United States Department of Labor
Employees' Compensation Appeals Board

D.H., Appellant	)	
and	)	**Docket No. 11-1788**
	)	**Issued: June 15, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Coppell, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 26, 2011 appellant filed a timely appeal from a February 16, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. As the last merit decision was issued February 26, 2010, more than 180 days before the filing of the appeal, the Board lacks jurisdiction to review the merits of this case pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request to reopen his case for further review of the merits pursuant to 5 U.S.C. § 8128.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 27, 2003 appellant, then a 51-year-old modified letter carrier, filed a traumatic injury claim alleging that he sustained pain in his arms, elbows, neck and lower back after casing mail. He began working in a limited-duty position on February 28, 2003. The employing establishment indicated that appellant was a rehabilitation employee with multiple claims. OWCP accepted the claim for neck strain, bilateral contusions of the shoulders, elbows and upper arms, lumbar sprain and thoracic or lumbosacral neuritis or radiculitis.

By decision dated July 19, 2004, OWCP reduced appellant's compensation based on its finding that his actual earnings as a modified carrier technician effective November 5, 2003 fairly and reasonably represented his wage-earning capacity.[2]

Appellant stopped work on January 19, 2008 and received compensation for total disability. By decision dated February 26, 2010, OWCP terminated his compensation effective March 13, 2010 on the grounds that he had no further employment-related disability. A conflict arose between appellant's attending physician, Dr. Ronald D. Shade, a Board-certified orthopedic surgeon, and Dr. Robert Holladay, a Board-certified orthopedic surgeon, who provided a second opinion examination, regarding whether appellant had any further disability. OWCP determined that the December 1, 2009 opinion of Dr. Bernie McCaskill, a Board-certified orthopedic surgeon, who performed an impartial medical examination, represented the weight of the evidence and established that appellant had no disability due to his February 27, 2003 work injury.[3]

In a report dated February 10, 2010, received by OWCP on March 2, 2010, Dr. Shade diagnosed cervical spinal stenosis and myelopathy, lumbar radiculopathy, bilateral impingement syndrome and myofascitis, bilateral osteoarthritis of the knees, right carpal tunnel syndrome, coronary artery disease, hypertension, congestive heart failure and a myocardial infarction. He related that he had reviewed Dr. McCaskill's report and stated:

> "It is apparent that Dr. McCaskill was basing his evaluation on Dr. Holladay's report, which was likewise an unreasonable assessment on [appellant]. [Appellant] has several diagnoses with objective testing to confirm his present medical status. It is my strong opinion that [appellant's] condition is not static, that it is progressive. [Appellant] will also require bilateral total knee replacements in the future if his health allows. It is also my strong opinion that [appellant] is totally disabled and is incapacitated and unable to work."

[2] In a decision dated September 13, 2004, OWCP granted appellant a schedule award for a 12 percent impairment of the bilateral upper extremities and an 11 percent impairment of the left lower extremity. By decision dated December 15, 2008, it found that he received an overpayment of $3,880.60 for the period September 13 through October 22, 2008 because he received both compensation from OWCP and leave from the employing establishment.

[3] In a report dated December 1, 2009, Dr. McCaskill discussed appellant's current complaints and noted that he had a prior work injury in 1998. He listed findings on examination and diagnosed chronic multifocal complaints of uncertain etiology and multiple nonphysiologic findings. Dr. McCaskill found no objective evidence of disability and attributed his lack of recovery to motivational issues.

In progress reports dated February 3, March 15, April 12 and May 26, 2010, Dr. Shade discussed appellant's symptoms and provided pain management.

On October 18, 2010 appellant requested reconsideration. He asserted that his February 27, 2003 employment injury aggravated a prior accepted July 26, 1988 work injury in file number xxxxxx197. Appellant contended that Dr. Holladay did not review x-rays, spent only 10 minutes with him during the examination and knew he was in pain during the examination. He argues that Dr. Holladay based his conclusions on the fact that he "looked healthy." Appellant also argued that Dr. McCaskill "stated he had had talked to Dr. Holladay and he said the same thing that I looked healthy and the 10 minutes I was in his office he had already decided with Dr. Holladay." He questioned how Dr. McCaskill found that he was not disabled given that he "almost got killed at work from injury that was reaggravated on February 27, 2003."

Dr. Shade submitted a report received October 25, 2010 identical to his February 10, 2010 report.[4] In a progress report dated October 20, 2010, he noted that appellant's compensation was terminated "based on the two unreasonable nonmedical evidence based reports by Dr. Holladay and Dr. McCaskill." Dr. Shade indicated that the Social Security Administration (SSA) found that appellant was totally disabled. He found tenderness on palpation of the cervical and lumbar spine and diagnosed a neck sprain, shoulder, elbow and arm contusion, lumbar sprain, lumbosacral neuritis and cervical stenosis.

