

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

S.W., Appellant)	
)	
and)	Docket No. 23-0368
)	Issued: October 3, 2023
U.S. POSTAL SERVICE, TAMPA)	
PROCESSING & DISTRIBUTION CENTER,)	
Tampa, FL, Employer)	
)	

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

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 17, 2023 appellant, through counsel, filed a timely appeal from a July 21, 2022 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days has elapsed from the last merit decision, dated May 12, 2021, to the filing of this appeal,

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 The Board notes that, following the July 21, 2022 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.*

pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of this case.

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

On February 14, 2013 appellant, then a 46-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging on that date she injured her right arm and shoulder when opening a trailer while in the performance of duty. OWCP accepted the claim for sprain of the neck, right shoulder, upper arm, and rotator cuff. Appellant stopped work on March 19, 2013. OWCP paid her wage-loss compensation on the supplemental rolls beginning April 5, 2013. It subsequently expanded the acceptance of the claim to include permanent aggravation of osteoarthritis of the right shoulder on April 24, 2014. Appellant returned to light-duty work for eight hours per day on April 28, 2014.

By decision dated May 27, 2015, OWCP issued a loss of wage-earning capacity (LWEC) determination based on appellant's actual earnings as a sales solution team member. It found that she had worked in the position for over 60 days, commencing April 28, 2014, and that the employment fairly and reasonably represented her LWEC. OWCP found that appellant's actual wages resulted in a 10 percent LWEC and net compensation of \$372.00 every four weeks.

On July 8, 2019 appellant filed claims for compensation (Form CA-7) for disability from work commencing June 8, 2019 due to her accepted employment injury. In support of her claim, she provided diagnostic studies.

In a development letter dated July 17, 2019, OWCP informed appellant of the deficiencies of her recurrence claim. It advised her of the type of additional medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond. Appellant completed the development questionnaire on August 5, 2019 and provided additional medical evidence.

In an August 8, 2019 report, Dr. Jorge J. Inga, a Board-certified neurosurgeon, described appellant's accepted February 14, 2013 employment injury, performed a physical examination, and diagnosed herniated disc at C5-6, disc protrusion at C4-5 and C6-7, and right rotator cuff tear.

On August 13, 2019 Dr. Dency Rivas, a family practitioner, described the February 14, 2013 employment injury and recounted that appellant had aggravated her symptoms on June 14, 2019 when she braced her right arm to arise from her bed and felt a sudden sharp shooting pain from the neck into the fingers of the right hand. He diagnosed spinal stenosis in the cervical region which began on February 14, 2013 due to the work injury, cervical radiculopathy due to the work injury, impingement syndrome of the right shoulder, sprain of the right rotator cuff capsule, and sprain of the right shoulder due to the work injury. Dr. Revis opined that the diagnosed conditions

³ 5 U.S.C. § 8101 *et seq.*

were the result of the accepted February 14, 2013 employment injury and that appellant's condition had deteriorated overtime with the natural disease process.

By decision dated August 29, 2019, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish a material change or worsening of her accepted conditions beginning June 8, 2019.

Appellant continued to provide medical evidence. On September 23, 2019 Dr. Evan Zimmer, a Board-certified psychiatrist, requested expansion of her claim to include the additional conditions of depression due to chronic pain and anxiety due to illness. He submitted a report dated December 30, 2019, diagnosing persistent depressive disorder and generalized anxiety disorder secondary to and as a consequence of appellant's work-related injuries and pain.

On September 28, 2019 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review. She provided a narrative statement and attributed her recurrence of disability to her return to full-duty work. Appellant described bracing herself with her right arm when attempting to rise, with a resulting sharp radiating pain from her neck down her shoulder to her fingers.

On November 21, 2019 appellant filed a notice of recurrence (Form CA-2a) alleging that on June 13, 2019 she sustained a recurrence of disability due to her accepted February 14, 2013 employment injury. She stopped work on June 18, 2019.

Appellant continued to provide medical evidence. In December 23, 2019 and January 14, 2020 reports, Dr. Inga repeated his diagnoses of cervical disc herniation and recommended anterior cervical discectomies and fusion at C5-6 and C6-7. He found that appellant was capable of working in a clerical capacity.

By decision dated February 11, 2020, OWCP's hearing representative affirmed the August 29, 2019 denial of appellant's claimed recurrence of total disability finding that the evidence did not establish that the accepted conditions worsened without intervening cause on June 8, 2019.

On February 11, 2021 appellant, through counsel, requested reconsideration. She continued to provide medical evidence. On March 2, 2021 Dr. Inga recommended anterior cervical discectomies and fusion at C5-6, C4-5, and C6-7.

By decision dated May 12, 2021, OWCP denied modification of its prior decision.

