

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

_____)
S.R., Appellant)
)
and) **Docket No. 21-1148**
) **Issued: September 29, 2022**
U.S. POSTAL SERVICE, ESCONDIDO POST)
OFFICE, Escondido, CA, Employer)
_____)

Appearances: *Case Submitted on the Record*
Lisa Varughese, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 21, 2021 appellant, through counsel, filed a timely appeal from a February 2, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated November 7, 2019 to the filing of this 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

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 2, 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.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her 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 presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 21, 2003 appellant, then a 48-year-old passport clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she injured her back and right arm when she sat down in a chair which someone had lowered and that she made a hard landing while in the performance of duty.⁵ She did not stop work, but started working a modified job as a "clerk/rehab" beginning March 22, 2003.⁶

On August 9, 2003 appellant filed a subsequent Form CA-1 alleging that on August 5, 2003 she injured her right knee, shoulder, and neck when her left leg collapsed while she was photographing a customer.⁷ She stopped work on August 5, 2003 and has not returned.

Following development of both claims, OWCP accepted the conditions of low back strain, cauda equina with neurogenic bladder, aggravation of thoracic/lumbosacral neuritis/radiculitis, and aggravation of lumbar (L5-S1) intervertebral disc displacement without myelopathy, closed left tibial fracture with fibula, acute cystitis, urinary incontinence, right open trimalleolar ankle fracture, right ankle medial malleolus fracture, closed ankle bimalleolar fracture, bilateral carpal tunnel syndrome, paralytic ileus, and pain disorder related to psychological disorders.

OWCP paid wage-loss compensation for the period September 20 to November 1, 2003 on the daily rolls and then paid appellant compensation on the periodic rolls for temporary disability beginning November 2, 2003.

OWCP authorized surgical procedures including L4-5 disc excision and L4-5 fusion on October 30, 2003, an interbody lumbar fusion on January 3 and June 20, 2007, a right carpal tunnel release on November 2, 2007, a left carpal tunnel release on September 23, 2008, and exploration of fusion, removal of hardware, and laminectomy on May 18, 2009.

On September 5, 2014 OWCP issued a notice proposing to terminate appellant's wage-loss benefits. By decision dated March 4, 2015, it terminated her entitlement to wage-loss compensation, effective March 8, 2015, based upon the second opinion of Dr. Frederick W. Close, a Board-certified orthopedic surgeon.

⁴ Docket No. 16-1832 (issued June 6, 2017).

⁵ OWCP assigned File No. xxxxxx091.

⁶ Appellant was given work restrictions of no repetitive twisting or bending and no climbing, squatting, or stooping.

⁷ OWCP assigned File No. xxxxxx034. On November 18, 2003 OWCP combined File Nos. xxxxxx034 and xxxxxx091 with the latter as the master file.

On February 22, 2016 appellant requested reconsideration. By letter dated February 19, 2016, which accompanied her reconsideration request, counsel argued that OWCP erred in terminating her wage-loss compensation benefits based upon the opinion of the second opinion physician, Dr. Close.

By decision dated May 26, 2016, OWCP denied modification.

Following the May 26, 2016 decision, OWCP received medical reports from Dr. Yogesh Patel, a Board-certified anesthesiologist and pain medicine physician, dated from June 7, 2016 through May 16, 2017. Dr. Patel provided examination findings and diagnosed lumbar radiculopathy, depressive disorder, peripheral neuropathy, lumbar spinal stenosis, bladder and bowel incontinence, lumbar spondylosis, lumbar post-laminectomy syndrome, and cauda equina syndrome.

Appellant, through counsel, appealed to the Board. By decision dated June 6, 2017, the Board affirmed the May 26, 2016 decision.⁸ The Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective March 8, 2015, based on the well-rationalized opinion of Dr. Close. The Board further found that appellant failed to meet her burden of proof to establish any continuing disability on and after March 8, 2015 causally related to her accepted employment injuries.

Following the Board's June 6, 2017 decision, OWCP received additional reports from Dr. Patel dated from June 14, 2017 through August 16, 2018, which were repetitious of prior reports.

In a July 13, 2017 initial consultation report, Dr. Ramin Raiszadeh, a Board-certified orthopedic surgeon, noted that appellant was seen for complaints of low back pain. He provided physical examination findings and diagnosed chronic low back and right leg pain following a March 21, 2003 work injury, persistent urinary incontinence, significant bilateral arm and neck pain, no focal deficit noted, and no symptoms or signs of spinal cord compression or cauda equina syndrome.

Progress notes dated January 11 and April 12, 2018 from Dr. Raiszadeh noted that appellant was seen for complaints of low back pain. These notes again related appellant's history of injury, medical history, and provided physical examination findings. Dr. Raiszadeh diagnosed persistent urinary incontinence, significant bilateral arm and neck pain, no focal deficit noted, and no symptoms or signs of spinal cord compression or cauda equina syndrome.

