

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

F.R., Appellant)	
)	
and)	Docket No. 20-1406
)	Issued: March 2, 2021
U.S. POSTAL SERVICE, ORLANDO POST)	
OFFICE, Orlando, FL, Employer)	
)	

Appearances:
Wayne Johnson, Esq., for the appellant¹
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 July 22, 2020 appellant, through counsel, filed a timely appeal from a January 24, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated December 7, 2018, 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.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, following the January 24, 2020 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 October 5, 2016 appellant, then a 53-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on October 5, 2016 he was lifting and loading a heavy mail tray and injured his low back, right leg, and waist while in the performance of duty. OWCP accepted the claim for strain of the muscle, fascia, and tendon of the lower back.

An October 13, 2016 magnetic resonance imaging (MRI) scan of the lumbar spine revealed degenerative change with neuroforaminal narrowing at L4-5 and L5-S1 and mild narrowing of the central canal at L4-5.

Appellant submitted reports from Dr. Robert R. Reppy, an osteopath and Board-certified family practitioner, dated November 4, 2016 through March 3, 2017 who treated him for low back and neck pain, which he noted began after lifting mail trays at work on October 5, 2016. Dr. Reppy diagnosed degenerative disc disease in the lumbar and cervical spine, disc osteophyte complex at C5-6, torn annulus at C5-6, and sub patellar chondromalacia.

Appellant attended physical therapy treatment on March 27, 2017.

On April 3, 2017 OWCP requested Dr. Reppy address whether the accepted work-related condition had resolved and appellant's capacity to return to work.

Appellant attended additional physical therapy treatments from April 3 through 19, 2017.

In a report dated April 14, 2017, Dr. Reppy indicated that the initially diagnosed sprain/strain was a temporary diagnosis until more data was gathered to make a definitive diagnosis. He diagnosed degenerative disc disease in the lumbar and cervical spine, disc osteophyte complex at C5-6, and torn annulus at C5-6. Dr. Reppy provided restrictions relating to sitting, standing, reaching above the shoulder, twisting, and stooping.

On April 24, 2017 OWCP referred appellant for a second opinion examination, along with a statement of accepted facts (SOAF), a set of questions, and the medical record to Dr. Richard C. Smith, a Board-certified orthopedic surgeon, to determine the nature of appellant's work-related condition, extent of disability, and treatment recommendations.

Appellant continued to attend physical therapy from April 24 through May 31, 2017.

In a May 18, 2017 report, Dr. Smith noted his review of the SOAF and medical records. He concluded that the lumbar sprain had resolved within 6 to 12 weeks of his injury. Dr. Smith noted imaging studies revealed degenerative changes consistent with appellant's age. However, he opined that appellant had preexisting degenerative changes in the cervical and lumbar spine, which were aggravated by the work-related injury and remained symptomatic and required additional treatment. Dr. Smith advised that appellant could work in a sedentary position until he completed a functional capacity evaluation (FCE) and vocational rehabilitation. In a work capacity

evaluation (Form OWCP-5c), he noted that appellant had not reached maximum medical improvement (MMI), but could return to a sedentary position.

Appellant attended physical therapy treatment on June 5, 12, and 13, 2017.

In a letter dated June 15, 2017, OWCP advised Dr. Reppy that the evidence was insufficient to establish that the newly diagnosed conditions of degenerative disc disease in the lumbar and cervical spine, disc osteophyte complex at C5-6, and torn annulus at C5-6 were causally related to the accepted employment injury. It requested that he submit a rationalized medical opinion addressing causal relationship and respond to a questionnaire.

OWCP received physical therapy reports dated May 5, June 19, 20, 26, and 27, and July 3, 2017.

On July 10, 2017 appellant attended an FCE.

By decision dated August 9, 2017, OWCP denied the expansion of appellant's claim because the evidence of record did not demonstrate that the additional conditions of degenerative cervical and lumbar disc disease, osteophyte complex at C5-6, and a torn annulus at C5-6 were causally related to the established employment injury.

On August 14, 2017 OWCP notified appellant that it proposed to terminate his wage-loss compensation and medical benefits as the weight of the medical evidence, as represented by the report of Dr. Smith, established that appellant no longer had continued disability from work as a result of his accepted employment injury. It indicated that, although Dr. Smith opined that appellant's work injury aggravated his preexisting degenerative cervical and lumbar spine conditions, his opinion was deficient as he failed to provide medical reasoning addressing how the October 5, 2016 work event aggravated the preexisting cervical and lumbar degenerative conditions. OWCP afforded appellant 30 days to submit additional evidence or argument if he disagreed with the proposed action.

