

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

W.B., Appellant

and

**DEPARTMENT OF THE INTERIOR, BUREAU
OF INDIAN AFFAIRS, Lapwai, ID, Employer**

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**Docket No. 09-1656
Issued: July 22, 2010**

Appearances:

John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 22, 2009 appellant timely appealed the March 5, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which denied reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the March 5, 2009 nonmerit decision.

ISSUE

The issue is whether the Office properly denied appellant's February 18, 2009 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case was previously before the Board.¹ Appellant, a 75-year-old soil conservationist, has an accepted claim for major depression, which arose on or about November 1, 1986. In a decision dated February 3, 2005, the Office terminated his wage-loss

¹ Docket No. 07-1265 (issued September 9, 2008).

compensation and medical benefits based on the January 4, 2005 report of Dr. Bert S. Furmansky, a Board-certified psychiatrist and impartial medical examiner (IME), who diagnosed recurrent major depression without psychosis, in remission, dysthymia, obsessive-compulsive disorder and history of alcohol abuse. Dr. Furmansky found that appellant's current psychiatric diagnoses were unrelated to his previous employment.² In terminating compensation and medical benefits, the Office accorded determinative weight to the IME's January 4, 2005 opinion. By decision dated January 11, 2007, the Branch of Hearings and Review affirmed the Office's February 3, 2005 decision. When the case was previously on appeal, the Board affirmed the Office's decision to terminate appellant's compensation and medical benefits based on Dr. Furmansky's January 4, 2005 opinion. The Board's September 9, 2008 decision is incorporated herein by reference.

On February 18, 2009 appellant, with the assistance of counsel, filed a request for reconsideration. The request consisted of a one-page, six-sentence letter that incorporated by reference the July 12, 2007 brief counsel previously submitted to the Board under Docket No. 07-1265.³ In his February 18, 2009 request for reconsideration, counsel noted that the Board reviewed the case and issued a decision on September 9, 2008. In the prior appeal, he argued, that the IME relied on a defective SOAF dated December 30, 2003. However, Dr. Furmansky did not rely on a December 30, 2003 SOAF, but instead relied upon an amended SOAF dated August 19, 2004.⁴ On reconsideration before the Office, counsel alleged that neither the Office nor the Board had addressed whether the "SOAF was defective."⁵ He argued that the SOAF was, in fact, defective and that it was error to base the IME's report on a defective SOAF. No additional evidence was submitted with the February 18, 2009 request for reconsideration.

In a decision dated March 5, 2009, the Office denied appellant's request for reconsideration. It indicated that Dr. Furmansky had been provided an amended SOAF dated August 19, 2004, a fact that was duly noted in both the hearing representative's January 11, 2007 decision and the Board's September 9, 2008 decision. The Office quoted passages from both decisions reflecting that the issue of the alleged defective SOAF had been previously addressed.

² The Office provided Dr. Furmansky an August 19, 2004 amended statement of accepted facts (SOAF) that identified appellant's June 26, 1989 request for a desk audit as the sole compensable employment factor. Appellant requested a desk audit because of his inability to complete certain assignments. He stated that he was expected to fill quotas that were far beyond his "mental and physical abilities." Appellant also noted that he had "tried to complete [his] assignment of leases, but the amount [was] overwhelming."

³ Counsel's July 12, 2007 brief was not part of the case record the Board returned to the Office after issuing its September 9, 2008 decision. Although part of the Board's records, briefs submitted on appeal are not customarily made a part of the permanent case record. Thus, when counsel referenced his previous appeal brief in the February 18, 2009 request for reconsideration, the Office's senior claims examiner had nothing to refer to on reconsideration.

⁴ *See supra* note 2.

⁵ Although reconsideration was an available option, counsel did not seek further Board review following the issuance of the September 9, 2008 decision. *See* 20 C.F.R. § 501.7(a) (2008).

Because appellant did not raise any substantive legal questions or submit any relevant and pertinent new evidence, the Office found that he was not entitled to merit review.⁶

LEGAL PRECEDENT

The Office has the discretion to reopen a case for review on the merits.⁷ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that, the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.⁸ When an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.⁹

ANALYSIS

In the current appeal, counsel acknowledged that Dr. Furmansky relied on the amended SOAF dated August 19, 2004. For the first time on appeal, he argues that the August 19, 2004 SOAF is inaccurate and incomplete. Counsel also argues that it was error for the Office not to conduct a merit review based on the arguments raised in his February 18, 2009 request for reconsideration.¹⁰

Appellant's February 18, 2009 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Appellant's counsel claimed that neither the Office nor the Board had addressed whether the "SOAF was defective." In his current brief, he acknowledged that both the hearing representative and the Board noted in their respective decisions that the IME relied upon an amended SOAF, and not the December 30, 2003 SOAF that he previously argued was defective.

In the March 5, 2009 decision denying reconsideration, the senior claims examiner correctly noted that both the Branch of Hearings and Review and the Board "discussed the updated and amended SOAF dated August 19, 2004 that was provided to Dr. Furmansky ... specifically addressed [counsel's] argument that the SOAF was defective."

⁶ The Office purports to affirm the Board's September 9, 2008 decision. However, the Board's decision is not subject to review by the Office. Board decisions are final as to the subject matter appealed and such decisions shall not be subject to review, except by the Board. 20 C.F.R. § 501.6(c).

⁷ 5 U.S.C. § 8128(a) (2006).

⁸ 20 C.F.R. § 10.606(b)(2) (2009).

⁹ *Id.* at § 10.608(b).

¹⁰ He cited the applicable regulations governing reconsideration requests and referenced several Board decisions that generally describe the grounds for merit review.

The second full paragraph on page 6 of the Board's September 9, 2008 decision reads as follows:

Contrary to counsel's argument, Dr. Furmansky did not rely on a December 30, 2003 statement of accepted facts. As noted, the Office provided Dr. Furmansky with an amended statement of accepted facts dated August 19, 2004. This latest statement of accepted facts correctly identified appellant's June 26, 1986 request for a desk audit as the only compensable employment factor, which is consistent with the Office's initial statement of accepted facts dated April 30, 1991.

The hearing representative similarly acknowledged counsel's argument about an "incomplete SOAF." He noted that counsel "questioned whether Dr. Furmansky ... reviewed an adequate SOAF." The hearing representative responded that "Dr. Furmansky's opinion was based upon a complete and accurate factual history of the case, as he reviewed a SOAF which was updated and amended by the Office...."

Contrary to counsel's February 18, 2009 argument on reconsideration, both the hearing representative and the Board addressed the allegedly defective SOAF that Dr. Furmansky allegedly relied upon in formulating his January 4, 2005 opinion. Accordingly, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).¹¹ He also failed to satisfy the third requirement under section 10.606(b)(2). Appellant did not submit any relevant and pertinent new evidence with his February 18, 2009 request for reconsideration. Consequently, he is not entitled to a review of the merits of his claim based on the third requirement under section 10.606(b)(2).¹²

CONCLUSION

The Office properly denied appellant's February 18, 2009 request for reconsideration.

¹¹ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

¹² *Id.* at § 10.606(b)(2)(iii). Counsel's citation regarding the grounds for merit review does not establish that the Office improperly denied reconsideration. The propriety of the Office's March 5, 2009 decision is judged based on the evidence and argument presented on reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the March 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 22, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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