

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

_____)	
G.A., Appellant)	
)	
and)	Docket No. 21-0329
)	Issued: October 12, 2022
DEPARTMENT OF VETERANS AFFAIRS,)	
MOUNTAIN HOME VA MEDICAL CENTER,)	
Mountain Home, TN, Employer)	
_____)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On January 5, 2021 appellant, through counsel, filed a timely appeal from two July 9, 2020 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 18, 2019, to the filing of this

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.

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 recurrence and disability claims, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 8, 2014 appellant, then a 41-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on April 7, 2014 he experienced low back pain when he moved a patient from a scale onto a wheelchair while in the performance of duty. He stopped work on April 7, 2014 and returned to full-time, modified-duty work on April 8, 2014. OWCP accepted appellant's claim for back sprain. On October 22, 2014 appellant underwent OWCP-approved lumbar spine fusion surgery and stopped work. OWCP paid appellant wage-loss compensation on the supplemental rolls, effective October 22, 2014, and placed him on the periodic rolls, effective November 16, 2014. On March 30, 2015 appellant returned to full duty, but stopped work again on November 9, 2015. OWCP placed him back on the periodic rolls, effective November 15, 2015.

On September 26, 2016 OWCP expanded the acceptance of appellant's claim to include lumbosacral neuritis or radiculitis and aggravation of pseudoarthrosis after fusion or arthrodesis.

On August 16, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Nicholas Grimaldi, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding appellant's work status and residuals of his accepted April 7, 2014 employment injury. In a September 16, 2016 report, Dr. Grimaldi reviewed appellant's history of injury and provided examination findings. He diagnosed chronic low back pain with chronic lumbosacral radiculitis and opined that appellant's lumbar sprain and thoracic radiculitis conditions had resolved. In a November 4, 2016 work capacity evaluation form (Form OWCP-5c), Dr. Grimaldi reported that appellant could work full time with restrictions of sitting occasionally up to two hours; repetitive movements occasionally up to two hours; twisting, bending, and stooping up to 40 pounds for two hours; occasional pushing, pulling, and lifting up to 20 pounds; and frequent squatting up to 10 pounds.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the July 9, 2020 decisions, appellant submitted additional evidence to OWCP. 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*

On August 22, 2017 appellant returned to full-time, modified-duty work.⁴

Appellant continued to receive medical treatment and submitted a November 6, 2017 report by Dr. David A. Wiles, a neurosurgeon. Dr. Wiles recounted appellant's complaints of low back pain and discussed his history of injury. He indicated that, since appellant had returned to work, he had experienced progressively worsening lower back and bilateral leg symptoms. Upon physical examination, Dr. Wiles observed that appellant had a difficult time with ambulation. He assessed low back pain and lumbar radiculopathy. Dr. Wiles advised that appellant not work for one month.

An October 10, 2017 electromyography (EMG) and nerve conduction velocity (NCV) study revealed a mild lesion of the right median nerve, moderate lesion of the left median nerve, moderate lesion of the left ulnar nerve, and a chronic lesion of the L5, S1 nerve roots on the left.

On November 15, 2017 appellant filed a notice of recurrence (Form CA-2a) alleging that, in "September 2017," he sustained a recurrence of disability due to his accepted April 7, 2014 employment injury. He noted that the date that he stopped work after the recurrence was on November 6, 2017. Appellant explained that, since returning to work in August 2017, he had experienced an increase in low back and hip pain, sciatica, and bilateral lower extremity radiculopathy.

In a November 28, 2017 work status note, Heather Hambrick, a nurse practitioner, indicated that appellant should remain off work until a spinal cord stimulator transplant was completed.

By decision dated January 25, 2018, OWCP denied appellant's recurrence of disability claim, finding that the medical evidence of record was insufficient to establish a recurrence of disability, beginning November 6, 2017, due to his April 7, 2014 employment injury.

On February 1, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for disability from work for the period January 8 through 22, 2018.

