United States Department of Labor
Employees' Compensation Appeals Board

S.E., Appellant	)	
and	)	**Docket No. 13-1931**
	)	**Issued: February 10, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Gaithersburg, MD, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 19, 2013 appellant, through her attorney, filed a timely appeal of a June 4, 2013 decision of the Office of Workers' Compensation Programs (OWCP), denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the June 4, 2013 nonmerit decision. Since more than 180 days elapsed from the most recent merit decisions of November 13 and August 10, 2012 to the filing of the appeal, the Board lacks jurisdiction to review the merits of the claim.[2]

ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was insufficient to warrant merit review under 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The June 4, 2013 decision on appeal was issued in response to an application for reconsideration of an August 10, 2012 OWCP decision. The record contains a November 13, 2012 decision with respect to an overpayment of compensation based on findings in the August 10, 2012 decision.

FACTUAL HISTORY

On December 5, 1990 appellant, then a 36-year-old router, filed an occupational disease claim (Form CA-2) alleging an emotional condition as a result of harassment by her supervisor. She stated that her service-connected disability had been aggravated. On June 3, 1991 OWCP accepted the claim for major depressive episode and appellant received compensation for wage loss.

By decision dated March 29, 2011, OWCP stated that the accepted condition was changed from major depressive disorder to aggravation of major depressive disorder. In a decision dated May 19, 2011, it terminated compensation for wage-loss and medical benefits. The termination decision was vacated, by decision dated November 7, 2011, on the grounds that the medical report from the second opinion physician was based on an incorrect statement of accepted facts (SOAF).

On November 14, 2011 OWCP advised appellant that a review of her file indicated that she had been receiving both FECA wage-loss compensation and disability benefits from the Department of Veterans Affairs (VA). It requested that she submit evidence with respect to her receipt of VA benefits.

The record contains a rating decision by VA dated April 18, 1994. The decision stated that "the evaluation of [appellant's] nervous condition is increased to 100 percent." According to the VA, Dr. Celeste Good, a treating physician, reported on December 15, 1993 that appellant had recurrent depression, suicidal ideation and uncontrollable anger and was unable to work due to major depression. Appellant was hospitalized in January 1994 for major depression. The VA reviewed the treatment notes from Dr. Good dated August 2, 1993 to February 26, 1994 and a March 8, 1994 VA examination and hospital report. The April 18, 1994 decision found that the conditions were dysthemic disorder and major depression, and the 100 percent disability was effective December 28, 1993. The record also contains a VA rating decision, dated September 1, 1992, indicating that the service-connected condition was dysthemic disorder with a 50 percent disability rating.

By letter dated February 21, 2012, OWCP advised appellant that she was in receipt of a dual benefit that was prohibited by FECA as she received FECA monetary benefits and an increased VA disability since December 28, 1993. Appellant was advised that she needed to make an election between OWCP and VA benefits.

In a letter dated March 29, 2012, appellant's representative contended that appellant had not received a dual benefit. He argued that the VA decision to increase disability was based only on a service-connected condition, not a work-related condition. By letter dated April 3, 2012, OWCP advised appellant that a failure to elect benefits would be considered an election of VA benefits.

By decision dated May 17, 2012, OWCP terminated appellant's benefits effective May 18, 2012. It found that her failure to make the required election of benefits was considered an election of VA benefits.

On June 14, 2012 appellant requested reconsideration. She argued that the VA benefits were based on dysthemic disorder, not a work-related injury.

By decision dated August 10, 2012, OWCP reviewed the case on its merits and denied modification of the May 17, 2012 decision.

On May 17, 2013 appellant requested reconsideration. She again argued that there was no dual benefit received, as the VA award was for dysthemic disorder and her work injury was a different condition. With respect to the medical evidence, appellant resubmitted a February 4, 2009 report from Dr. Good, who stated that appellant, had been under her care since July 1993 and the treating diagnosis was bipolar disorder and post-traumatic stress disorder (PTSD). Dr. Good advised that appellant's condition was chronic and she could not return to work.

Appellant also submitted a February 19, 2013 report from Dr. Good, who stated that appellant was under her care since July 1993 and was previously diagnosed with major depression and PTSD. Dr. Good stated that previous treatments with antidepressants had failed to control her symptoms and on August 26, 1993 her medication was changed. She stated that the "working diagnosis" was bipolar disorder starting on August 26, 1993. Appellant also submitted a hospital discharge report dated January 10, 1994 from Dr. Good with a diagnosis of major depression and recurrent PTSD.

By decision dated June 4, 2013, OWCP found that the application for reconsideration was insufficient to warrant further merit review of the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[3] OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains 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 evidence not previously considered by OWCP."[4] 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.[5]

ANALYSIS

Appellant submitted an application for reconsideration on May 17, 2013. She did not show that OWCP erroneously applied or interpreted a specific point of law or advance a legal argument not previously considered. Appellant reiterated her argument that she did not believe

[3] 5 U.S.C. § 8128(a) (providing that "[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.")

[4] 20 C.F.R. § 10.606(b)(2).

[5] *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

that a dual benefit had occurred, because the VA disability increase was not due to her FECA work-related injury. This argument was raised prior to the August 10, 2012 merit decision and therefore it does not represent a legal argument not previously considered by OWCP.

The remaining issue is whether appellant had submitted relevant and pertinent evidence not previously considered by OWCP. She submitted a February 19, 2013 report and a January 10, 1994 hospital discharge report from Dr. Good. However, this evidence does not provide any new and relevant evidence with respect to the underlying merit issue. OWCP found that the VA decision to increase disability to 100 percent effective December 28, 1993 was due to the employment injury.[6] The accepted condition by OWCP had initially been major depressive episode, but was later modified to an aggravation of major depressive disorder.

In the February 19, 2013 report, Dr. Good stated that appellant's medication was changed on August 26, 1993 and the "working diagnosis" was bipolar disorder. She had previously noted a diagnosis of bipolar disorder in her February 4, 2009 report. The February 19, 2013 report does not provide any new and relevant evidence related to the issue of whether the VA disability increase was due to an employment injury. The April 18, 1994 VA rating decision specifically noted a December 15, 1993 report from Dr. Good, reporting appellant's symptoms and stating that appellant was disabled due to major depression. The February 19, 2013 report from Dr. Good does not address that report or provide any new information as to the relationship of the major depression noted by VA and federal employment. With respect to the January 10, 1994 hospital discharge report, the VA rating decision had noted that appellant was hospitalized for major depression in January 1994. The hospital report listed a diagnosis of major depression with recurrent PTSD and failed to provide any new and relevant information on the issue presented.

The Board finds that appellant's application for reconsideration was not sufficient to warrant a merit review of the claim. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608(b), OWCP properly declined to reopen the case for merit review.

CONCLUSION

The Board finds that OWCP properly found the application for reconsideration was insufficient to warrant merit review of the claim.

[6] 5 U.S.C. § 8116(a) prohibits an employee from receiving benefits under FECA and VA statutes for the same injury. This prohibition extends to an increase in a service-connected disability award where the increase is brought about by an injury sustained in civilian employment. *See Kelvin L. Davis*, 56 ECAB 404 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 4, 2013 is affirmed.

Issued: February 10, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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