United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 12-358**
	)	**Issued: July 11, 2012**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Manchester, NH, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 30, 2011 appellant filed a timely appeal from August 12 and October 20, 2011 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP) denying his requests for reconsideration.[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board does not have jurisdiction over the merits of this case.

[1] The last merit decision in this case was the April 4, 2011 hearing representative decision, which denied authorization for spinal foramina epidural injections. For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to file an appeal. 20 C.F.R. § 501.3(d)(2). For final adverse decisions of OWCP issued on or after November 19, 2008, a claimant must file an appeal within 180 days of the decision. 20 C.F.R. § 501.3(e). Because more than 180 days elapsed between the most recent merit decision of April 4, 2011 to the filing of this appeal on November 30, 2011, the Board lacks jurisdiction to review the merits of this case.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's May 18 and September 26, 2011 requests for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 20, 2004 appellant, then a 58-year-old pipe fitter leader, filed a traumatic injury claim alleging that on May 19, 2004 he experienced right shoulder pain and sustained a contusion to the head when he fell off a ladder. He stopped work and did not return. OWCP accepted appellant's claim for right shoulder rotator cuff tear, head contusion, abrasions of the face, neck strain and right diaphragm paralysis. Appellant received temporary total disability compensation and underwent right shoulder arthroscopy, open rotator cuff repair, right thoracotomy and placation of right diaphragm.

On November 6, 2009 OWCP referred appellant to Dr. Joel Saperstein, a Board-certified orthopedic surgeon, for a second-opinion examination to determine whether he had residuals of his accepted work-related injuries. In a December 3, 2009 report, Dr. Saperstein reviewed appellant's medical history and the statement of accepted facts. Upon examination, he observed normal heel/toe gait, normal reflexes in the lower extremities and normal straight leg raise. Examination of the neck revealed full range of motion of the neck in extension, flexion, lateral rotation and lateral flexion with no significant pain and no subjective complaints of a radicular component into the left lower arm. Dr. Saperstein found that appellant had residuals of the May 19, 2004 work-related injury and was not capable of returning to his preinjury job as a pipe fitter. He opined that the only reason appellant was not able to return to work in his usual occupation was due to his significant chest problems. Dr. Saperstein stated that appellant could perform a different job position within work restrictions related to his thoracic condition. He reported that appellant had reached maximum medical improvement regarding his neck and shoulder conditions, but he could not address appellant's chronic shortness of breath and phrenic nerve problems as he was an orthopedic surgeon. In an attached work capacity evaluation, Dr. Saperstein authorized appellant to return to work full time with restrictions but noted that his lung condition should be addressed by an expert in that field.

In a January 11, 2010 report, Dr. Thomas J. Kleeman, a Board-certified orthopedic surgeon, stated that he had treated appellant for his neck and shoulder pain since his 2004 injury. He noted that a recent examination questioned the relationship between appellant's current symptoms and the 2004 injury, but stated that the medical record revealed that appellant complained about neck pain for a long time. Dr. Kleeman noted that an x-ray showed degenerative changes at C5-6 and C6-7 and that a magnetic resonance imaging (MRI) scan demonstrated a disc protrusion left paracentral at C5-6 and bilateral foraminal narrowing at C6-7. He conducted an examination and diagnosed cervical herniation with referred pain to the left scapular area. Dr. Kleeman recommended cervical injections to help with appellant's scapular pain and stated that he would keep appellant out of work for now.

In a January 12, 2010 report, Dr. Aron M. Jeffrey, Board-certified in physical medicine and rehabilitation, noted that appellant was referred to him by Dr. Kleeman. He reviewed appellant's history and conducted an examination. Dr. Jeffrey did not observe any atrophy,

deformities and clear asymmetry to girth. Range of motion of the neck was limited in side bending but normal in rotation and flexion. Dr. Jeffrey diagnosed cervical spine pain with radiation to the left scapula and numbness in the C7 distribution. He noted that he would administer a cervical epidural as requested.

On January 25, 2010 appellant submitted a request for spinal and foramina epidural injections. OWCP authorized his request.

In a July 14, 2010 report, Dr. Kleeman stated that appellant had a work-related neck injury and was temporarily off work until his work capacity could be established. He reported that appellant needed a permanent set of work restrictions and that he would schedule a functional capacity evaluation test for this purpose.

On August 4, 2010 OWCP found a conflict in medical opinion between Dr. Saperstein, the second-opinion examiner, and Dr. Kleeman, appellant's treating physician, regarding appellant's work capacity. It referred him for an impartial medical examination regarding his residuals of the May 19, 2004 work-related injury.

