

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

D.T., Appellant)	
)	
and)	Docket No. 24-0125
)	Issued: April 9, 2024
SOCIAL SECURITY ADMINISTRATION,)	
Chicago, IL, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 20, 2023 appellant filed a timely appeal from a May 25, 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 3, 2023, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 25, 2023 decision, appellant submitted additional evidence to OWCP and with his appeal to the Board. 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 November 5, 2014 appellant, then a 53-year-old social insurance specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2014 he sustained an injury to his middle back and left elbow when he attempted to lift and move heavy boxes while in the performance of duty. He stopped work on November 6, 2014.

In a note dated November 7, 2014, Dr. Sudhakar Yeturu, an internist, indicated that appellant was treated in his office on that date, and was unable to work from November 7 through 17, 2014.

By decision dated December 22, 2014, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the November 3, 2014 employment incident occurred as alleged. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

On January 3, 2015 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a statement and completed questionnaire dated December 30, 2014, appellant described the November 3, 2014 employment incident. He alleged that it was the process of moving the boxes from the pallet and pulling the pallet across the room when he felt an initial pain in his back and beneath the shoulder. Appellant described his medical treatment, and indicated that he returned to work on December 18, 2014, even though the pain continued in his arm, shoulder, and lower back.

Appellant submitted a letter dated December 30, 2014 from Dr. Yeturu, who indicated that he evaluated appellant on November 7, 2014 for an injury sustained on November 3, 2014 while moving boxes and shifting things at work. He noted that initial physical examination findings revealed left lateral epicondyle pain and tenderness, and positive test for tennis elbow. Dr. Yeturu reported that straight leg raise testing was restricted due to pain. He recommended physical therapy and orthopedic evaluation.

In a witness statement dated March 20, 2015, J.A., a coworker, indicated that on November 3, 2014 he and appellant were instructed to empty files from numerous boxes. He noted that appellant pulled the pallet across the room to the other side of the building and attempted to pick up extremely heavy boxes, but was not able to complete the task.

By decision dated June 19, 2015, OWCP's hearing representative affirmed the December 22, 2014 decision with modification. She found that the factual evidence of record was sufficient to establish that the November 3, 2014 employment incident occurred as alleged, but denied appellant's claim finding that the medical evidence of record failed to establish that

appellant's diagnosed lumbar conditions were causally related to the accepted November 3, 2014 employment incident.

On June 13, 2016 appellant requested reconsideration.

In office visit notes dated January 8 and March 2, 2015, Dr. George Branovacki, a Board-certified orthopedic surgeon, described that on November 3, 2014 appellant was lifting some heavy boxes when he experienced severe back pain. On examination of appellant's lumbar spine, he observed limited range of motion, and weakly positive straight leg raise testing. Dr. Branovacki opined that appellant's current back symptoms and diagnosis were causally related to the accepted November 3, 2014 employment incident.

A lumbar spine magnetic resonance imaging (MRI) scan dated February 25, 2015 revealed right lateral disc protrusion at T11-12, minimal left posterior paracentral disc protrusion at T12-L1, and multilevel spinal, lateral recess, and neural foraminal stenosis.

By decision dated September 7, 2016, OWCP denied modification of the June 19, 2015 decision.

Appellant, through then-counsel, disagreed with the September 7, 2016 decision and continued to request reconsideration on August 28, 2017, December 20, 2018, and February 28, 2020.

In reports dated April 6 and June 15, 2017, Dr. Branovacki described the November 3, 2014 employment incident, and noted appellant's current complaints of persistent low back pain. He indicated that appellant was "able to do his job with dysfunction and pain." Dr. Branovacki provided examination findings and diagnosed low back pain. In the June 15, 2017 report, he concluded that appellant had low back pain for almost two years clearly caused from lifting boxes at work on November 3, 2014.

Appellant submitted additional medical reports dated August 14, 2017, April 12, 2018, and September 19, 2019, by Dr. Branovacki who noted appellant's complaints of persistent low back problems.³ Dr. Branovacki provided examination findings, and discussed appellant's diagnostic imaging test results. He diagnosed low back pain. Dr. Branovacki assessed low back pain and back dysfunction with severe stiffness. He opined that appellant's back condition was causally related to his injury from lifting heavy boxes. In the September 19, 2019 report, Dr. Branovacki explained that repetitively lifting heavy boxes on November 3, 2014 put too much pressure on appellant's spinal cord, nerve roots and discs, which caused an aggravation of his asymptomatic stenosis and led to instability of the lumbar disks.

By decisions dated January 11, 2018, March 20, 2019, and May 19, 2020, OWCP denied modification of its prior decisions.

On May 6, 2021 appellant, through then-counsel, requested reconsideration.

³ Appellant retired from Federal Government, effective August 7, 2017.

In a report dated February 4, 2021, Dr. Branovacki indicated that appellant had no changes in his current back symptoms since his last visit. He reviewed appellant's history, and noted lumbar examination findings. Dr. Branovacki diagnosed low back pain. He opined that the activity of repetitively moving boxes on November 3, 2014 resulted in appellant's diagnosed conditions. Dr. Branovacki further described the mechanical process through which repetitively moving boxes on November 3, 2014 increased pressure on the nerve roots of appellant's thoracolumbar spine leading to symptomatic spinal stenosis.