Appellant continued to provide medical evidence. In a dated January 7, 2021 report, Dr. Xinmin Tang, a Board-certified physiatrist, recounted appellant's history of injury on February 14, 2013 and related that, in July 2019, after months of repetitive arm/shoulder movement while shifting gears in the performance of duty, appellant experienced a sudden sharp shooting pain from her neck as she braced herself with her right arm to rise. She diagnosed neck sprain, cervical disc displacement, and osteoarthritis of the right shoulder, rotator cuff sprain, supraspinatus syndrome, biceps tendinitis, and glenoid labrum tear. Dr. Tang opined that subscapularis tendinopathy and degenerative wear of the superior labrum and neck pain related to cervical joint arthropathy and impingement of the nerve root were consequential to the February 14, 2013 shoulder injury. She also provided a series of treatment notes and a work

capacity evaluation (Form OWCP-5c) dated May 17 through October 12, 2021 diagnosing cervical disc displacement, neck sprain, osteoarthritis of the shoulder region, and right rotator cuff sprain, and indicating that appellant was totally disabled from work.

In a report dated January 29, 2021, Dr. Ruth Gettes, a Board-certified psychiatrist, recounted that appellant was under treatment for accepted work injuries and evaluated her for anxiety and depression. She diagnosed major depressive disorder and generalized anxiety disorder secondary to medical illness and also submitted a note dated November 22, 2021, requesting that appellant's claim be expanded to include these conditions.

Dr. Wendell J. Bulmer, an osteopath, completed notes dated June 3 through February 8, 2022, and recounted that appellant injured her shoulder at work in 2013. He also related that in 2019 she was lifting a trailer door when she experienced a sudden sharp pain in her right shoulder with immobility. Dr. Bulmer diagnosed acromioclavicular joint derangement, rotator cuff tear, and labral tear as work-related injuries.

Dr. Rivas completed notes dated June 30 through October 27, 2021, diagnosing cervical disc disease with neuritis. He also provided a July 24, 2021 Form OWCP-5c, finding that appellant could not work eight hours a day and providing work restrictions including no reaching above the shoulder and no pushing, pulling, or lifting more than 15 pounds.

In reports dated July 15 through March 29, 2022, Dr. Inga diagnosed right carpal tunnel syndrome, herniated discs at C4-7, and recommended anterior cervical discectomies. He opined that as a direct consequence of appellant's February 14, 2013 work injury she experienced the sudden onset of severe pain in the cervical region and right shoulder and that the diagnosed herniated cervical discs were also direct consequence of her accepted employment injury. Dr. Inga also provided a January 7, 2022 attending physician's report (Form CA-20) diagnosing herniated posterocentral disc herniations at C4-5, C5-6, and C6-7. He indicated by checking a box marked "Yes" that the conditions were caused or aggravated by employment activities. Dr. Inga found that appellant was totally disabled.

On July 23, 2021 appellant underwent an additional cervical magnetic resonance imaging scan.

Dr. Fabiola Fargrieve, a family practitioner, examined appellant on December 9, 2021 and recounted her history of injury on February 14, 2013. She diagnosed cervical sprain and disc displacement C5-7, right rotator cuff tear, impingement, and primary osteoarthritis, and headaches, depression, anxiety, and insomnia.

In notes dated December 27, 2021 through May 3, 2022, Dr. Mary Sullivan, an osteopath, noted appellant's February 14, 2013 employment injury to the cervical spine and right shoulder. She diagnosed cervical sprain and disc displacement at C5-7, right shoulder rotator cuff tear, primary osteoarthritis, and impingement syndrome, and headaches, depression, anxiety, and insomnia. Dr. Sullivan completed OWCP-5c forms on January 5 through June 9, 2022 and found that appellant was totally disabled.

On May 12, 2022 appellant, through her representative, requested reconsideration.

Dr. Sullivan completed a Form OWCP-5c on May 31, 2022 and found that appellant was totally disabled.

In a June 28, 2022 report, Dr. Inga recommended anterior cervical discectomy and fusion at C4-5, C5-6, and C6-7. He also diagnosed right carpal tunnel syndrome. Dr. Inga completed a Form CA-17 of even date and found that appellant was totally disabled.

Appellant also provided additional physical therapy and massage therapy notes.

By decision dated July 21, 2022, 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 or her own motion or on application.⁴

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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ 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.⁸

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim.

The underlying issue on reconsideration is the medical question of whether appellant sustained a recurrence of disability commencing June 8, 2019 due to her accepted employment injury.

⁴ *Id.* at § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(a).

⁸ *Id.* at § 10.608(b).

In support of her request for reconsideration, appellant submitted reports dated July 15 through March 29, 2022 from Dr. Inga, wherein he opined that the diagnosed herniated cervical discs were a direct consequence of her accepted employment injury. The Board finds that this constitutes relevant and pertinent new evidence warranting further consideration of the merits of her claim. Therefore, the Board finds that appellant is entitled to a review of the merits based on the third requirement of 20 C.F.R. § 10.606(b)(3).⁹ Accordingly, the Board will set aside OWCP's July 21, 2022 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 her claim.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2022 decision of the Office of Workers' Compensation Programs reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 3, 2023
Washington, DC

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

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

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

⁹ *Id.* at § 10.606(b)(3); *see L.D.*, Docket No. 22-0214 (issued September 21, 2022); *M.N.*, Docket No. 22-0243 (issued June 28, 2022); *see also S.C.*, Docket No. 20-1661 (issued May 6, 2022); *J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).