In a September 28, 2010 report, Dr. Jonathan W. Sobel, a Board-certified orthopedic surgeon selected as the impartial medical specialist, reviewed appellant's medical history and noted that his initial symptoms included right shoulder and neck pain and subsequent right diaphragm paralysis. He noted that diagnostic studies revealed multiple age-related degenerative changes in the cervical spine C4 through C7 with various disc bulges and disc osteophyte complexes consistent with the diagnosis of cervical spondylodegenerative arthropathy. Upon examination, Dr. Sobel observed that range of motion for forward flexion was such that appellant was able to touch his knees, extend about 25 degrees and lateral bend 25 degrees. In the seated position, appellant appeared to have nearly full range of motion of the cervical spine with the exception of left lateral rotation, which was about 35 degrees. Examination of the right shoulder revealed external rotation 45 degrees, full abduction and forward flexion. Examination of the left shoulder revealed markedly reduced range of motion for external rotation, approximately 25 degrees, abduction was 90 degrees, forward flexion 80 degrees and difficulty with full overhead abduction. Dr. Sobel also observed mild subacromial crepitation and a prominence of both acromioclavicular (AC) joints. He stated that appellant had right shoulder rotator cuff repair and phrenic nerve paralysis that was treated with surgery, but also suffered from progressive age-related arthritis, diabetes and peripheral neuropathy.

Dr. Sobel reported that the medical record did not show that appellant developed cervical arthritis, herniated disc or other major cervical problems as a result of the 2004 work-related injuries. He explained that the most recent MRI scan showed some minor changes in the overall cervical spondyloarthropathy but there was no evidence of acutely herniated disc or chronic cervical condition related to his accident. Dr. Sobel opined that appellant's ongoing condition was probably due to his age and mild-to-moderate cervical degenerative disc disease and that his shoulder pain reflected an impingement-type syndrome more likely than not due to progressive type 2 acromion and AC joint subacromial spurring that was clearly not caused by his accident. He stated that the medical record and appellant's examination did not support any ongoing significantly limiting factors due to the May 2004 work-related injury because the present condition and limitations were related to the aging process. Dr. Sobel concluded that appellant's

May 2004 injuries had resolved and that he did not require additional medical treatment. He found that appellant reached maximum medical improvement regarding his accepted injuries and reported that his continued physical therapy therapeutic exercises, ultrasound, electrical stimulation, cervical pneumatic equipment and injections did not appear to be causally required as a result of his accepted conditions.

On October 19, 2010 appellant requested foramina epidural injections on his left side and cervical spinal injections.

In a November 17, 2010 addendum, Dr. Sobel stated that he reviewed appellant's medical records and noted multiple nonwork-related conditions such as diabetes, hypertension, pulmonary problems and thyroid problems. He reported that appellant's right shoulder revealed some residuals of status post rotator cuff repair, but range of motion and strength appeared good. Dr. Sobel observed that appellant's diaphragm and neck sprain appeared to have resolved and that any residuals were entirely unrelated to appellant's accepted injuries and probably due to his degenerative disc disease. He opined that appellant was capable of working limited duty as a result of his accepted condition but explained that further restrictions were needed for his unrelated medical conditions.

In a decision dated December 9, 2010, OWCP denied authorization for spinal injections and foramina epidural injections on the left side based on Dr. Sobel's September 28, 2010 impartial medical examination. It noted that Dr. Sobel did not attribute appellant's current cervical arthritis, herniated disc or other major cervical problems to his accepted 2004 injuries and explained that his ongoing conditions were due to his age. OWCP found that the injections were not medically necessary as appellant had no residuals of his work-related injuries.

On December 29, 2010 appellant submitted a request for a review of the written record. He stated that he had been examined by physicians for 6½ years and questioned how a referee examiner could spend 15 minutes with him and undermine all his years of treatment. Appellant resubmitted Dr. Kleeman's January 11, 2010 report and the September 28, 2010 impartial medical examination report.

Appellant also resubmitted a September 25, 2006 report by Dr. Dennis Wachs, an orthopedic surgeon, who described appellant's May 19, 2004 work-related injury and medical treatment received for the head, neck and shoulder conditions. Dr. Wachs reported that appellant's neck and right shoulder continued to bother him as a result of an aggravation of a disc. He concluded that appellant's continued difficulties were related to his May 19, 2004 fall at work.

In a January 25, 2011 work capacity evaluation report, Dr. Kleeman diagnosed cervical disc herniation and stated that appellant was able to work eight hours per day with restrictions. He limited appellant to sitting, walking, standing, reaching, reaching, twisting, bending and stooping 30 minutes at a time and no more than three hours per day.

