

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

W.S., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, Glenville, WV,
Employer**

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**Docket No. 16-0889
Issued: October 10, 2017**

Appearances:
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 29, 2016 appellant, through counsel, filed a timely appeal from a February 25, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated September 23, 2014, 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 the 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 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

On December 30, 2013 appellant, then a 40-year-old senior correctional officer, filed a traumatic injury claim (Form CA-1) for a lower back condition that allegedly arose on December 16, 2013 while breaking up an altercation between inmates. He indicated that he responded to an announcement that there was a fight in the C-3 unit. Appellant then pulled one inmate off another inmate, and one of the inmates then swung and struck him in the nose. He indicated that he "took the inmate to the ground to restrain him." Appellant claimed to have tweaked something in his lower back, and was currently awaiting test results to determine the extent of his injury. The employing establishment indicated that appellant had not informed his supervisor that he injured his back.

Employee health unit records from December 16, 2013 indicated that appellant was breaking up a fight when an inmate struck him in the nose. No medical attention was necessary at the time. Appellant was advised to follow up with his primary care physician.

On December 18, 2013 appellant was seen in the emergency department at Roane General Hospital at which time he was treated by Dr. Daniel B. Prudich, Board-certified in internal medicine, for complaints of left-sided back pain and was taken off work for three days. He was also treated for back pain at Roane General Hospital on December 22, 2013 by Dr. Paul J. Clancy, a specialist in emergency medicine, who diagnosed low back pain with sciatica.

On December 23, 2013 Amber Knowlton, a certified physician assistant, excused appellant from work through January 6, 2014.

A January 2, 2014 lumbar magnetic resonance imaging (MRI) scan showed multilevel degenerative changes of the lumbar spine, including an annular tear at L4-5.

On January 6, 2014, Donna Shanholtzer, a family nurse practitioner, excused appellant from work for the dates of January 6 and 7, 2014.

On January 17, 2014 OWCP advised appellant that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked him to submit a comprehensive report from a treating physician describing his symptoms and the medical reasons for his condition, including an opinion as to whether his claimed condition was causally related to his federal employment. OWCP afforded appellant 30 days to submit this evidence.

OWCP received December 23, 2013 treatment notes from Ms. Knowlton, who provided an assessment of low back pain and neuralgia/neuritis/radiculitis. Appellant also submitted

January 6, 2014 treatment notes from Ms. Shanholtzer, who provided the same assessment as Ms. Knowlton.³

In a January 7, 2014 report, Dr. Roshan A. Hussain, Board-certified in family practice, advised that appellant had twisted his back during a fight/scuffle at work and was experiencing severe low back pain. He reported that appellant was unable to return to work. Dr. Hussain noted muscle spasms in his cervical, thoracic, and lumbar spine, in addition to left leg numbness and tingling, which suggested some radicular pain and sciatic nerve involvement. He recommended that appellant undergo a lumbar spine MRI scan and be referred to an orthopedic surgeon. Dr. Hussain placed appellant off work for two weeks.

In a January 22, 2014 report, Dr. Hussain noted that appellant had been experiencing moderate pain in his lumbosacral spine for two months. He reported that he had sustained trauma from a work injury and advised that his back pain was exacerbated by bending and standing for long periods. Dr. Hussain noted that the results of a lumbar MRI scan showed bulging discs at L3-S1, spinal canal narrowing, and central disc protrusion with no obvious neurological abnormality.

By decision dated February 18, 2014, OWCP denied the claim based on appellant's failure to establish fact of injury. It found that the evidence of record was insufficient to establish that the December 16, 2013 incident occurred as alleged.

On March 5, 2014 appellant requested a review of the written record before the Branch of Hearings and Review.

