United States Department of Labor
Employees' Compensation Appeals Board

F.L., Appellant	)	
and	)	**Docket No. 11-2083**
	)	**Issued: May 24, 2012**
U.S. POSTAL SERVICE, DALLAS BULK MAIL CENTER, Dallas, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2011 appellant filed a timely appeal of an April 15, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying further merit review. Because over 180 days elapsed between the most recent merit decision of September 9, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's 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 for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 17, 1986 appellant, then a 22-year-old casual clerk, filed a traumatic injury claim alleging that he sustained a severe contusion to his left heel when a mail container over ran his heel. OWCP accepted his claim for contusion of the Achilles tendon on the left, strain and tarsal tunnel syndrome as well as peripheral autonomic neuropathy. Appellant underwent a tarsal tunnel release on March 20, 1987. OWCP granted appellant a schedule award for six percent impairment of his left lower extremity on August 15, 1988. Appellant underwent a second tarsal tunnel release on September 9, 1988. He returned to modified work on November 18, 1989. On November 19, 1990 OWCP granted appellant an additional schedule award for 21 percent impairment of his left lower extremity.

Appellant was diagnosed with reflex sympathetic dystrophy (RSD) on April 20, 1990. On November 26, 1991 a second opinion physician, Dr. William M. Osborne, a Board-certified orthopedic surgeon, questioned the diagnosis of RSD. Dr. David R. Webb, Jr., the impartial medical examiner Board-certified in orthopedic surgery, completed a report on January 27, 1992 and diagnosed RSD of the left lower extremity following two tarsal tunnel releases and a questionable neuroma of the medial plantar nerve. He recommended approval of a pieces implant. On April 27, 1992 appellant received surgical implantation of a pieces spinal cord stimulator for treatment of RSD in his left leg authorized by OWCP. He underwent an implantation of a electrode on May 4, 1993. On August 5, 1995 appellant had placement of an epidural catheter for continuous epidural infusion and pain control due to RSD.

By decision dated February 17, 1999, OWCP reduced his compensation benefits to zero finding that his actual earnings as a modified mail handler fairly and reasonably represented his wage-earning capacity.

Dr. Nayan R. Patel, a physician Board-certified in physical medicine and rehabilitation, examined appellant on January 7, 2003 and diagnosed chronic pain related to RSD of the left foot. On June 4, 2003 he noted that appellant was experiencing right foot pain.

On September 28, 2003 appellant filed a notice of recurrence of disability alleging that on March 25, 2003 his RSD symptoms increased in his left foot and ankle causally related to his accepted employment injury of December 17, 1986 rendering him totally disabled.

Dr. Richard Eusenio, a podiatrist, completed a report on June 6, 2003 and diagnosed complex regional pain syndrome type II and conversion reaction.

In a letter dated December 23, 2003, OWCP requested additional factual and medical evidence in support of appellant's claimed recurrence. It denied his claim by decision dated January 23, 2004.

Appellant requested reconsideration on March 24, 2004 and submitted additional medical evidence. In a note dated February 25, 2004, Dr. Patel stated that appellant did not have significant objective changes in his examination which establish increased disability. He recommended a functional capacity evaluation. On March 1, 2004 Dr. Eusenio again diagnosed complex regional pain syndrome in both feet. He stated, "The exact etiology of this condition

has been well studied, but relatively little is known. Overt extensive trauma to part is not necessary to develop this syndrome and the trauma to the right foot and ankle as a result of favoring the already affected left limb is a reasonable cause of the same condition developing in the overburdened right foot."

OWCP denied modification of appellant's claim by decision dated April 14, 2004.

Appellant again requested reconsideration on September 22, 2004. Dr. Pierre Herding, a Board-certified neurologist, completed a report dated September 20, 2004 and stated that appellant had a diagnosis of complex regional pain syndrome since 1986. He stated, "It has been established that a complex regional pain syndrome, particularly if of long duration, may well extend to involve the other limb, and it is the opinion of the undersigned that [appellant's] right foot pain precisely reflects this process."

By decision dated December 15, 2004, OWCP denied modification of its prior decisions.

Appellant requested reconsideration on October 25, 2005. Dr. Michael Ellman, a physician Board-certified in physical medicine and rehabilitation, examined appellant on October 10, 2005 and noted his history of injury. He found that appellant had discoloration of his feet bilaterally with some atrophic changes of his skin and nail changes bilaterally. Dr. Ellman noted that appellant's extremities were cool with mild edema. He diagnosed complex regional pain syndrome involving the bilateral lower extremities. Dr. Ellman stated that this condition initially started in the left lower extremity and had spread to the right side. He stated, "This is a natural process of this disease and certainly, it is well known that complex regional pain syndrome can spread from one leg to another." OWCP declined to modify the prior decisions on January 3, 2006.

Appellant requested reconsideration on July 26, 2006. On February 22, 2006 Dr. Patel stated that complex regional pain syndrome was the name currently used in place of RSD. He stated that the change in diagnosis was a change in semantics and that appellant continued to exhibit the same pathology. Appellant submitted a report dated May 23, 2006 diagnosing hyperesthesia with intractable pain with post-traumatic regional pain syndrome in both feet which is worsening.[2]

In a note dated March 30, 2006, Dr. Ellman stated that appellant was disabled due to complex regional pain syndrome in his right extremity. He reported that appellant had significant pain and trouble walking and sleeping.

By decision dated March 16, 2007, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions.