In reports dated January 24 and April 2, 2018, Ms. Hambrick discussed the medical treatment that appellant had received for his current lumbar symptoms and noted that Dr. Wiles had placed him off work because he was "unable to perform and meet the demands of his job." She conducted an examination and diagnosed chronic pain syndrome, lumbar post-laminectomy syndrome, lumbar radiculopathy, lumbar spondylosis, and low back pain.

OWCP received a February 8, 2018 letter wherein Dr. Thomas Morgan, a neurologist, recounted appellant's complaints of increased difficulty with walking and noted that a

⁴ The job offer letter indicated that appellant's duties as a patient advocate required returning calls to parties to address questions or complaints, relaying next course of action to the caller, informing them to expect a return call, and recording notes from conversations with the caller. It reported that the work restrictions included pushing, pulling, or lifting up to 20 pounds, squatting up to 10 pounds, twisting, bending, and stooping up to three hours per shift, and alternating sitting, standing, and walking as needed.

computerized tomography (CT) scan⁵ of appellant's lumbar spine revealed moderate central canal stenosis at L3-4. Dr. Morgan opined that appellant's difficulty walking was directly related to his lumbar radiculopathy and L3-4 central canal stenosis. He advised that appellant was unable to work until the spinal cord stimulator trial and a new functional capacity evaluation.

By decision dated March 13, 2018, OWCP denied appellant's disability claim for the period January 8 through 22, 2018. It found that the medical evidence of record was insufficient to establish that he had a return or increase of disability due to a change or worsening of the April 7, 2014 employment injury.

On August 28, 2018 appellant underwent an OWCP-authorized spinal cord stimulator insertion procedure.

Appellant continued to receive medical treatment for his lumbar symptoms. In a September 10, 2018 work excuse note from Richard Maupin, a certified physician assistant, and an October 23, 2018 note from Susan Maye, a registered nurse, appellant was held off work beginning August 28, 2018.

OWCP received a November 21, 2018 report from Dr. Wayne Woodbury, a Board-certified physical medicine and rehabilitation physician. Dr. Woodbury reviewed appellant's history of chronic low back pain due to a work-related injury and noted that appellant was currently not working. He provided lumbar examination findings and assessed chronic pain syndrome, lumbar post-laminectomy syndrome, lumbar radiculitis, lumbar spondylosis, and low back pain.

On January 24, 2019 appellant, through counsel, requested reconsideration of the January 25, 2018 decision denying his recurrence claim. He asserted that, according to the FECA Procedure Manual, a claimant only needed to show that he or she was disabled in order to establish a recurrence of disability within 90 days of returning to duty. Counsel alleged that Dr. Wiles' medical opinion was sufficient to meet appellant's burden of proof.

Appellant continued to receive medical treatment for his lumbar symptoms and submitted additional reports, including a January 8, 2019 report from Erin Douglas, a physician assistant, a January 18, 2019 report from Ms. Hambrick, and a January 30, 2019 report from Dr. Selma Kominek, a Board-certified neurological surgeon.

On March 13, 2019 appellant, through counsel, requested reconsideration of the March 13, 2018 decision denying his claim for wage-loss compensation.

By decision dated April 17, 2019, OWCP denied modification of the March 13, 2018 decision.

In an April 18, 2019 decision, OWCP denied modification of the January 25, 2018 decision.

⁵ A March 13, 2017 lumbar spine CT scan revealed a new L3-4 moderate central canal stenosis secondary to a broad-based disc protrusion.

Appellant subsequently submitted March 14 and October 3, 2019 reports by Dr. Woodbury. Dr. Woodbury discussed the medical treatment that appellant had received for his work-related lumbar injury and noted that he was not working. He recounted appellant's current complaints of low back pain radiating into his bilateral lower extremities. Upon examination of appellant's lumbar spine, Dr. Woodbury observed tenderness on palpation and positive straight leg raise testing. He diagnosed chronic pain syndrome, lumbar post-laminectomy syndrome, lumbar radiculitis, lumbar spondylosis, low back pain, and muscle spasm.