On June 5, 2018 appellant, through counsel, requested reconsideration. Counsel asserted that the weight of the medical opinion evidence rested with appellant's treating physicians and that Dr. Close's opinion was not sufficiently rationalized. At a minimum, counsel asserted that there was an unresolved conflict in the medical opinion evidence requiring referral to an impartial medical examiner.

By decision dated August 31, 2018, OWCP denied modification.

⁸ *Supra* note 4.

In a progress note dated October 11, 2018, Dr. Raiszadeh noted that appellant continued to relate that she was disabled due to back pain. He diagnosed chronic lower back and right leg pain post March 21, 2003 work injury; persistent urinary incontinence, status post three prior spinal operations; significant neck and bilateral arm pain, no symptoms or signs of spinal cord compression or cauda equina syndrome; no focal deficit; L1-2 and L5-S1 spondylosis and L1-2 mild-to-moderate right lateral recess and central stenosis; and L5-S1 spondylolisthesis. Dr. Raiszadeh noted that appellant's symptoms seemed more problematic than what he visualized on x-ray and computerized tomography (CT) scan. He recommended that she undergo further CT and magnetic resonance imaging (MRI) scans.

In a December 19, 2018 report, Dr. Paul D. Kim, a Board-certified orthopedic surgeon, noted appellant's history of injury, medical history, and that she was seen for complaints of back and leg pain. Physical examination findings were provided, and diagnostic testing reviewed. Dr. Kim diagnosed history of cauda equina syndrome with persistent bladder/bowel symptoms, L5-S1 degenerative disc disease, prior L3- and L4-5 TLIF status post L2-3 fusion, and persistent pain. He opined that appellant was severely disabled and that she should pursue pain management with Dr. Patel rather than further surgical treatment. With respect to causation, Dr. Kim opined that it was reasonable that the mechanism of injury as described by appellant caused her need for treatment and symptoms.

In a note dated April 22, 2019, Dr. Patel opined that there was no question that appellant was totally and permanently disabled due to her very limited mobility and inability to perform any sustainable type of work.

In progress notes dated July 25 and August 5, 2019, Dr. Raiszadeh noted that appellant was seen for a follow-up visit. He diagnosed chronic lower back and right leg pain status post a March 23, 2003 work injury, persistent urinary incontinence, no signs or symptoms of cauda equina syndrome or spinal cord compression, no focal deficit, significant bilateral arm and neck pain, and L5-S1 and L1-2 spondylosis. Dr. Raiszadeh further related that CT of the lumbar spine dated September 24, 2018 revealed spondylosis at L5-S1, L1-2, and stenosis at L1-2, but no significant stenosis; x-rays of the lumbar spine dated April 22, 2019 showed prior lumbar fusion, but no significant instability; MRI scan of the thoracic spine dated May 14, 2019 showed no cord compression and appeared comparable to the prior October 2018 MRI scan.

Dr. Patel, in progress notes dated August 12, 2019, detailed examination findings and noted that appellant was seen for medication refill due to complaints of back pain.

On August 29, 2019 appellant, through counsel, requested reconsideration.

On August 29, 2019 OWCP received an undated report⁹ from Dr. Jack D. Schim, a Board-certified psychiatrist and neurologist, wherein he diagnosed post-laminectomy syndrome and cauda equina syndrome secondary to a March 21, 2003 work injury. Dr. Schim concluded that due to appellant's cauda equina symptoms she would never be able to return to work.

On September 12, 2019 appellant was seen by Dr. Raiszadeh. Dr. Raiszadeh again diagnosed chronic lower back and right leg pain status post a March 23, 2003 work injury, persistent urinary incontinence, no signs or symptoms of cauda equina syndrome or spinal cord

⁹ The Board notes that the report contains a fax date of January 28, 2016 at the top of the report.

compression, no focal deficit, significant bilateral arm and neck pain, and L5-S1 and L1-2 spondylosis.

The record also contains progress notes dated September 12, October 22, December 5, 2019, and March 27, 2020 from Dr. Patel noting that appellant was seen for medication refill due to complaints of back pain. Dr. Patel detailed his examination findings. He diagnosed postlaminectomy syndrome; lumbar spondylosis; lumbar radiculitis; lumbosacral stenosis; long-term use of opiate analgesic; lumbar spinal stenosis, unspecified whether neurogenic claudication present; lumbosacral spondylosis without myelopathy; lumbar intervertebral disc disorder with myelopathy; cauda equina syndrome; depressive disorder; hereditary and idiopathic neuropathy; lumbar radiculopathy; and idiopathic peripheral neuropathy. OWCP also received an October 15, 2019 report from Dr. Patel wherein he related that appellant had undergone placement of a lumbar neuro-stimulator.

In a progress report dated October 24, 2019, Dr. Raidzadeh reiterated his examination findings and diagnoses from prior reports. A work status note of even date advised that appellant remained off work.

By decision dated November 7, 2019, OWCP denied modification.

