

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

_____)	
E.T., Appellant)	
)	
and)	Docket No. 20-0845
)	Issued: February 19, 2021
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, Arlington, VA, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On March 9, 2020 appellant filed a timely appeal from an October 11, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated December 17, 2018, 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 the claim.

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 29, 2019 appellant, then a 53-year-old inspector, filed a traumatic injury claim (Form CA-1) alleging that on January 22, 2019 he sustained whiplash to his "back and neck" when

¹ 5 U.S.C. § 8101 *et seq.*

the vehicle in which he was riding was rear-ended while in the performance of duty. He related that he had just dropped off his assigned government vehicle to the dealership for repairs and was given courtesy ride home. While *en route* home, the accident occurred. On the reverse side of the claim form the employing establishment acknowledged that appellant was injured while in the performance of duty.

In support of his claim, appellant submitted a January 22, 2019 local police accident report documenting the motor vehicle accident and employing establishment policy directives regarding the use of government-owned vehicles and commercial rentals. He also submitted a January 22, 2019 report wherein Dr. Luigi DiRubba, a chiropractor, noted examination findings of an acute injury with whiplash like symptoms and nerve root swelling of the cervical and thoracic areas of the spine.

By development letter dated February 8, 2019, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP noted that a chiropractor did not qualify as a physician under FECA unless a spinal subluxation, demonstrated by x-ray evidence was diagnosed. Appellant was afforded 30 days to submit the necessary evidence.

OWCP subsequently received additional evidence including a state police crash report dated January 24, 2019.

In a narrative report dated February 26, 2019, Dr. DiRubba noted that appellant had presented on January 22, 2019 because he had been involved in a motor vehicle accident (MVA) earlier that morning. While he was riding in the passenger's seat, the car was struck from behind and struck a snow bank on the right side of the road. Dr. DiRubba related that appellant's evaluation revealed chiropractic subluxations demonstrated by static and motion palpation. X-ray findings demonstrated a significant loss of cervical lordosis with decreased disc spacing between C5-C6 and C6-C7; anterior spurring on the C4 and C5 cervical vertebrae; increased curvature of the lumbar spine from L1-L5; a left lateral wedging of the L5 vertebra suggestive of subluxation; and a higher left ilium.²

OWCP subsequently received appellant's completed development questionnaire.

By development letter dated March 15, 2019, OWCP requested additional information from the employing establishment concerning appellant's claim and whether he was injured in the performance of duty. It afforded the employing establishment 30 days to respond.

On April 4, 2019 appellant's supervisor replied to OWCP's March 15, 2019 development letter, confirming that appellant's assigned government vehicle was in need of emergency repairs as required by the employing establishment. He explained that repairs to assigned government vehicles had to be authorized in advance; that the repairs were performed at specific dealerships or service centers; and that vehicles were usually taken for repairs during business hours.

² An evidence slip of record indicates that, on March 4, 2019, OWCP also received "Physical Evidence/Non-Scannable," which was noted as "other."

By decision dated April 17, 2019, OWCP denied appellant's claim, finding that he had not submitted medical evidence sufficient to establish a diagnosis in connection with the accepted January 22, 2019 employment incident. It noted that Dr. DiRubba had not provided a definitive medical diagnosis as a physician under FECA, as he had not definitively diagnosed a subluxation by the spine as demonstrated by x-ray.

On July 8, 2019 appellant requested reconsideration. In support thereof, he submitted a series of chart notes from Dr. DiRubba dated January 22 through May 23, 2019 which noted that he conducted a physical examination and performed x-rays. Appellant also noted diagnoses of spinal restrictions and subluxations at various levels of the spine. He further diagnosed cervical sprain, other cervical disc degeneration, cervicocranial syndrome, cervicalgia, sprain of thoracic spine, muscle spasms of back, and intervertebral disc disease.

Also received was non-scannable physical evidence³ and a duplicate copy of Dr. DiRubba's February 26, 2019 report previously of record.

By decision dated October 11, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), finding that the evidence submitted on reconsideration was cumulative and substantially similar to evidence already contained in the case file and previously considered. It related that the evidence reviewed in support of appellant's reconsideration request included chiropractic treatment notes and x-ray imaging studies

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 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

³ An evidence slip of record indicates that, on July 8, 2019, OWCP received "Physical Evidence/Non-Scannable," which was noted to be "CD – medical evidence."

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] 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.

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 improperly denied appellant's request for reconsideration of the merits of his claim.

OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish a diagnosed medical condition in connection with the accepted January 22, 2019 employment incident. On reconsideration appellant submitted a series of chart notes dated January 22 through May 23, 2019 by Dr. DiRubba. The chart notes consistently noted diagnoses of spinal restrictions and subluxations at various levels of the spine. Dr. DiRubba also diagnosed cervical sprain, other cervical disc degeneration, cervicocranial syndrome, cervicgia, sprain of thoracic spine, muscle spasms of back, and intervertebral disc disease. As this evidence addresses the underlying merit issue in this case, the Board finds that this evidence submitted with appellant's timely request for reconsideration constitutes relevant and pertinent new evidence. Therefore, appellant's July 8, 2019 reconsideration request met the third above-noted requirement of 20 C.F.R. § 10.606(b)(3).

Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608. The case shall therefore be remanded to OWCP for consideration of the merits of appellant's claim, to be followed by an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

⁷ *Id.* at § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: February 19, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board