By decision dated February 16, 2011, OWCP denied appellant's request for reconsideration after finding that the evidence submitted and arguments raised were insufficient to warrant reopening his case for further merit review.

On appeal appellant argued that Dr. Holladay and Dr. McCaskill did not review his x-rays. He further maintained that Dr. McCaskill relied upon an inaccurate history of injury as he did not find that he had a prior work-related injury. Appellant asserted that his 1988 work injury was aggravated by the injury in 2003. He further questioned his attending physician's decision that he was unable to undergo a fusion due to his coronary artery disease.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[5] its 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.[6] 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

[4] The report is dated July 11, 2008. It is apparent, however, that this is a typographical error as Dr. Shade discussed Dr. McCaskill's December 1, 2009 report.

[5] 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

[6] 20 C.F.R. § 10.606(b)(2).

of the date of that decision.[7] 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.[8]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[9] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[10]

ANALYSIS

By decision dated February 26, 2010, OWCP terminated appellant's compensation effective March 13, 2010 after finding that the weight of the evidence, as represented by the opinion of Dr. McCaskill, the impartial medical examiner, established that he had no further disability due to his February 27, 2003 work injury. On October 10, 2010 appellant requested reconsideration of the February 26, 2010 decision.

As noted, the Board does not have jurisdiction over the February 26, 2010 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In his October 10, 2010 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument not previously considered. He contended that Dr. Holladay, an OWCP referral physician, did not review x-rays, performed a cursory examination and was aware that he was in pain during the examination. Appellant maintained that Dr. Holladay based his conclusion on his appearance. He also asserted that Dr. McCaskill related that he had spoken with Dr. Holladay prior to the examination and agreed with his conclusions. Appellant did not, however, submit any evidence supporting his allegations that the physicians were biased against him or failed to adequately perform a medical examination.

Appellant contended that his February 27, 2003 employment injury aggravated a July 26, 1988 work injury. The underlying issue in the case, however, is whether he had further disability due to his February 27, 2003 injury. Appellant's lay opinion is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.[11]

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[7] *Id*. at § 10.607(a).

[8] *Id*. at § 10.608(b).

[9] *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

[10] *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

[11] *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *Gloria J. McPherson*, 51 ECAB 441 (2000).

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case. In support of his request for reconsideration, he submitted a February 10, 2010 report from Dr. Shade, who asserted that Dr. McCaskill's opinion was "unreasonable."[12] Dr. Shade diagnosed cervical spinal stenosis and myelopathy, lumbar radiculopathy, bilateral impingement syndrome and myofascitis, bilateral osteoarthritis of the knees, right carpal tunnel syndrome, coronary artery disease, hypertension, congestive heart failure and a myocardial infarction. He maintained that appellant would require bilateral knee replacements at a future date and asserted that he was totally disabled from employment. The issue, however, is whether appellant has any further disability due to his February 27, 2003 injury, accepted by OWCP for neck strain, bilateral contusions of the shoulders, elbows and upper arms, lumbar sprain and thoracic or lumbosacral neuritis or radiculitis. Dr. Shade did not address whether appellant remained disabled due to the February 27, 2003 and thus his opinion is not relevant to the underlying issue in the case. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.[13]

In a progress report dated October 20, 2010, Dr. Shade asserted that the opinions of Dr. Holladay and Dr. McCaskill were not reasonable. He provided examination findings and diagnosed a neck sprain, contusions of the shoulder, elbow and arm, lumbar sprain, cervical stenosis and lumbosacral neuritis. Dr. Shade indicated that SSA determined that appellant was totally disabled; however, the pertinent issue is whether the disability was due to the February 27, 2003 work injury. Further, he did not explain why he believed the opinion of Dr. Holladay and Dr. McCaskill were unreasonable. Consequently, Dr. Shade's opinion is irrelevant and insufficient to warrant reopening the case for further review of the merits under section 8128.[14]

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He 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 new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal appellant argued that Dr. Holladay and Dr. McCaskill did not review his x-rays. He further maintained that Dr. McCaskill relied upon an inaccurate history of injury as he denied that he had a prior work-related injury. Both physicians, however, provided a detailed review of the evidence of record. Appellant asserted that a prior work injury was aggravated by the injury in 2003. He also disagreed with Dr. Shade's finding that his heart condition prevented him from undergoing a surgical fusion. As discussed, however, appellant's lay opinion is not relevant to the underlying medical issue.[15]

[12] The record also contains an identical report from Dr. Shade dated July 11, 2008 and received October 20, 2010. As previously noted, the date of July 11, 2008 is a typographical error.

[13] *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

[14] *Id*.

[15] *See Gloria J. McPherson*, *supra* note 11.

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).

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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