

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

P.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 22-0544
Issued: October 17, 2022**

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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 1, 2022 appellant, through counsel, filed a timely appeal from a September 2, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The most recent merit decision was a Board decision dated November 25, 2020, which became final after 30 days of 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 Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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 G.G.*, Docket No. 18-1074 (issued January 7, 2019).

³ 5 U.S.C. § 8101 *et seq.*

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.⁴ The facts and circumstances as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

On November 4, 2000 appellant, then a 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2000 he pulled a muscle in his left shoulder, neck, and arm when he removed bags from the pick-up box while in the performance of duty. He did not stop work, but worked in a limited-duty capacity. OWCP accepted appellant's claim for left shoulder sprain, left hand sprain, cervical sprain, and cervical radiculopathy.

On September 22, 2004 appellant filed a claim for compensation (Form CA-7) for disability from work during the period September 18 through October 1, 2004. OWCP paid him wage-loss compensation on the supplemental rolls effective September 18, 2004, and on the periodic rolls effective October 3, 2004.

On November 27, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Clinton Bush, III, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of appellant's November 3, 2000 employment injury. In a December 12, 2018 report, Dr. Bush indicated that he had reviewed the SOAF and noted appellant's accepted conditions of brachial neuritis or radiculitis, left shoulder sprain, left hand sprain, and cervical sprain. On examination of appellant's cervical spine he observed no reproducible tenderness, crepitus, or spasm. Examination of appellant's left upper extremity demonstrated dramatic loss of active range of motion in the left shoulder and wrist. Dr. Bush indicated that strength testing in the left upper extremity revealed repeated and multiple episodes of give way weakness in the elbow flexion and extension, shoulder abduction, and wrist dorsiflexion and palmar flexion. Sensory examination revealed no sensory loss in either upper extremity. Dr. Bush diagnosed degenerative disc disease of the cervical spine with multiple disc herniations and resolved cervical strain.

In response to OWCP's questions, Dr. Bush responded that appellant's work-related medical conditions had resolved. He noted his examination revealed no objective findings of neurological compromise and, therefore, no current evidence of brachial neuritis or radiculitis. Dr. Bush reported that there were no objective findings of left shoulder or hand pathology and no suggestion of any other diagnosis, including left shoulder and left hand sprain. He further opined that appellant's current cervical spine diagnosis "is and always has been degenerative disc disease." Dr. Bush explained that the act of lifting an object out of a bin was "unlikely to have

⁴ Docket No. 05-0655 (issued June 16, 2005); Docket No. 06-0572 (issued May 11, 2006); Docket No. 20-0862 (issued November 25, 2020).

been a significant cause of [appellant's] multilevel disc pathology.” He concluded that appellant could perform sedentary-duty work.

In reports dated December 15, 2018 through August 23, 2019, Dr. Curtis Kephart, a Board-certified orthopedic surgeon, indicated that appellant was evaluated for complaints of cervical pain and upper extremity weakness. On initial examination of appellant's cervical spine he observed paravertebral muscle spasm to the mid-to-lower cervical, trapezius, and rhomboid areas. Sensory examination demonstrated decreased sensation in the upper extremities at C6-7. Dr. Kephart diagnosed cervical radiculopathy, strain of muscle at the neck level, and cervicalgia.

In a letter dated September 11, 2019, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as the evidence of record established that he no longer had residuals of his accepted November 3, 2000 employment injury. It found that the weight of the medical evidence rested with the December 12, 2018 report of Dr. Bush, the second opinion physician. OWCP afforded appellant 30 days to respond if he disagreed with the proposed termination.

Appellant subsequently submitted additional reports dated September 23, 2019 through March 2, 2020 by Dr. Kephart.

By decision dated March 23, 2020, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective March 29, 2020. It found that the weight of the medical evidence rested with the December 12, 2018 report of Dr. Bush.

On April 21, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 8, 2020.

By decision dated August 12, 2020, the hearing representative affirmed the March 23, 2020 termination decision.

On August 12, 2021 appellant, through counsel, requested reconsideration of the August 12, 2020 decision. Counsel argued that OWCP improperly terminated appellant's benefits on March 23, 2020 based on Dr. Bush's December 12, 2018 second-opinion report because it constituted stale medical evidence. He also asserted that Dr. Bush ignored the accepted conditions detailed in the SOAF.

By decision dated September 2, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim 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.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 OWCP improperly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In his reconsideration request, appellant argued that OWCP improperly terminated appellant's wage-loss compensation and medical benefits on March 23, 2020 based on Dr. Bush's December 12, 2018 second-opinion report as Dr. Bush's report constituted stale medical evidence and ignored the accepted conditions noted in the SOAF. The Board finds that this constitutes a new and relevant legal argument not previously considered. Therefore, appellant is entitled to a review of the merits based on the second above-noted requirements under section 10.606(b)(3).¹⁰

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 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).

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 (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.

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).

¹⁰ *Supra* note 6; *P.G.*, Docket No. 20-0235 (issued July 13, 2020); *T.B.*, Docket No. 18-1214 (issued January 29, 2019).

Accordingly, the Board will set aside OWCP's September 2, 2021 decision and remand the case for an appropriate merit decision.

CONCLUSION

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).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2021 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: October 17, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board