Appellant requested reconsideration on August 7, 2007 and submitted a note dated April 23, 2007 from Dr. Eusenio. By decision dated May 28, 2008, OWCP denied modification of its prior decisions.

[2] The physician's signature is illegible.

Appellant requested reconsideration on March 10, 2009. Dr. Herding completed a note dated March 11, 2009 and stated that appellant had a history of complex regional pain syndrome type II which was formally known as RSD in his left foot. He noted that appellant had pain and allodynia in his right foot. Dr. Herding stated, "It has been established that a complex regional pain syndrome, particularly if of long duration, may well extend to involve the other limb, and it is the opinion of the undersigned that [appellant's] right foot pain precisely reflects this process."

In a note dated December 30, 2008, Dr. Patel stated that appellant's current condition was related to his accepted employment injury on December 17, 1986 which resulted when a large container of mail ran over his feet. He noted appellant's history of medical treatment. Dr. Patel stated that appellant still continues to complain of similar pain that he experienced in conjunction with the original injury. He stated, "[S]o basically the main cause of relationship is the documentation of the original injury in 1986 and continued pain in the same areas that it has always been in his lower extremities with failure of the treatments documented previously."

By decision dated March 10, 2010, OWCP denied modification of its prior decisions. It reissued this decision on September 9, 2010. OWCP stated, "You claim that you now have a right ankle/foot condition due to the traumatic injury in 1986. There is no objective evidence in the case file records to support your right ankle/foot condition. Diagnostic testing has been done, but copies have not been provided to this office for review."

On February 27, 2011 appellant requested reconsideration. In support of this claim, he resubmitted Dr. Herding's September 20, 2004 report. Appellant submitted a note dated March 11, 2009 from Dr. Herding stating that complex regional pain syndrome was formerly termed RSD. He submitted a portion of a report dated May 19, 2003 from Dr. Herding listing his history of injury and increasing right foot pain. Appellant submitted a May 19, 2003 nerve conduction study of the right foot conducted by Dr. Herding which was normal. The report stated that appellant was hypersensitive to palpation of the medial aspect of his right foot and diagnosed complex regional pain syndrome type II. Appellant resubmitted a duty status report from Dr. Patel dated June 4, 2003 diagnosing RSD.

By decision dated April 15, 2011, OWCP declined to reopen appellant's claim for reconsideration of the merits on the grounds that the evidence submitted was not relevant and pertinent new evidence which was not previously considered by OWCP.[3]

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.[4] Section 10.606(b) of the Code of Federal Regulations provide that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific

[3] The Board notes that the record contains no factual or medical evidence from December 17, 2001 through June 10, 2002

[4] 5 U.S.C. §§ 8101-8193, 8128(a).

point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.[5] Section 10.608 of OWCP's regulations provide that, when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.[6]

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. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[7]

ANALYSIS

The only issue before the Board on appeal is whether OWCP properly declined to review the merits of appellant's claim. The Board does not have jurisdiction to consider whether appellant has met his burden of proof to establish left RSD, a recurrence of disability on March 25, 2003 or whether OWCP has properly addressed whether appellant developed a consequential injury of the right foot as a result of his accepted left foot conditions of contusion of the Achilles tendon on the left, strain and tarsal tunnel syndrome as well as peripheral autonomic neuropathy on the left.

In support of his February 27, 2011 request for reconsideration, appellant resubmitted Dr. Herding's September 20, 2004 report and a duty status report from Dr. Patel dated June 4, 2003 diagnosing RSD. As OWCP had previously considered these reports in reaching a final decision, these reports are not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

Appellant submitted a note dated March 11, 2009 from Dr. Herding stating that complex regional pain syndrome was formerly termed RSD. The Board finds that this note does not present relevant and pertinent new evidence not previously considered by OWCP. Dr. Herding completed a note on March 11, 2009 which contained this information. This note was considered by OWCP in reaching the September 9, 2010 merit decision.

Appellant also provided a portion of a report dated May 19, 2003 from Dr. Herding listing his history of injury and increasing right foot pain and a nerve conduction study of the right foot conducted by Dr. Herding which was normal, but stated that appellant was hypersensitive to palpation of the medial aspect of his right foot. Dr. Herding diagnosed complex regional pain syndrome type II. The Board finds that these documents are not previously included in the record and that the nerve conduction study was submitted in response

[5] 20 C.F.R. § 10.606.

[6] *Id.* at § 10.608.

[7] *M.E.* 58 ECAB 694 (2007).

to the statement by OWCP in the September 9, 2010 decision, that appellant had not submitted copies of diagnostic testing. As the evidence was submitted in response to OWCP's directive, appellant advanced relevant and pertinent new evidence not previously considered by OWCP such that OWCP was obliged to conduct a merit review.[8] On remand, OWCP shall conduct a merit review and following any necessary development, issue an appropriate merit decision.

CONCLUSION

The Board finds that appellant submitted pertinent new and relevant evidence requiring OWCP to reopen appellant's claim for consideration of the merits. Thus, OWCP abused its discretion in declining to conduct a merit review.

ORDER

IT IS HEREBY ORDERED THAT the decision of Office of Workers' Compensation Programs dated April 15, 2011 is set aside and remanded for further development consistent with this decision of the Board.

Issued: May 24, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[8] *See John Reese*, 49 ECAB 397 (1998) (finding that, when the evidence submitted by appellant was in response to OWCP's directive, OWCP was obliged to conduct a merit review).