

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

K.M., Appellant)	
)	
and)	Docket No. 19-1784
)	Issued: April 20, 2021
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, DISTRICT OF COLUMBIA)	
SUPERIOR COURT, Washington DC, Employer)	
)	

Appearances:
Appellant, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 23, 2019 appellant filed a timely appeal from a February 26, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ As more than 180 days has elapsed from the last merit decision, dated November 14, 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 jurisdiction³ over the merits of this case.

¹ Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.2(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted because OWCP had applied an incorrect standard to the evidence submitted as the medical evidence established employment-related disability. The Board, in exercising its discretion, denies appellant's request for oral argument because the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the February 26, 2019 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 his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 22, 2015 appellant, then a 50-year-old deputy United States Marshal, filed a traumatic injury claim (Form CA-1) alleging that on January 14, 2014 he experienced a sudden onset of lumbar radiculopathy and severe pain after spending the workday in a seated stationary position in a courtroom while in the performance of duty. He indicated that he had increased pain with sitting down and standing up from his chair and the nature of his injury included a lumbar injury, herniated disc, and lumbar radiculopathy. Appellant stopped work on January 14, 2014. On August 13, 2015 OWCP accepted the claim for exacerbation of spondylolisthesis, L5-S1, and exacerbation of sciatica.

Beginning on August 19, 2015 appellant filed a series of claims for compensation (Form CA-7) for disability for the period March 10 through November 28, 2014.

In reports dated March 10, April 9, June 25, August 6, and, October 1, 2014 and January 29, 2015, Dr. Christopher R. Good, a Board-certified orthopedic surgeon, noted appellant's history of injury January 14, 2014, finding that appellant developed severe low back pain after prolonged sitting during a trial and advised that appellant was disabled from January 16 through December 1, 2014. He reviewed appellant's April 9, 2014 magnetic resonance imaging (MRI) scan and diagnosed spondylolysis, spondylolisthesis, instability, disc collapse, progressive pain, and neurologic symptoms. Dr. Good opined that prolonged positioning, including sitting during a long trial, increased the pressure in the discs of the lumbar spine resulting in increased inflammation and worsening symptoms including stenosis on subsequent neural structures at the L5-S1 level where appellant had an isthmic spondylolisthesis. He requested that appellant's accepted conditions be expanded to include additional conditions beyond lumbar sprain including lumbar spondylolisthesis and radiculopathy. Dr. Good noted that appellant could return to work without restrictions on December 1, 2014. He also recommended lumbar decompression and stabilization at L4-5 and L5-S1.

Lindsay D. Orosz, a physician assistant, completed a work release note and asserted that appellant was totally disabled from March 10 through November 28, 2014 due to his accepted work-related injury.

In an August 28, 2015 development letter, OWCP requested that appellant provide additional medical evidence, explaining why he was unable to perform the duties of his position beginning March 10, 2014. It afforded him 30 days for a response.

On May 8, 2014 Dr. K.C. Glidiner, an employing establishment physician, conducted a medical review and opined that appellant was medically unqualified to perform the essential functions of his position. He found that appellant continued to experience severe back and leg pain. On May 23, 2014 the employing establishment restricted appellant from full duty and noted that it had no permanent limited-duty positions available for law enforcement employees.

By decision dated November 30, 2015, OWCP denied appellant's disability claim for the period from March 10 through November 28, 2014.

In a December 9, 2015 note, Lani Ellis, a physician assistant, noted that appellant was out of work for much of 2014 due to symptoms of his conditions.

On January 4, 2016 appellant requested reconsideration. He provided documents from the employing establishment restricting him from work. On May 8, July 14, and October 1, 2014 Dr. Glidiner found appellant unable to perform aggressive law enforcement activities and not medically qualified for his position.

By decision dated March 25, 2016, OWCP denied modification of its prior decisions.

On May 23, 2016 appellant requested reconsideration. He provided May 22 and June 25, 2014 form reports in which Dr. Good indicated that appellant was totally disabled due to severe low back and bilateral pain. Dr. Good diagnosed lumbar spondylolisthesis, radiculopathy, and segmental instability.

On May 27, 2014 Dr. Glidiner restricted appellant from any work duty with the employing establishment.

In a September 10, 2014 report, Dr. Good diagnosed isthmic spondylolisthesis at L5-S1, stress fracture of the low back, spinal instability, and lumbar radiculopathy. He found that appellant was unable to participate in the activities of daily living or to perform the full range of duties for his federal position in law enforcement. Dr. Good recommend lumbar stabilization surgery with a fusion at L4-5 and L5-S1.

On September 8, 2014 Dr. Glidiner found that appellant was medically disqualified for his position. In a November 11, 2014 report, he found that appellant could perform nonexertional duty without aggressive law enforcement activities.

By decision dated August 19, 2016, OWCP denied modification of its prior decisions.

On August 21, 2017 appellant requested reconsideration. He provided an August 15, 2017 letter, asserting that OWCP had not properly applied its regulations, an excerpt from a medical publication, a history of his employment injuries, and an assertion that he was totally disabled due to his employment injuries from January 15 through December 3, 2014. Appellant noted that he was removed from service on August 6, 2014 as he was not medically qualified to perform the essential functions of his federal job and removed from his position on November 19, 2015.

By decision dated November 14, 2017, OWCP denied modification of its prior decision.

On November 13, 2018 appellant requested reconsideration of the November 14, 2017 decision. In support of his request, he provided an additional report dated November 12, 2018 from Dr. Good. Dr. Good noted that appellant experienced an initial exacerbation of his symptoms in 2014. He diagnosed lumbar spondylolisthesis and lumbar sciatica and found that appellant's disc herniation, spondylolysis, segmental instability, and radiculopathy were all part of spondylolisthesis causing sciatica. Dr. Good opined that the exacerbation of spondylolisthesis and sciatica were responsible for appellant's total disability for the period between January and December 2014. He again recommended surgical intervention in the form of lumbar fusion.

By decision dated February 26, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has impose certain limitations in exercising its authority.⁶ 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.⁷ A timely request 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.⁸ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁹

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8182(a).

Appellant filed a timely request for reconsideration on November 13, 2018, but did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently, he was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The underlying issue in this case is whether appellant has submitted sufficient medical evidence to establish that he was totally disabled from work for the period March 10 through November 28, 2014 due to his accepted conditions of exacerbation of spondylolisthesis, L5-S1, and exacerbation of sciatica. However, he did not submit any relevant and pertinent new evidence with his November 13, 2018 request for reconsideration.

Appellant provided a medical report from Dr. Good dated November 12, 2018 with his request for reconsideration. Dr. Good repeated his previous diagnoses, findings, and conclusions. As this report repeats evidence already in the case record, it is cumulative and does not constitute relevant and pertinent new evidence. Providing additional evidence that either repeats or

⁴ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁵ 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 [appellant’s] own motion or on application.” 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.607.

⁷ *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 its 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.

⁸ *Id.* at § 10.606(b)(3).

⁹ *Id.* at § 10.608(b).

duplicates information already in the record does not constitute a basis for reopening a claim.¹⁰ Therefore, it is insufficient to require OWCP to reopen the claim for consideration of the merits. Because appellant has not provided relevant and pertinent new evidence, he was not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).¹¹

The Board therefore 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 his claim pursuant to 5 U.S.C. § 8182(a).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 20, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁰ *P.W.*, Docket No. 20-0380 (issued November 23, 2020); *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹¹ 20 C.F.R. § 10.606(b)(3)(iii).