In a March 11, 2011 report, Dr. Jeffrey stated that he had treated appellant for neck pain and explained that he suffered from chronic right C7 radiculopathy, which had been treated in the past with physical therapy and a C6-7 transforaminal epidural steroid injection. He

concluded that, due to appellant's current symptoms and the C7 radiculopathy, repeating C6-7 transforaminal epidural steroid injection was a medically necessary course of treatment.

By decision dated April 4, 2011, an OWCP hearing representative affirmed the December 9, 2010 decision denying authorization for epidural and spinal injections. The hearing representative determined that the weight of the medical evidence rested with Dr. Sobel's impartial medical examination report. Appellant's accepted conditions had resolved and the epidural injections were not medically warranted.

In a form dated May 18, 2011, appellant submitted a request for reconsideration. He contended that the impartial medical examiner knew nothing about his case and stated that all he wanted was relief from his back pain and discomfort. Appellant resubmitted April 2010 diagnostic test results and Dr. Jeffrey's March 11, 2011 report.

In a decision dated August 12, 2011, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a).

In a letter dated September 26, 2011, appellant submitted a request for reconsideration and resubmitted the September 28, 2010 impartial medical examination and Dr. Kleeman's January 11, 2010 report. He also resubmitted July 23, 2004 and March 10, 2005 treatment notes by Dr. Wachs and a March 18, 2005 report by Dr. Lawrence M. Hoepp, a Board-certified general surgeon, which noted appellant's treatment for his pulmonary condition.

In a September 14, 2011 report, Stephen Ellis, a physical therapist, stated that he had worked with appellant following his May 19, 2004 work-related injury and treated him for his right shoulder condition. He described appellant's medical treatment and related that his shoulder rehabilitation progressed very well. Mr. Ellis reported that they also worked on appellant's cervical pain and ongoing problems of pain in the posterior scapular and cervical region. He opined that all of the above-mentioned issues were directly related to the 2004 injury.

By decision dated October 20, 2011, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation.[3] OWCP's regulations provide that OWCP may review an award for or against compensation at any time on its own motion or upon application. The employee shall exercise his right through a request to the district OWCP.[4]

[3] 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

[4] 20 C.F.R. § 10.605; *see also R.B.*, Docket No. 09-1241 (issued January 4, 2010); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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 new evidence not previously considered by OWCP.[5]

A request for reconsideration must also be submitted within one year of the date of the OWCP decision for which review is sought.[6] A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or provided an argument that meets at least one of the requirements for reconsideration. If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.[7] If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[8]

ANALYSIS

The Board has no jurisdiction to review the April 4, 2011 decision of the OWCP hearing representative denying authorization for epidural spinal injections. Appellant did not file a timely appeal of that decision and it is not before the Board on this appeal. The only decisions the Board may review are the August 12 and October 20, 2011 nonmerit decisions denying his requests for reconsideration. The Board finds that OWCP properly denied appellant's requests for reconsideration because his requests did not meet any of the requirements for obtaining merit review.

In support of his requests for reconsideration, appellant resubmitted various medical records previously of record and reviewed. The submission of evidence which repeats or duplicates evidence already of record and considered by OWCP does not constitute a basis for reopening a case and is insufficient to warrant further merit review.[9] The September 14, 2011 physical therapy report was also insufficient to warrant further merit review because a physical therapist is not a physician as defined under FECA.[10] The physical therapy reports are not considered probate medical evidence and are not relevant to the issue on appeal.[11] Appellant did

[5] *Id*. at § 10.606(b); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[6] *Id*. at C.F.R. § 10.607(a).

[7] *Id*. at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[8] *Id*. at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

[9] *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

[10] Section 8102(2) of FECA provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. As nurses, physician's assistants, physical and occupational therapists are not "physicians" as defined by FECA, their medical opinions regarding diagnosis and causal relationship are of no probative medical value. 5 U.S.C. § 8101(2); *E.H.*, Docket No. 08-1862 (issued July 8, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *see also Roy L. Humphrey*, 57 ECAB 238 (2005).

[11] *C.O.*, Docket No. 11-562 (issued November 10, 2011).

not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a relevant legal argument nor submit relevant medical evidence not previously considered by OWCP. Accordingly, OWCP properly denied appellant's requests for reconsideration as he did not meet any of the requirements sufficient to warrant merit review.

On appeal, appellant described his May 19, 2004 injury and related his medical treatments. He pointed out that he only spent 15 minutes with the impartial medical examiner who determined that he did not suffer from any residuals of his accepted injury. Appellant's assertions, however, do not satisfy any of the criteria necessary to reopen a case for merit review as they do not show that OWCP erroneously applied a specific point of law nor advance any new legal argument.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP did not abuse its discretion by denying appellant's May 18 and September 26, 2011 requests for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 20 and August 12, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 11, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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