Dr. Hussain submitted reports dated February 20 and March 5, 2014 in which he noted that appellant continued to experience low back pain and essentially reiterated his previous findings and conclusions. In his March 5, 2014 report, he advised that appellant continued to have persistent, worsening problems with low back pain. Dr. Hussain noted that he injured his back at work in December 2013 while breaking up scuffles with prisoners. He related that appellant was diagnosed with sciatica and subsequently underwent an MRI scan which showed a bulging disc. Dr. Hussain determined that he was unable to work his regular job, which required heavy lifting, pushing, pulling, and involved the risk of breaking up fights at the prison. He noted that appellant currently had no physical disability and no identifiable neurological abnormality.

By decision dated September 23, 2014, OWCP's hearing representative found that appellant had established fact of injury. However, she denied appellant's traumatic injury claim because the medical evidence of record failed to establish a causal relationship between appellant's diagnosed lumbar condition and the December 16, 2013 accepted employment incident. Accordingly, the hearing representative affirmed as modified the prior denial of appellant's traumatic injury claim.

On September 15, 2015 appellant submitted 51 pages of medical reports from Dr. Hussain January through October 2014, which documented his treatment of appellant's back

³ Both Ms. Knowlton and Ms. Shanholtzer are associated with Roane County Family Health Care Inc.

condition and essentially reiterated his previous findings and conclusions. With a letter dated February 15, 2016, received February 19, 2016, counsel enclosed a copy of a reconsideration request dated September 8, 2015 and a signed certified return receipt indicating receipt by OWCP on September 14, 2015. Counsel also submitted 26 pages of medical reports from Dr. Hussain which documented treatment for mild-to-moderate upper back pain, middle back pain, and lower back pain during office visits dated February 20, March 5, May 22, June 18 and 25, September 17 and October 15, 2014; 24 pages of medical reports from Dr. Hussain documenting treatment for back pain during office visits dated January 7, 22, and 30, February 5 and 20, and March 5, 2014; and the January 2, 2014 MRI scan report which was previously submitted.

In a December 18, 2013 report, Dr. Daniel B. Prudich, Board-certified in internal medicine, noted that appellant had pain in his lumbar spine and paraspinal muscles. He noted that appellant had been experiencing lower back pain for one month, but the pain had become more severe.

In a December 22, 2013 report, Dr. Clancy noted that appellant was experiencing low back pain. He diagnosed sciatica.

By decision dated February 25, 2016, OWCP denied appellant's September 14, 2015 reconsideration request without conducting a merit review. It explained that some of the evidence submitted on reconsideration was previously of record and other additional evidence did not specifically address the issue of causal relationship. Consequently, OWCP found that further merit review was unwarranted.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁶ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ When a timely application for reconsideration does not meet at least one

⁴ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application.” 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607.

⁶ *Id.* at § 10.607(a). 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 2.1602.4b.

⁷ 20 C.F.R. § 10.606(b)(3).

of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

In his September 14, 2015 request for reconsideration, counsel neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance any relevant legal arguments not previously considered by OWCP. Accordingly, appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).⁹

Appellant also failed to submit any relevant and pertinent new evidence with his request for reconsideration. Much of the evidence received since OWCP's September 23, 2014 merit decision was already of record, and thus, does not provide a basis for reopening the claim for merit review.¹⁰ Additional treatment records from Dr. Hussain, covering the period May 22 through October 15, 2014, continue to diagnose lumbago and lumbar/lumbosacral disc degeneration, but do not explain how appellant's lumbar condition is causally related to the accepted December 16, 2013 employment incident. Submission of evidence that does not address the particular issue involved in the case does not constitute a basis for reopening a claim.¹¹ Because appellant did not provide OWCP with any relevant and pertinent new evidence, he is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹² Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

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).

⁸ *Id.* at § 10.608(a), (b).

⁹ *Id.* at § 10.606(b)(3)(i) and (ii).

¹⁰ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

¹¹ *See David J. McDonald*, 50 ECAB 185 (1998).

¹² 20 C.F.R. § 10.606(b)(3)(iii).

ORDER

IT IS HEREBY ORDERED THAT that the February 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 10, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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