

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

_____)	
W.B., Appellant)	
)	
and)	Docket No. 18-1346
)	Issued: April 3, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Rochester Hills, MI, Employer)	
_____)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 27, 2018 appellant, through counsel, filed a timely appeal from a May 31, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days have elapsed from the last merit decision, dated June 19, 2017, 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 claim.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 appellant submitted additional evidence on appeal. 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

On September 16, 2011 appellant, then a 43-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on September 16, 2011 she fractured her left ankle when she stepped out of her postal vehicle onto the grass and twisted her left ankle while in the performance of duty. She stopped work on that date.

By decision dated November 28, 2011, OWCP accepted appellant's claim for closed fracture of the left distal fibula. It paid wage-loss compensation benefits and placed appellant on the periodic rolls, effective July 1, 2012. On January 27, 2012 OWCP expanded acceptance of appellant's claim to include left ankle sprain.

Appellant underwent authorized left leg and ankle surgery on February 2, 2012.

OWCP again expanded acceptance of appellant's claim to include gastroparesis secondary to narcotic medication and sacroiliitis.

On December 31, 2013 appellant accepted a modified-duty job offer as a rural carrier

A May 19, 2015 diagnostic examination of appellant's bilateral feet showed osseous excrescence in the lateral base of the first metatarsal, mild bilateral first metatarsal phalangeal joint degenerative change, mild hallux valgus deformity, and mild degenerative change in the right tibiotalar joint.

In a June 9, 2015 report, Dr. Lawrence Kurz, a Board-certified orthopedic surgeon, treated appellant for complaints of numbness and tingling intermittently in her lower extremities, left greater than right. He reported that neurological examination of appellant's upper and lower extremities was normal. Dr. Kurz recommended that appellant continue with physical therapy and rehabilitation.

On May 19, 2015 OWCP referred appellant, along with the case record and a statement of accepted facts (SOAF), to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 12, 2015 report, Dr. Obianwu determined that appellant's September 16, 2011 employment injury had resolved and that she was able to work without restrictions.

In an August 4, 2015 report, Dr. Philip Henning, Board-certified in physical medicine and rehabilitation, related appellant's complaints of left ankle and foot pain for several years following a work injury. Upon physical examination of appellant's left lower extremity, he observed tenderness to palpation along the left peroneal tendons. Tinel's test was positive along the left sural nerve. Dr. Henning diagnosed left sural neuropathy and left peroneal tendinitis

OWCP determined that a conflict in medical opinion existed between Dr. Obianwu, OWCP's referral physician, and appellant's treating physicians, regarding whether appellant still

required medical treatment and remained disabled due to her accepted September 16, 2011 employment injury.⁴ Accordingly, it referred appellant to Dr. Edward Sladek, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a January 17, 2016 report, Dr. Sladek noted his review of the SOAF and the medical record. He described the September 16, 2011 employment injury. Upon physical examination of appellant's left foot, Dr. Sladek observed limited inversion of the ankle compared to the right. He also noted complaints of tingling across the top of appellant's foot when he touched behind the lateral malleolus. In response to OWCP's questions, Dr. Sladek indicated that appellant never had a fracture of the fibula. He also opined that appellant no longer had residuals of her accepted left ankle sprain as her surgery was successful and postoperative results showed that her left ankle was stable. Dr. Sladek further reported that there was no evidence of sacroiliitis upon examination. He concluded that appellant was capable of returning to her original position.⁵

On February 3, 2016 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Obianwu's September 18, 2012 second opinion and Dr. Sladek's January 17, 2016 impartial medical report, which determined that appellant did not have residuals or disability causally related to her September 16, 2011 employment injury. It provided appellant 30 days to submit additional information.

By decision dated March 8, 2016, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date. It noted that both Dr. Obianwu, the second opinion examiner, and Dr. Sladek, the impartial medical examiner, had determined that there were no objective examination findings to demonstrate that appellant still had residuals or disability causally related to the September 16, 2011 employment injury.

On March 18, 2016 appellant, through counsel, requested a telephonic hearing. A telephonic hearing was scheduled for November 8, 2016. Counsel did not call in to attend the telephonic hearing. Appellant indicated that she wanted to do a review of the written record instead of a telephonic hearing.

In support of her review of the written record, appellant submitted the first page of various examination notes from the University of Michigan Musculoskeletal Health Center, which indicated that appellant had medical appointments on certain dates for various medical diagnoses. An April 22, 2015 note related that appellant was treated by Dr. Susannah G. Parke, an osteopathic physician specializing in physical medicine and rehabilitation, for low back pain and sacroiliac dysfunction. Examination notes dated August 1 and 8, 2016 indicated that appellant was treated

⁴ An impartial medical examination was scheduled for October 28, 2015. Appellant did not attend the examination. On October 29, 2015 OWCP proposed to suspend her wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8123(d) because she failed to report to an examination. By decision dated November 12, 2015, it finalized the suspension of her wage-loss compensation and termination benefits, effective November 13, 2015. On November 17, 2015 appellant, through counsel, requested a telephone hearing before a hearing representative of OWCP's Branch of Hearings and Review. In a September 28, 2016 decision, an OWCP hearing representative affirmed the November 12, 2015 decision to suspend appellant's wage-loss compensation and medical benefits, effective November 13, 2015.

