 20 C.F.R. § 10.606(b)(3).¹³

Consequently, the Board will set aside OWCP's June 1, 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 for the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the June 1, 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: July 15, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹² *Id.* See also *F.F.*, Docket No. 20-1542 (issued April 9, 2021).

¹³ *Id.*