

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

A.G., Appellant)	
)	
and)	Docket No. 21-0817
)	Issued: July 26, 2022
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, East Boston, MA,)	
Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 4, 2021 appellant filed a timely appeal from an April 5, 2021 merit decision and an April 27, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the April 27, 2021 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.*

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish eligibility for continuation of pay (COP) by April 5, 2021; and (2) 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 1, 2021 appellant, then a 27-year-old compliance inspection and support employee, filed a traumatic injury claim (Form CA-1) alleging that on that day he injured his low back when he sat down, his chair collapsed, and he fell while in the performance of duty. He indicated by checkmark that he chose sick and/or annual leave, if needed. Appellant did not claim COP. On the reverse side of the claim form, appellant's supervisor acknowledged that he was injured in the performance of duty. Appellant stopped work on March 1, 2021.

In support of his claim, appellant submitted a report dated March 9, 2021 from Teryl D. Pett, a physician assistant, listing appellant's diagnoses as acute bilateral thoracic back pain and bilateral low back pain without sciatica. Mr. Pett submitted a letter dated March 9, 2021 which stated that appellant should remain off of work until further notice due to an acute back injury.

Appellant submitted a medical report dated March 11, 2021 from Dr. Jeremy Shore, a Board-certified orthopedic surgeon. Dr. Shore related that appellant suffered from lower back pain after he fell out of a chair on March 1, 2020 at work. He diagnosed low back strain. In a report dated March 25, 2021, Dr. Shore related that appellant felt that his pain was not improving.

By decision dated April 5, 2021, OWCP accepted appellant's claim for strain of muscle, fascia and tendon of lower back. By separate decision of even date, it denied appellant's claim for COP, finding that he had not reported his injury on an OWCP-approved form within 30 days of the accepted March 1, 2021 employment injury and that the employing establishment indicated no lost time or medical expenses incurred or expected. OWCP noted that the denial of COP did not preclude him from filing a claim for disability for the effects of the accepted employment injury.

On April 15, 2021 appellant requested reconsideration of OWCP's April 5, 2021 decision. He submitted an additional April 15, 2021 progress report from Dr. Shore, noting that appellant was seen for a follow-up appointment and would continue with physical therapy. OWCP also received April 16, 2021 referral orders for physical therapy.

On April 16, 2021 appellant submitted a claim for compensation (Form CA-7) for leave buy back during the dates March 28 through April 10, 2021.

By decision dated April 27, 2021, OWCP summarily denied appellant's request for reconsideration. It related that appellant had neither raised substantive legal questions nor provided new and relevant evidence warranting merit review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8118(a) of FECA authorizes COP, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to a traumatic injury with his or her immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.³ This latter section provides that written notice of injury shall be given within 30 days.⁴ The context of section 8122 makes clear that this means within 30 days of the injury.⁵

OWCP's regulations provide, in pertinent part, that to be eligible for COP, an employee must: (1) have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.⁶

OWCP's regulations provide that an employee may elect COP by checking the appropriate box on the front of the Form CA-1.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof to establish eligibility for COP by April 5, 2021.

The record reflects that appellant filed written notice of his traumatic injury on a Form CA-1 on March 1, 2021. As his accepted employment injury occurred on March 1, 2021, appellant filed the Form CA-1 within 30 days of the date of the injury. However, appellant indicated on the Form CA-1 that he chose sick and/or annual leave, if needed, he did not indicate that he was electing COP. As previously noted, OWCP's regulations provide that an employee may elect COP by checking the appropriate box on the front of the Form CA-1.⁸

OWCP's procedures further provide that an employee may make a request to change sick or annual leave to COP no later than one year from the date the leave was used or the date the

³ *Supra* note 1 at § 8118(a).

⁴ *Id.* at § 8122(a)(2).

⁵ *E.M.*, Docket No. 20-0837 (issued January 27, 2021); *J.S.*, Docket No. 18-1086 (issued January 17, 2019); *Robert M. Kimzey*, 40 ECAB 762, 763-64 (1989); *Myra Lenburg*, 36 ECAB 487, 489 (1985).

⁶ 20 C.F.R. § 10.205(a)(1-3); *see also T.S.*, Docket No. 19-1228 (issued December 9, 2019); *J.M.*, Docket No. 09-1563 (issued February 26, 2010); *Dodge Osborne*, 44 ECAB 849 (1993); *William E. Ostertag*, 33 ECAB 1925 (1982).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Claims for Compensation*, Chapter 2.0807.13a. (June 2012) (noting that if there is no election between COP and leave it should be construed as election for COP).

⁸ *Id.*

claim was approved, whichever is later.⁹ Upon receipt of a timely request, the sick or annual leave will be converted and the leave restored to the employee.¹⁰ However, as of April 5, 2021 appellant had not made a request to change sick and/or annual leave to COP. The Board therefore finds that appellant had not established his eligibility for COP by April 5, 2021, the date OWCP denied his request for COP.¹¹

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

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.¹²

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.¹³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁴ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁵ If the request is timely, but fails to meet at least one of the

⁹ *Id.* at 2.0807.13e.

¹⁰ *Id.*

¹¹ *Id.*

¹² 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).

¹³ 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).

¹⁴ *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). Chapter 2.1602.4b.

¹⁵ *Id.* at § 10.608(a); *see also A.F.*, Docket No. 19-1832 (issued July 21, 2020); *M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹⁶

ANALYSIS -- ISSUE 2

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).

In his timely request for reconsideration appellant neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. Consequently, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁷

The underlying issue in this case is whether appellant timely elected to receive COP. The record reflects that when appellant filed written notice of his traumatic injury on Form CA-1 on March 1, 2021, he indicated that he chose sick and/or annual leave. Following the denial of appellant's request for COP, on April 16, 2021 appellant filed a Form CA-7 claiming leave buy back for the period March 28 through April 10, 2021.¹⁸

Section 8124(a) of FECA (5 U.S.C. § 8124(a)) provides that OWCP shall determine and make findings of fact and make an award for or against payment of compensation. 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. As well, OWCP's procedures provide that the reasoning behind OWCP's decision should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹⁹

In its April 27, 2021 decision, OWCP did not discharge its responsibility to set forth findings of fact and a clear statement of reasons explaining the disposition so that appellant could understand the basis for the decision, *i.e.*, why the evidence submitted on reconsideration was insufficient to meet any of the requirements of 20 C.F.R. § 10.606(b)(3), warranting further merit review. OWCP did not address the underlying issue in this case, whether appellant had timely elected to receive COP. This case must therefore be remanded to OWCP for an appropriate decision on appellant's reconsideration request that describes the evidence submitted on

¹⁶ *Id.* at § 10.608(b); *J.B.*, Docket No. 20-0145 (issued September 8, 2020); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁷ *A.G., id.*; *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Continuation of Pay and Initial Claims for Compensation*, 2.0807.13e (June 2012).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

reconsideration and provides detailed reasons for accepting or rejecting the reconsideration request, pursuant to the standards set forth in 5 U.S.C. § 8124(a) and 20 C.F.R. § 10.126.²⁰

The Board will therefore set aside April 27, 2021 decision and remand the case for findings of fact and a statement of reasons, to be followed by an appropriate decision on appellant's reconsideration request.

CONCLUSION

The Board finds that appellant had not met his burden of proof to establish eligibility for continuation of pay by April 5, 2021. The Board further 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 April 5, 2021 decision is affirmed. The April 27, 2021 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 26, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

²⁰ See *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *T.M.*, Docket No. 17-1609 (issued December 4, 2017); *J.J.*, Docket No. 11-1958 (issued June 27, 2012).