By decisions dated July 8, 2021, OWCP set aside the May 19, 2020 decision, and accepted appellant's claim for aggravation of spinal stenosis of the lumbar region, aggravation of spondylosis without myelopathy or radiculopathy of the lumbar region, and aggravation of intervertebral disc degeneration of the lumbar region.

On February 28, 2022 appellant filed a claim for compensation (Form CA-7) for disability from work for the period November 3, 2014 through August 7, 2017.

In an April 4, 2022 development letter, OWCP informed appellant of the deficiencies of his claim for wage-loss compensation for the period November 3, 2014 through August 7, 2017. It advised him of the type of additional medical evidence needed and afforded him 30 days to provide the necessary evidence.

In an April 18, 2022 response to OWCP's development letter, appellant indicated that he had endured pain and discomfort since the injury until it became too much to endure, and he retired in August 2017. He explained that he used large amounts of sick leave, Family and Medical Leave Act (FMLA) leave, annual leave, and leave without pay (LWOP) between the date of injury and his retirement. Appellant noted that he submitted time and attendance sheets related to approved leave that included two to six days of LWOP per pay period after sick and annual leave was exhausted.

Appellant submitted an overpayment bill, which noted the annual and sick leave used for pay period 201504.

Appellant submitted a letter dated October 5, 2016 from Dr. Yeturu, who indicated that appellant was currently under his care. Dr. Yeturu reported that appellant's condition "may cause [appellant] to miss work intermittently and/or frequently while under our medical care."

In a report dated February 4, 2021, Dr. Branovacki indicated that appellant was evaluated for follow-up on low back problems. On examination of appellant's lumbar spine, he observed tenderness at the paraspinal muscles and extremely limited range of motion. Dr. Branovacki diagnosed low back pain. He reported that appellant also had diagnoses of stenosis, spondylosis, and degenerative disc disease that had developed over time and were aggravated by the November 3, 2014 employment injury. Dr. Branovacki provided a detailed explanation of how the repetitive lifting injury affected appellant's lumbar spine, and explained that appellant's lumbar conditions continued to deteriorate over time after the November 3, 2014 employment injury. He noted that there were no records of treatment for the period March 2, 2015 through April 6, 2017 because appellant was mostly asymptomatic.

In a treatment record dated February 10, 2022, Dr. Branovacki noted diagnoses of low back pain, spondylosis, degenerative joint disease, and hypertension.

By decision dated May 19, 2022, OWCP denied appellant's claim for wage-loss compensation disability from work for the period November 3, 2014 through August 7, 2017.⁴

On May 18, 2023 appellant requested reconsideration. He submitted a statement alleging that OWCP did not obtain his retirement and employment records as it had stated it would do. Appellant also contended that the medical reports from Dr. Yeturu and Dr. Branovacki contained detailed medical evidence to substantiate his inability to work from the date of injury to his retirement. He indicated that it was difficult to obtain medical treatment during this time because his claim was denied for eight years.

Appellant also submitted a request for reasonable accommodation due to his disabling spinal condition, a request to work at home dated February 23, 2017, and an overpayment audit report.

By decision dated May 25, 2023, 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 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.⁵

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.⁶

⁴ By decision dated April 3, 2023, OWCP granted appellant a schedule award for 18 percent left lower extremity permanent impairment and 19 percent right lower extremity permanent impairment. The period of the award ran for 109.44 weeks from May 20, 2022 to June 24, 2024.

⁵ 5 U.S.C. § 8128(a); *see A.N.*, Docket No. 20-1487 (issued March 19, 2021); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁶ 20 C.F.R. § 10.606(b)(3); *see S.K.*, Docket No. 22-0248 (issued June 27, 2022); *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.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ 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.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. § 8128(a).

In support of his reconsideration request, appellant submitted a statement alleging that OWCP failed to obtain his retirement and employment records as required. This argument, however, is irrelevant to the underlying issue of whether he has established intermittent disability from work for the period November 3, 2014 through August 7, 2017.¹⁰ Consequently, appellant 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).¹¹

Appellant also submitted a request for reasonable accommodation due to his disabling spinal condition, a request to work at home dated February 23, 2017, and an overpayment audit report. However, these are irrelevant to the underlying issue of whether he has established intermittent disability from work. 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.¹²

Appellant did not submit any medical evidence to support his November 18, 2022 reconsideration request. Because he has not provided relevant and pertinent new evidence, he is

⁷ *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.

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹⁰ *L.S.*, Docket No. 22-1238 (issued May 19, 2023); *M.M.*, Docket Nos. 21-0482 & 21-1051 (issued April 19, 2023).

¹¹ 20 C.F.R. § 10.606(b)(3); *M.L.*, Docket No. 22-0120 (issued May 12, 2022); *G.K.*, Docket No. 20-1026 (issued December 11, 2020).

¹² *K.F.*, Docket No. 24-0052 (issued March 26, 2024); *R.H.*, Docket No. 23-0033 (issued September 20, 2023); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹³

The Board, accordingly, finds that appellant did not meet 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. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2024
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

¹³ See *D.H.*, Docket No. 22-0875 (issued December 5, 2022); see also *D.J.*, Docket No. 21-0371 (issued November 24, 2021).