United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 10-2067**
	)	**Issued: July 15, 2011**
DEPARTMENT OF AGRICULTURE,	)	
Ottumwa, IA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 10, 2010 appellant filed a timely appeal of a July 15, 2010 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration of the merits. As more than 180 days has elapsed between the issuance of OWCP's last merit decision of June 5, 2009 and the filing of the appeal on August 10, 2010. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over only the July 15, 2010 nonmerit decision. The Board does not have jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal, appellant alleged errors in OWCP's determination that he had not established a recurrence of disability. He contends that his physician did not opine that appellant could

[1] 5 U.S.C. § 8101 *et seq.*

perform the duties of a food inspector until he was pressured to do so by OWCP. Appellant stated that he submitted evidence that he had symptoms of a recurrence when he tried to return to work. He also contended that the opinion of a physical therapist should be given more weight.

FACTUAL HISTORY

On January 15, 2002 appellant, then a 44-year-old food inspector, filed a traumatic injury claim alleging that on January 14, 2002 he fell into a head trough and sustained a laceration on his right little finger, an abrasion on his right forearm and pain in his back, hip and abdomen. On February 20, 2002 OWCP accepted appellant's claim for lumbosacral sprain. On June 17, 2002 Dr. John D. Miles, a Board-certified orthopedic surgeon, performed a laminotomy and medial facetectomy at L3-4 and L4-5 on the left. On August 16, 2002 OWCP expanded the claim to include acceptance for degenerative disc disease, L3-4 and L4-5 (aggravation). On November 13, 2002 Dr. Miles performed a laminotomy and medial facetectomy at L3-4 and L4-5 on the right. On February 27, 2003 he released appellant to work. Although Dr. Miles did not believe that appellant could return to work in his capacity as hog inspector, he did believe he could return to a position that required no repetitive bending, twisting or stooping. Appellant returned to work as a food inspector (slaughter) on April 20, 2003 with restrictions of no repetitive bending, no twisting or stooping and frequent lifting limited to 20 to 50 pounds. On December 3, 2003 OWCP found that this position fairly and reasonably represented his wage-earning capacity. However, appellant stopped work on November 25, 2003 claiming total disability to his back.

On April 6, 2005 appellant underwent an anterior spinal fusion, L3-4, L4-5 with patellar allograft and bone morphogenic protein. On October 10, 2005 he returned to work, two hours a day, to be increased periodically to a full day. In a medical report dated February 2, 2006, Dr. Fuller indicated that appellant tried to return to work but was unable to do so. He indicated that he provided appellant a work slip to be permanently off work.

Appellant claimed a recurrence of disability beginning February 5, 2006.

By decision dated March 14, 2006, OWCP denied appellant's claim for a recurrence because the medical evidence did not establish that disability was related to accepted conditions.

In a March 21, 2006 report, Dr. Fuller noted that appellant returned to the office on January 3, 2006 and reported that he continued to experience severe pain with working. He noted that he presently did not believe appellant could return to work and the basis for this recommendation was that any work seemed to create intolerable pain. Dr. Fuller stated that appellant should undergo a functional capacity assessment. He also noted that appellant had high narcotic intake and that, although he endeavored to wean appellant from narcotic use, these have been provided to him by other physicians. Dr. Fuller noted that the use of narcotics caused excessive drowsiness and that it would be inadvisable for appellant to operate a motor vehicle or other heavy equipment. He noted that appellant was unlikely to improve. In a May 1, 2006 work capacity evaluation, Dr. Fuller released appellant to work with restrictions of no lifting over 10 pounds and no pushing or pulling of over 20 pounds. In a May 10, 2006 report, he diagnosed lumbago. In a May 16, 2006 report, Dr. Fuller noted that appellant achieved solid fusion. He reviewed the position of modified food inspector job duties and indicated that this

position was well within appellant's restrictions. In a June 13, 2006 report, Dr. Fuller stated that appellant told him that the modified food inspector job required a substantial amount of bending, twisting and sitting or standing in a forward leaning posture with an unsupported back and stated that these activities are proscribed.

In an August 29, 2006 on-site-job analysis for the position of inspector, Stephen Schill, a rehabilitation counselor, indicated that the position at the employing establishment involved occasional standing, no pulling, pushing, lifting, carrying ladders or scaffolds. He noted that it involved only occasional simple grasping.

In a September 24, 2006 report, Dr. Fuller noted a divergence between the on-site-job-analysis provided by OWCP and the one provided by appellant. He stated that, based on his knowledge of this job, he maintained his prior opinion.

OWCP's March 14, 2006 decision was affirmed by a hearing representative on December 26, 2006.

On December 2, 2007 appellant filed a request for reconsideration and contended that the modified position was not within his restrictions based on the medical evidence.

On March 19, 2008 OWCP reviewed appellant's case on the merits and denied modification.

On March 18, 2009 appellant filed a request for reconsideration. He, through counsel, argued that statements from his coworkers, inspectors and an environmental health specialist support his assertion that he could not perform the position offered by the employing establishment. Appellant submitted new reports by Mark Blankespoor, a physical therapist, dated March 17 and 18, 2009, and contended that these reports showed deficiencies in an earlier rehabilitation counselor's report, and opined that appellant could not perform the position. He again contended that the medical evidence, and in particular the reports by Dr. Fuller, support that he could not perform the duty assignment at the employing establishment. Appellant also resubmitted multiple items of evidence that had previously been before OWCP when it issued its prior decisions. These documents included reports by Dr. Fuller and an October 8, 2006 report by Dr. Paul D. Poncy, an osteopath.