⁵ On February 3, 2016 OWCP notified appellant that the suspension of her wage-loss compensation benefits would be lifted since she had attended the impartial medical examination. Appellant received compensation retroactive to November 15, 2015.

by Dr. SriKrishna Chandran, Board-certified in physical medicine and rehabilitation, for lumbar spondylosis. Appellant was treated by Dr. Henning on April 19, July 5, October 3, and November 3, 2016 for left foot sural neuropathy, chronic pain of both ankles, and chronic bilateral low back pain without sciatica.

OWCP also received medical reports from 2015.

In a May 19, 2015 report, Dr. Todd Irwin, a Board-certified orthopedic surgeon, noted a history of a September 16, 2011 employment-related left ankle injury. He provided physical examination findings and diagnosed bilateral peroneal tendinopathy and right lateral ankle instability.

In an August 4, 2015 report, Dr. Henning indicated that appellant was referred to him for a nerve block due to left ankle and foot pain. Physical examination of the left lower extremity revealed tenderness to palpation along the left peroneal tendons. Tinel's sign was positive along the left sural nerve. Dr. Henning diagnosed bilateral carpal tunnel syndrome, left sural neuropathy, and left peroneal tendinitis.

By decision dated January 18, 2017, an OWCP hearing representative affirmed the March 8, 2016 termination decision. He determined that OWCP had properly relied on the opinion of Dr. Sladek, the impartial medical examiner, who determined in a January 17, 2016 report that appellant no longer had residuals or disability causally related to her September 16, 2011 employment injury.

On February 9, 2017 appellant requested reconsideration. By decision dated February 15, 2017, OWCP denied further merit review of her claim under 5 U.S.C. § 8128(a). It found that appellant's reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review of appellant's claim.

On February 23, 2017 appellant, through counsel, again requested reconsideration.

Appellant submitted a November 17, 2016 report by Dr. Henning. Dr. Henning indicated that appellant was receiving ongoing care at the University of Michigan Health System Department of Physical Medicine and Rehabilitation for back, leg, and bilateral ankle pain. He noted that appellant had a work-related injury in 2011 and had subsequent surgery to her left ankle in 2012.

By decision dated June 19, 2017, OWCP denied modification of the January 8, 2017 decision. It found that Dr. Henning had not provided objective findings to support his opinion that appellant's current bilateral ankle pain was causally related to the September 16, 2011 employment injury.

On May 1, 2018 appellant, through counsel, requested reconsideration. She submitted additional medical evidence.

In a January 25, 2018 examination note, Nancy Thomas, a nurse practitioner, related that appellant still had issues of lingering back pain and neuropathic symptoms in the left foot. She conducted an examination and noted that sensation was intact to light touch throughout, except diminished over the left greater than right dorsal foot.

A March 27, 2018 lumbar spine magnetic resonance imaging (MRI) scan report showed mild retrolisthesis of L1, L2, and L3 and multilevel degenerative changes with mild disc space narrowing of L4-5 and L5-S1.

In a March 28, 2018 report, Dr. Paul Park, a Board-certified neurological surgeon, indicated that appellant was treated for progressive and worsening back and bilateral leg discomfort, left greater than right. Upon examination, he observed grossly normal strength in her lower extremities. Sensation was grossly symmetric to light touch. Dr. Park recommended further diagnostic testing.

By decision dated May 31, 2018, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found that her reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review of appellant's claim. OWCP noted that the medical evidence submitted was substantially similar to evidence previously contained in the case file.

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ 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 payment of compensation at any time on his own motion or on application.⁷

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.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ 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.¹¹

⁶ *Supra* note 1.

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

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).

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and did not advance a relevant legal argument not previously considered by OWCP. Accordingly, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

Along with her most recent May 8, 2018 reconsideration request, appellant submitted several medical reports not previously considered by OWCP. In a January 25, 2018 note, Ms. Thomas related appellant's complaints of lingering neuropathic symptoms in appellant's left foot and reported slightly diminished sensation over appellant's left foot. In a March 28, 2018 report, Dr. Park noted examination findings of normal strength and sensation in appellant's left leg. The March 27, 2018 lumbar spine MRI scan report confirmed multilevel degenerative changes. The Board finds, however, that these medical reports are repetitive and substantially similar to previously submitted medical reports, which noted appellant's treatment for complaints of continued lumbar and bilateral leg pain. As these medical reports merely repeat medical opinion already in the case record and previously reviewed by OWCP, it does not constitute a basis for reopening the case for further merit review.¹²

None of the medical evidence submitted provided any objective findings to establish that appellant still had residuals or disability causally related to her accepted September 16, 2011 employment injury. Thus, appellant is also not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

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).

¹² See *D.P.*, Docket No. 17-0450 (issued June 20, 2018).

ORDER

IT IS HEREBY ORDERED THAT the May 31, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 3, 2019
Washington, DC

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

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

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