On September 25, 2017 appellant, through counsel, asserted that termination of his benefits was improper and that his condition goes beyond the mere strains that were accepted. He noted that appellant's treating physician, Dr. Reppy, and Dr. Smith, OWCP's referral physician, opined that appellant had an aggravation of his preexisting degenerative spinal condition, which was not resolved.

OWCP received reports from Dr. Reppy dated August 4 through September 20, 2017, who maintained throughout that appellant remained disabled from the accepted employment-related conditions as well as the preexisting conditions.

By decision dated October 5, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective October 6, 2017, finding that the report from Dr. Smith constituted the weight of the medical evidence and established that he had no continuing residuals or disability of his work-related condition.

On October 5, 2018 appellant, through counsel, requested reconsideration and submitted a new report from Dr. Reppy dated October 5, 2018. Counsel contended that OWCP should have requested a supplemental report from Dr. Smith to clarify his original report.

On October 15, 2018 OWCP referred appellant for a second opinion examination, along with a SOAF, a set of questions, and the medical record to Dr. Jeffrey T. O'Brien, a Board-certified orthopedic surgeon, to determine the extent of appellant's work-related injuries, work tolerance limitations, and treatment recommendations.

In a November 15, 2018 report, Dr. O'Brien noted his review of the SOAF and medical records. He noted that there were no objective findings to support a diagnosis of strain of the lower back. Dr. O'Brien indicated that appellant's complaints of radiating pain into the lower extremities was the result of age-related degenerative disc disease of the cervical and lumbar spine and not the one time workplace incident. He opined that the work-related lumbar strain resolved and appellant could return to work in a sedentary position. In a Form OWCP-5c, Dr. O'Brien noted that appellant could return to sedentary duty eight hours a day.

By decision dated December 7, 2018, OWCP reversed the October 5, 2017 decision, noting that OWCP did not meet its burden of proof to terminate wage-loss compensation and medical benefits on the basis that appellant's accepted conditions had resolved without residuals. It found that the accepted strain of the muscle, fascia, and tendon of the lower back had resolved without residuals at the time of the second opinion examination of Dr. O'Brien on November 5, 2018 and, therefore, appellant was not entitled to wage-loss compensation and medical benefits after that date.

OWCP received physical therapy treatment notes dated June 5, 6, 19, 20, and July 5, 7, 10, and 18, 2017.

On December 6, 2019 appellant requested reconsideration.

By decision dated January 24, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the 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 request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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

⁴ 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). Chapter 2.1602.4b.

considered by OWCP.⁷ 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 a review on the merits.⁸

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. § 8128(a).

In his timely request for reconsideration, appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. 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).⁹

The Board further finds that appellant did not submit relevant and pertinent new evidence in support of his reconsideration request under 20 C.F.R. § 10.606(b)(3). The underlying issue in this case is whether his accepted strain of the muscle, fascia, and tendon of the lower back resolved without residuals at the time of the second opinion examination of Dr. O'Brien on November 5, 2018. This is a medical issue that must be addressed by relevant medical evidence, including the rationalized opinion of a physician.¹⁰

On reconsideration appellant submitted physical therapy treatment notes dated June 5, 19, and 20, 2017, previously of record. The Board finds that submission of this evidence does not require reopening appellant's case for merit review, as it had already been considered by OWCP and, therefore, does not constitute pertinent new and relevant evidence. As these reports repeat evidence already in the case record, they are cumulative in nature and do not constitute relevant and pertinent new evidence.¹¹ Therefore, they are insufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also submitted new physical therapy treatment notes dated June 6, July 5, 7, 10, and 18, 2017.¹² While this evidence is new, it is not relevant as it did not address whether the accepted strain of the muscle, fascia, and tendon of the lower back resolved without residuals on

⁷ *Id.* at § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

⁸ *Id.* at § 10.608.

⁹ *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *E.W.*, Docket No. 19-1393 (issued January 29, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

¹⁰ 20 C.F.R. § 10.606(b)(3); *see C.C.*, Docket No. 19-1622 (issued May 28, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008); *D.B.*, Docket No. 19-1963 (issued July 1, 2020); *M.C.*, Docket No. 18-0841 (issued September 13, 2019); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹¹ *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹² The Board has held that treatment notes signed by a physical therapist are not considered medical evidence as these providers are not a physician under FECA. *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses, and physical therapists are not competent to render a medical opinion under the FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

November 5, 2018. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹³ As such, this evidence is insufficient to warrant merit review.

The Board, accordingly, finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹²

On appeal appellant contends that he still has residuals of his work-related injury. As explained above, however, the Board lacks jurisdiction to review the merits of his claim.

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 January 24, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 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

¹³ *Supra* note 2; *J.R.*, Docket No. 19-1280 (issued December 4, 2019); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).