Subsequent to the November 7, 2019 decision, OWCP received progress notes dated November 7, 2019 from Dr. Patel, which again noted that appellant was seen for medication refill. The report related findings repetitive of prior reports.

In a progress report dated November 14, 2019, Dr. Raidzadeh reiterated examination findings and diagnoses from prior reports. He noted that appellant was awaiting authorization of permanent placement of a percutaneous spinal cord stimulator. In a work status note of even date, Dr. Raiszadeh advised that appellant remained off work.

Dr. Patel, in progress notes dated December 5 and 18, 2019, March 27, April 23, May 22, July 10, August 7, September 17, October 8, and 12, 2020, detailed examination findings, listed diagnoses and noted appellant's medication refills. His October 2020 notes also related that appellant had undergone implant of the permanent stimulator on September 28, 2020.

Progress notes dated December 12, 2019, March 26, April 23, May 14, June 11, July 9, and August 19, 2020 were received from Dr. Raiszadeh.

Dr. Raiszadeh also provided work status notes dated March 26, April 23, May 14, June 11, July 9, August 19, September 18, and October 22, 2020 wherein he advised that appellant remain off work for one month.

In progress notes dated September 18, 2020, Dr. Raiszadeh detailed examination findings, reviewed diagnostic tests, and diagnosed chronic lower back and right leg pain status post a March 23, 2003 work injury, persistent urinary incontinence, no signs or symptoms of cauda equina syndrome or spinal cord compression, no focal deficit, significant bilateral arm and neck pain, and L5-S1 and L1-2 spondylosis.

On November 6, 2020 appellant, through counsel, requested reconsideration. Counsel argued that OWCP failed to meet its burden of proof to terminate appellant's compensation

benefits as the weight of the medical opinion rested with appellant's treating physician, Dr. Raiszadeh, and not with the opinion of Dr. Close, a second opinion physician.

By decision dated February 2, 2021, OWCP denied reconsideration. It found that, in support of her request for reconsideration, appellant had submitted reports from Dr. Raiszadeh dated May 14, June 11, July 9 and August 19, 2020. OWCP further found that these reports did not address appellant's ability to perform the duties of her position, effective March 18, 2015, and therefore did not warrant merit review.

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 or her own motion or on application.¹⁰

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or 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.¹¹

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹² If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹³ 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.¹⁴

ANALYSIS

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

In denying appellant's request for reconsideration, OWCP did not reference Dr. Patel's progress notes from November 2019 through October 2020, which listed diagnoses, detailed

¹⁰ 5 U.S.C. § 8128(a); *see D.J.*, Docket No 21-0371 (issued November 24, 2021); *D.G.*, Docket No. 20-1203 (issued April 28, 2021); *T.K.*, Docket No. 19-1700 (issued April 30, 2020); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *W.C.*, 59 ECAB 372 (2008).

¹¹ 20 C.F.R. § 10.606(b)(3); *see D.J., id.; D.G., id.; 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).

¹² *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). *Id.* at Chapter 2.1602.4(b).

¹³ *Id.* at § 10.608(a); *D.J., supra* note 10; *D.G., supra* note 10; *F.V.*, Docket No. 18-0230 (issued May 8, 2020); *see also M.S.*, 59 ECAB 231 (2007).

¹⁴ *Id.* at § 10.608(b); *B.S.*, Docket No. 20-0927 (issued January 29, 2021); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

examination findings, and noted medication refills. It also did not reference Dr. Raiszadeh's progress notes from November 2019 through October 2020, which addressed appellant's work status and detailing examination findings.

In the case of *William A. Couch*,¹⁵ 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. While OWCP is not required to list every piece of evidence submitted to the record, there is no indication that all of the progress notes from Dr. Patel and or any of the reports from Dr. Raiszadeh were reviewed and considered by OWCP in its February 2, 2021 decision.¹⁶ In its February 2, 2021 decision, OWCP denied appellant's request for reconsideration, finding that she failed to submit any relevant medical evidence in support of her request for reconsideration. As it did not review or consider all of Dr. Patel's and Dr. Raiszadeh's progress notes submitted in support of her request for reconsideration, it failed to follow its own procedures by properly discussing the relevant evidence of record.¹⁷

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.¹⁸

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 a decision.

¹⁵ 41 ECAB 548, 553 (1990).

¹⁶ *See N.S.*, Docket No. 21-1357 (issued March 15, 2022); *T.G.*, Docket No. 19-1930 (issued January 8, 2021).

¹⁷ All evidence submitted should be reviewed and discussed in the decision. Evidence received following development that lacks probative value should also be acknowledged. Whenever possible, the evidence should be referenced by author and date. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Denials*, Chapter 2.1401.5(b)(2) (November 2012).

¹⁸ 20 C.F.R. § 501.6(d); *supra* note 16; *W.G.*, Docket No. 20-1536 (issued December 17, 2021); *see also A.V.*, Docket No. 20-1251 (issued January 28, 2021).

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further review.

Issued: September 29, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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