In reports dated May 9, June 14, August 9, and December 5, 2019 and January 30, March 27, and May 28, 2020, Ms. Hambrick recounted appellant's complaints of chronic low back pain and reviewed appellant's history, including two prior lumbar surgeries. She reported that appellant was currently not working. Ms. Hambrick conducted an examination and diagnosed chronic pain syndrome, lumbar post-laminectomy syndrome, lumbar radiculitis, lumbar spondylosis, low back pain, and muscle spasm.

In a June 3, 2019 report, Isaac Odell, a physician assistant discussed appellant's history of chronic low back pain. Upon physical examination, he observed that appellant walked with a stooped and stiff gait. Mr. Odell diagnosed back pain and chronic pain syndrome.

In a report dated August 19, 2019, Dr. Selma Kominek, a Board-certified neurological surgeon, reviewed appellant's history of injury and the medical treatment that he had received. She indicated that she disagreed with OWCP's denial of appellant's wage-loss compensation claim. Dr. Kominek opined that appellant's current back condition qualified as a recurrence of his original injury. She explained that, after his last back surgery, soft tissue developed, which caused symptoms that prevented him from working. Dr. Kominek also asserted that appellant was unable to perform his job duties or the duties of the position offered by his employing establishment.

On April 17, 2020 appellant, through counsel, requested reconsideration of the April 17, 2019 decision concerning the denial of his wage-loss compensation claim. He, through counsel, also requested reconsideration of the April 18, 2019 decision denying his recurrence claim. Counsel asserted that, since those decisions were issued, appellant had submitted an August 19, 2019 narrative report from Dr. Kominek who opined that appellant's job was outside of his work restrictions.

By decision dated July 9, 2020, OWCP denied appellant's April 17, 2020 request for reconsideration of the merits of his recurrence claim pursuant to 5 U.S.C. § 8128(a). It specifically noted that "there is no medical dated 8/19/2019."

By separate decision dated July 9, 2020, OWCP denied appellant's April 17, 2020 request for reconsideration of the merits of his wage-loss compensation claim pursuant to 5 U.S.C. § 8128(a). It specifically noted that "there is no medical dated 8/19/2019."

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 this case is not in posture for decision.

The case record reflects that appellant submitted an August 19, 2019 report of Dr. Kominek following the April 17 and 18, 2019 merit decisions. In its July 9, 2020 decisions, however, OWCP specifically noted that "there is no medical dated 8/19/2019." In the case of *William A. Couch*,¹¹ the Board held that, when adjudicating a claim, OWCP is obligated to consider all evidence properly submitted by a claimant and received by OWCP before the final decision is issued. As it did not review or consider Dr. Kominek's August 19, 2019 report, which was

⁶ 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).

⁷ 20 C.F.R. § 10.606(b)(3); *see P.M.*, Docket No. 20-0780 (issued November 24, 2020); *J.W.*, Docket No. 19-1795 (issued March 13, 2010); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *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. 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 (September 2020). 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); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹¹ 41 ECAB 548, 553 (1990).

received after the April 17 and 18, 2019 decisions, OWCP failed to follow its own procedures by properly discussing the relevant evidence of record.¹²

As the Board's decisions are final as to the subject matter appealed, it is crucial that OWCP address all relevant evidence properly submitted to OWCP prior to the issuance of its decision.¹³

For this reason, the case will be remanded to OWCP to properly consider all of the evidence of record. Following this and other such further development as deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the two July 9, 2020 decisions of the Office of Workers' Compensation Programs are set aside, and the case is remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: October 12, 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 Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

¹³ 20 C.F.R. § 501.6(d); *supra* note 8; *W.G.*, Docket No. 20-1536 (issued December 17, 2021); *see also A.V.*, Docket No. 20-1251 (issued January 28, 2021).