By decision dated June 5, 2009, OWCP denied modification of its earlier decisions.

On April 12, 2010 appellant again requested reconsideration. He contended that he lost faith in Dr. Fuller and submitted new medical evidence in support of his claim. Appellant also contended that statements from his colleagues showed that he was unable to perform the duties of the position. He further contended that there were many day activities he was unable to do because of pain. Appellant also disagreed with OWCP's conclusion that as Mr. Blackespoor was not a physician, his opinion was of no probative value in establishing a recurrence of disability. Moreover, he pointed out that the Social Security Administration had determined he was totally disabled and awarded him disability retirement benefits. Appellant contended that he met his burden of proof to establish a recurrence of disability.

In a February 8, 2010 opinion, Dr. David S. Diamant, a Board-certified physiatrist with a subspecialty in pain medicine, noted that he most recently saw appellant on June 20, 2007. He noted that he reviewed the medical records supplied by appellant and opined that appellant was unable to perform the job duties of food inspector on a full-time basis based upon the job demands and his current medical status. Dr. Diamant noted that the last statement of accepted facts dated July 10, 2004 stated that the position of food inspector involved lifting and carrying 15 to 44 pounds, repetitive motion of the upper body and limbs and walking and standing eight hours. He stated that appellant could not perform these duties.

In further support, appellant submitted a March 15, 2010 opinion wherein Dr. Poncy indicated that he has been appellant's primary physician since 2006. Dr. Poncy noted that he reviewed medical evidence and other documents, including the July 10, 2004 statement of accepted facts mentioned above. He noted that, based on the job description provided by the employing establishment, there was no way appellant could perform the duties. Dr. Poncy also noted that with the amount of narcotic pain medication that appellant requires to manage his pain at a tolerable level it would be extremely unsafe for him to work around machinery or other objects with moving parts. Accordingly, he opined that there was no way that appellant could perform the job of poultry food inspector. Dr. Poncy further questioned whether appellant ever recovered fully enough to perform his duties as a food inspector. However, he opined that, if appellant did fully recover after his spinal fusion in 2005, then in his opinion, on or before February 6, 2006 appellant did experience a recurrence of his initial injury of January 14, 2002.

By decision dated July 15, 2010, OWCP denied appellant's request for reconsideration without conducting a merit review of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[2] its regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[3] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[4] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[5] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[6] and the submission

[2] 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. *Id*. at § 8128(a).

[3] 20 C.F.R. § 10.606(b)(2)

[4] *Id*. at § 10.607(a).

[5] *Id.* at § 10.607(b).

[6] *Eugene F. Butler*¸ 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980)

of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[7] While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[8]

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration. Appellant has not shown that OWCP erroneously applied or interpreted a point of law. He has also failed to advance a relevant legal argument not previously considered by OWCP. In this regard, appellant's contentions that the statements by his coworkers showed that he established a recurrence were already raised and reviewed by OWCP in its prior decisions including the decision dated March 19, 2008. OWCP also has previously found in its March 19, 2008 opinion that the vocational rehabilitation specialist, Mr. Schill, visited the plant and accurately observed the duties of the job appellant was expected to perform. In the June 5, 2009 decision, it noted that Mr. Schill's opinion was not given the weight of medical evidence but rather carried the weight of the evidence in determining the physical requirements of the offered position. Accordingly, appellant's contention that the job analysis performed by the vocational counselor was inaccurate had been raised and reviewed by OWCP previously. His contention that the opinion of the physical therapist he retained, Mr. Blackespoor, should be given greater weight in establishing a recurrence is irrelevant as health care providers such as physical therapists are not physicians under FECA. Thus, a physical therapist is not competent to give a medical opinion.[9]

The Board notes that decisions by other agencies regarding disability are not binding on OWCP. The standards for establishing work-related disability under FECA, which governs OWCP and the Board, are not the same as the standards set for disability retirement or social security benefits.[10]

However, the Board finds that the February 8, 2010 report by Dr. Diamant and the March 15, 2010 report by Dr. Poncy constituted relevant and pertinent new evidence not previously considered by OWCP. Both of these physicians opined that appellant could not perform the job duties of a food inspector on a full-time basis due to the effects of his employment injury. OWCP's decision denied reconsideration without review on the merit; however, it noted certain deficiencies in these reports. Dr. Poncy added that it was unsafe for appellant to operate machinery due to the pain he experienced as he had not fully recovered from the employment injury. However, the requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.[11] If OWCP should determine that the new evidence submitted

[7] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[8] *John F. Critz*, 44 ECAB 788, 794 (1993).

[9] *See* 5 U.S.C. § 8102(2).

[10] *Raj B. Thackurdeen*, 54 ECAB 396 (2003); *P.H.*, Docket No. 10-981 (issued December 9, 2010).

[11] *See Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *D.M.*, Docket No. 10-1844 (issued May 10, 2011).

lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.[12] The case shall be remanded to OWCP to conduct a merit review of the entire record. After such development as is deemed necessary, OWCP shall issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 15, 2010 is set aside and remanded for further review of the merits.

Issued: July 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[12] *See Dennis J. Lasanen*, 41 ECAB 933 (1990).