

FACTUAL HISTORY

This case was previously before the Board. By decision dated September 27, 2010, the Board affirmed an April 14, 2009 OWCP decision terminating appellant's wage-loss and medical compensation effective that day.² OWCP accepted that appellant sustained lumbar strains as a result of work injuries of October 4, 2006 and June 9, 2008. It also accepted that he sustained a bilateral inguinal hernia as a result of the June 9, 2008 work injury for which he underwent surgery on August 29, 2008. In the April 14, 2009 OWCP decision, determinative weight was accorded to the opinion of Dr. Theodore J. Suchy, a Board-certified orthopedic surgeon and OWCP referral physician, who found that the accepted conditions had resolved and without any disability. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.

In a January 10, 2011 letter, appellant, through counsel of record, requested reconsideration before OWCP. Counsel contended that the medical evidence supported appellant's entitlement to wage-loss and medical benefits. He submitted a January 3, 2009 notification of personnel action; a November 16, 2010 letter from appellant to his attorney, which argued that Dr. Nittan Khanna, a Board-certified orthopedic surgeon to whom appellant was referred to by his treating physician, made conflicting statements about his work capacity; and a November 17, 2010 letter from appellant to his attorney arguing that Dr. Khanna's examination was flawed and alleging that Dr. Khanna lied about his physical status. Counsel also submitted December 8, 2008 and August 11, 2009 diagnostic studies; an August 11, 2009 fluoroscopic-guided lumbar discography; and an April 17, 2009 chart note and an October 28, 2008 duty status report by an unknown author.

In a July 7, 2009 report, Dr. Tian Xia, a Board-certified family practitioner reviewed the history of injury. He stated that a recent magnetic resonance imaging (MRI) scan revealed L5-S1 disc tear and multiple facet disease at L4-5 and L5-S1 levels. Dr. Xia provided examination findings and stated that appellant's symptoms were fully explained by L5-S1 significant annular tear. In an August 17, 2009 report, he reviewed appellant's lumbar discogram and the computerized axial tomography (CT) scan. Dr. Xia reported there were no significant changes and provided an assessment of lumbar disc herniation. He opined that while appellant has prolonged compression to his left L3-4 nerves, which may have caused some irreversible damages, he should be able to return to most of his functions if he underwent percutaneous decompression surgery at L3-4 on the left. Dr. Xia referred appellant to Dr. Ronald Michael, a Board-certified neurosurgeon. In a September 28, 2009 progress note, he discussed treatment options. In a November 15, 2010 report, Dr. Xia noted that appellant had not worked for over a year and that he visited the emergency room in October 2010. He noted that appellant lost his private insurance and his workers' compensation case was in litigation. Dr. Xia agreed with Dr. Michael that appellant should remain off work and that he should undergo percutaneous disc decompression at the L3-4 level once his financial issues were resolved.

In a June 30, 2009 report, Dr. Ronald Hickombottom, an internist, noted the history of injury, set forth his examination findings and diagnosed annular tear of the lumbar spine, multi-

² Docket No. 10-104 (issued September 27, 2010).

level facet disease, adjustment reaction with secondary depression and bilateral inguinal hernia repair. He indicated that appellant's MRI scan showed annular tear at L5-S1 along with degenerative changes at the facet joints of L4-5 and L5-S1. Recommendations for further evaluations and care were provided.

Medical reports from Dr. Michael were submitted. In an August 24, 2009 report, Dr. Michael noted the history of injury and presented examination findings. He stated that the postdiscogram CT scan demonstrated L5-S1 annular tear and fissure formation within the disc. Appellant's objective studies were requested. In an August 31, 2009 report, Dr. Michael reviewed appellant's objective studies and indicated that appellant has L5-S1 disc protrusion, annular tear and discogenic pain. He opined that appellant should remain off work. In a September 11, 2009 report, Dr. Michael advised that appellant has L5-S1 disc protrusion and annular tear and a L3-4 bulging disc. In an October 7, 2009 report, he discussed treatment options for appellant's left L3-4 and left L4-5 annular tears. In an October 22, 2010 report, Dr. Michael indicated that appellant has an L5-S1 disc protrusion and L3-4 bulging disc and set forth treatment options. In an October 25, 2010 report, he noted appellant's progress and that approval was being sought for treatment. In a November 14, 2010 report, Dr. Michael reported that appellant has L3-4 disc protrusion with L3-4 discogenic pain and cervical radiculitis.

In a January 21, 2011 decision, OWCP denied appellant's reconsideration request on the basis that the evidence submitted was insufficient to warrant a merit review of the record.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP 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.⁴ To be entitled to a merit review of OWCP's 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.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 The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁷

³ Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at anytime on her own motion or on application. 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.607(a).

⁶ *Id.* at § 10.608(b).

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

ANALYSIS

OWCP terminated appellant's wage-loss and medical compensation effective April 14, 2009, which the Board affirmed in its September 27, 2010 decision.⁸ The underlying issue is whether appellant established any continuing disability or residuals due to his accepted lumbar strains of October 4, 2006 and June 9, 2008 and the bilateral inguinal hernia which was surgically repaired on August 29, 2008. He requested reconsideration and submitted two statements addressed to his attorney questioning the adequacy and accuracy of Dr. Khanna's examination. Appellant's arguments regarding Dr. Khanna's examination show no legal or procedural error by OWCP. The Board notes that Dr. Khanna's reports were considered at the time of OWCP's termination of benefits and Dr. Khanna did not attribute any residual condition or disability to appellant's work injuries. Appellant further failed to provide sufficiently detailed allegations which offer any argument of fact or law. Consequently, he is not entitled to a review of the merits of his case based on the first or second above-noted requirements under 20 C.F.R. § 10.606(b)(2).

Appellant also did not submit any relevant and pertinent new evidence not previously considered by OWCP. The reports from Drs. Xia, Hickombottom and Michael diagnosed his current conditions of L5-S1 disc tear and multiple facet disease at L4-5 and L5-S1 levels. However the physicians offered no opinion regarding whether appellant's lumbar conditions were caused by or attributable to his previously accepted conditions. While such reports are new to the record, they are not relevant and pertinent to the issue of whether appellant has residuals and disability associated with his work injuries and, thus, can not constitute a basis to reopen his case.⁹

Appellant also submitted several diagnostic studies and testing. This information, while also new, is not relevant to the issue of whether appellant continues to suffer residuals from his accepted work-related injuries. The diagnostic studies and testing are not relevant as they do not address the question of causal relationship. Similarly the April 17, 2009 chart note and an October 28, 2008 duty status report are not relevant to the underlying medical issue as they are from an unknown author such that they cannot be considered competent medical evidence.¹⁰

Accordingly, the Board finds that appellant did not meet at least one of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by it or submit relevant and pertinent new evidence not previously considered by OWCP. Thus, OWCP properly denied a merit review of his case.

⁸ As the last merit decision dated September 27, 2010 was issued by the Board, the Board notes that this decision became final upon the expiration of 30 days of its issuance and is final as to the subject matter appealed. *See* 20 C.F.R. § 501.6(d).

⁹ *Jimmy O. Gilmore*, 37 ECAB 257 (1985); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

¹⁰ *C.B.*, Docket No. 09-2027 (issued May 12, 2010) (a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2) and reports lacking proper identification do not constitute probative medical evidence).

On appeal, counsel argues that the decision is contrary to fact and law. However, for the reasons detailed above, appellant failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(2) to be entitled to a merit review of his case.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 21, 2011 is affirmed.

Issued: November 15, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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