

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

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| _____) | |
| G.W., Appellant) | |
|) | |
| and) | Docket No. 23-0806 |
|) | Issued: October 13, 2023 |
| U.S. POSTAL SERVICE, HUNTINGTON POST) | |
| OFFICE, Huntington, WV, Employer) | |
| _____) | |

Appearances:
Kristen Williams, 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 May 17, 2023 appellant, through his representative, filed a timely appeal from a May 4, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated April 12, 2022, 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.

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.

² 5 U.S.C. § 8101 *et seq.*

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 October 29, 2020 appellant, then a 43-year-old city delivery specialist, filed a traumatic injury claim (Form CA-1) alleging that on October 23, 2020 he experienced upper back pain when twisting and lifting while in the performance of duty. OWCP accepted the conditions of thoracic spine ligament sprain and cervical region radiculopathy. On January 13, 2021 Dr. Deborah Gillispie, Board-certified in family medicine, reported that appellant had systemic symptoms of neck pain. She released him to full duty with no restrictions. Appellant returned to regular duty on January 13, 2021.

On September 2, 2021 appellant filed a notice of recurrence (Form CA-2a) alleging disability from work as of August 24, 2021.

In a development letter dated September 10, 2021, OWCP provided the definition of a recurrence of disability and requested that appellant provide rationalized medical opinion evidence to support that his need for wage-loss compensation was due to a worsening of the accepted work-related conditions without intervening cause. It also provided a questionnaire for his completion and afforded him 30 days to respond.

Appellant subsequently responded to the questionnaire and submitted medical evidence.

By decision October 19, 2021, OWCP denied appellant's recurrence claim, finding that the evidence of record was insufficient to establish disability from work due to a material change or worsening of his accepted employment-related conditions.

On October 26, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held telephonically on January 27, 2022.

Appellant submitted claims for compensation (Form CA-7) for time lost from work for the period August 24 through September 24, 2021 and September 25 through October 8, 2021.

OWCP also received a January 26, 2022 report, wherein Dr. Allen Young, a specialist in occupational medicine, noted appellant's diagnosis as upper back sprain and stated that he was returned to work prematurely. Dr. Young indicated that there was no recurrence because the injury never resolved, and appellant should never have been put on regular duty. He opined that appellant could return to modified duty.

By decision dated April 12, 2022, OWCP's hearing representative affirmed the denial of appellant's recurrence claim, finding that he had not presented a medical opinion on the issue of disability, and he did not meet his burden of proof to establish a recurrence of disability claim due to a change in the nature and extent of his accepted injury-related condition.

On April 11, 2023 appellant requested reconsideration.

With his reconsideration request, appellant submitted a July 2, 2022 statement where he described his job duties and his condition. He noted his September 21, 2021 magnetic resonance imaging (MRI) scan showed bulging discs in the thoracic region. Appellant also submitted a December 6, 2022 electromyography (EMG) and nerve conduction velocity (NCV) study, which noted an impression of bilateral median neuropathy at the wrists (carpal tunnel syndrome), grade 3, moderate to severe; left ulnar neuropathy at the elbow and right ulnar neuropathy, site unspecified.

In a January 24, 2023 report, Dr. Chandos Tackett, a family medicine specialist, noted the history of the work injury and the results of the December 6, 2022 EMG/NCV study. He opined that the bilateral carpal tunnel syndrome was likely work related and that his right ulnar nerve dysfunction, was likely coming from his neck left cubital syndrome and cubital tunnel syndrome. Dr. Tackett also stated that appellant's chronic thoracic back pain was exacerbated after appellant returned to work.

March 30, May 11, and July 13, 2022 reports from Dr Young were also received. In his reports, Dr. Young noted the history of the injury to appellant's thoracic region of the spine. He indicated that appellant was working modified duty, irritated the area again, and stopped work again on August 23, 2021. Dr. Young presented examination findings and reviewed appellant's MRI, which he noted had changes at multiple levels consistent with time. He diagnosed upper back sprain and indicated that appellant could return to modified duty with restrictions. Dr. Young recommended that appellant undergo a functional capacity evaluation and work conditioning. In his July 13, 2022 progress report, he stated that appellant had an acute isolated fortuitous event on October 23, 2020 with persistent pain.

In a March 27, 2023 duty status report (Form CA-17), a physician with an illegible signature indicated that appellant could resume full-duty work on March 27, 2023.

By decision dated May 4, 2023, OWCP denied reconsideration of the merits of appellant's 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.³

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.⁴

³ 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).

⁴ 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).

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ 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.⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

In his narrative statement submitted with his reconsideration request, appellant described his work duties, and noted the results of his September 21, 2021 MRI scan. He has not alleged or 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, he is 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).⁸

In support of his request for reconsideration, appellant submitted new evidence which included reports from Dr. Young and Dr. Tackett, a December 5, 2022 EMG/NCV study, and a March 27, 2023 duty status report from a physician with an illegible signature, none of the evidence submitted is pertinent to the issue at hand. These medical reports did not provide a medical opinion from a physician which discusses whether appellant was disabled due to a material change or worsening of his accepted work-related conditions, without intervening cause. The Board notes that the reports from Dr. Young and Tackett both indicated that appellant exacerbated his thoracic condition after he returned to full-time work. Dr. Young had previously made note of this in his January 26, 2022 report. The Board has held that the submission of evidence or argument that repeats or duplicates evidence or argument already of record does not constitute a basis for reopening a case.⁹ Thus, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(3).¹⁰

⁵ *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.

⁶ *Id.* at § 10.608(a); *see also F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁸ *W.B.*, Docket No. 22-0985 (issued March 27, 2023); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

⁹ *J.B.*, Docket No. 22-1166 (issued April 3, 2023); *S.H.*, Docket No. 22-1179 (issued January 17, 2023); *S.E.*, Docket No. 17-0222 (issued December 21, 2018); *T.H.* Docket Nos. 17-1578 and 17-1651 (issued April 26, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁰ *See supra* note 7.

The Board, therefore, finds that appellant has not met any of the three requirements under 20 C.F.R. § 10.606(b)(3). Thus, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹¹

CONCLUSION

The Board finds that OWCP properly 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 May 4, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 13, 2023
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

¹¹ See *J.B.*, Docket No. 22-1166 (issued April 3, 2023); *A.M.*, Docket No. 21-1413 (issued March 28, 2022); *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).