

¹ 5 U.S.C. § 8101 *et seq.*

On appeal appellant argues that OWCP erred in denying his request for a merit review, failing to expand his claim to include additional conditions and in terminating his compensation benefits.

FACTUAL HISTORY

This case has previously been before the Board.² On September 29, 1994 appellant, then a 48-year-old seasonal motor vehicle operator, strained his lower back and skinned his left jaw while in the performance of duty. OWCP accepted the claim for left jaw contusion and low back strain, postconcussion syndrome, aggravation of preexisting migraines and suboccipital neuralgia. Appellant stopped work on September 29, 1994 and was placed on the periodic rolls in receipt of temporary total disability.

In a December 10, 2011 letter, appellant requested reimbursement for his massage therapy treatment and therapeutic sessions with a personal trainer. He stated that his physician had prescribed the treatments and that OWCP had previously authorized massage therapy treatment.

On February 15, 2012 OWCP received prescriptions dated October 12 and December 8, 2009 from Dr. David B. Hagie, who recommended a personal trainer for total body muscle imbalance and areas of disuse atrophy from lumbosacral sprain, spondylolisthesis and postconcussion syndrome. It also received appellant's request for authorization and reimbursement for the personal trainer for the period October 27, 2009 through March 18, 2010 and reimbursement for massage therapy for the period January 5 to July 29, 2010.

In an undated progress report received on April 11, 2012, Dr. Hagie diagnosed headache, migraine and somatic cranium, lumbar and sacrum dysfunctions. He recommended massage therapy for treatment of appellant's headaches.

By correspondence dated April 26, 2012, OWCP requested additional information from Dr. Hagie explaining why appellant's July 29, 1994 employment injury required a personal trainer or massage therapy when it had been found that his postconcussion syndrome had

² In the first appeal, the Board affirmed a July 3, 2008 OWCP hearing representative's decision finding an overpayment of compensation and denying wavier of the recovery of the overpayment. See Docket No. 08-2265 (issued September 28, 2009). The Board reversed OWCP's April 10, 2008 decision which denied reconsideration of a February 2, 2007 decision terminating monetary benefits pursuant to 5 U.S.C. § 8106(c). The Board noted that on June 9, 2004 OWCP referred to Dr. Mary Reif, a Board-certified neurologist, to resolve the conflict in the medical opinion evidence between Dr. David B. Hagie, a treating Board-certified osteopath, and Dr. Stephen C. Zinsmeister, a second opinion Board-certified psychiatrist and neurologist, on the issues of whether appellant was capable of performing sedentary work for eight hours per day and whether his current condition was employment related and totally disabling. On July 8, 2004 Dr. Reif concluded that appellant was capable of working an eight-hour day with restrictions. The Board found that OWCP improperly relied upon the July 8, 2004 opinion of Dr. Reif, the impartial Board-certified neurologist, as the opinion was not current. On remand, by decision dated December 16, 2010, OWCP terminated appellant's compensation benefits, with the exception of the medical benefits for headache aggravation, effective that date. It denied reconsideration on December 16, 2011 and the Board affirmed on December 6, 2012. See Docket No. 12-1473 (issued December 6, 2012).

resolved and that a physical examination by a second opinion physician found appellant to be “well-muscled.”

In a May 8, 2012 letter, appellant related that he was requesting reimbursement for a personal trainer for the period October 27, 2009 to October 28, 2010 and reimbursement for massage therapy for the period January 5 to October 28, 2010. He related that he had been reimbursed for massage therapy for the period August 12 to October 28, 2010. In support of his request, appellant submitted medical evidence from Dr. Hagie for the period August 20, 1999 through May 1, 2012.

On June 11, 2012 Dr. Kenneth D. Sawyer, an OWCP medical adviser, reviewed the medical evidence of record. He concluded that the massage therapy and personal trainer did not meet the statutory requirements under FECA as it would not reduce the period or degree of disability or likely cure or give relief or aid in decreasing the amount of compensation paid. Dr. Sawyer related that Dr. Hagie based his recommendations for treatment on conditions not accepted by OWCP. He found no convincing evidence that appellant suffered from the multiple conditions for which Dr. Hagie recommended treatment.

By decision dated June 22, 2012, OWCP denied appellant’s request for reimbursement for a personal trainer from October 27, 2009 through March 18, 2010 or for massage therapy treatments from January 5 to July 29, 2010.

In a letter dated June 2, 2013, appellant requested reconsideration of the June 22, 2012 decision denying reimbursement. He contended that Dr. Hagie had provided adequate rationale explaining how the personal trainer and massage treatment met the statutory definition under FECA. Appellant also requested that his claim be expanded to accept an aggravation of degenerative disc disease and cervical strain and that his compensation benefits be reinstated as of December 16, 2010.

By decision dated July 12, 2013, OWCP denied further reconsideration.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP’s regulations provide that 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.⁴ 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

³ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁴ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

of the date of that decision.⁵ 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.⁶

ANALYSIS

By letter dated June 2, 2013, appellant requested reconsideration; but he did not submit any relevant and pertinent new evidence or new relevant argument with his request. He reiterated that his treating physician had provided sufficient rationale to meet FECA requirements for approval of a personal trainer and massage therapy. Appellant also reiterated that his compensation benefits should be reinstated, effective December 16, 2010, the date OWCP terminated his compensation benefits and that his claim be expanded to include additional conditions. The Board finds that appellant did not raise new arguments or present new evidence that OWCP erroneously applied or interpreted a specific point of law; advanced any relevant legal arguments not previously considered by OWCP; or present any relevant and pertinent new evidence, he is not entitled to further review of the merits of his claim under any criteria of section 10.606(b)(3).⁷

As appellant did not meet any of the regulatory requirements for review of the merits of his claim, OWCP properly denied his June 2, 2013 request for reconsideration.

On appeal appellant contends that OWCP erred in the evidence upon which it relied in terminating his compensation benefits, failing to expand his claim to include additional conditions and denying authorization and reimbursement for a personal trainer and massage therapy. The merits of his claim are not before the Board as the only decision currently on appeal is the nonmerit July 12, 2013 decision. As discussed above appellant has not met any of the regulatory requirements under 20 C.F.R. § 10.606 to warrant a merit review of his claim.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁶ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁷ *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *W.C.*, 59 ECAB 372 (2008); *Susan A. Filkins*, *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 12, 2013 is affirmed.

Issued: June 12, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board