United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 12-238**
	)	**Issued: May 23, 2012**
DEPARTMENT OF THE NAVY, PUGET SOUND NAVAL SHIPYARD, BALLSTON SPA, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 14, 2011 appellant filed a timely appeal of a July 25, 2011 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because over 180 days elapsed between the most recent merit decision, of December 1, 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).

On appeal, appellant alleged that OWCP failed to consider his legal arguments in declining to reopen his claim for consideration of the merits. He also argued the merits of his claim.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 25, 2010 appellant, then a 55-year-old marine machinery mechanic leader, filed an occupational disease claim alleging that he developed a left shoulder rotator cuff tear on October 30, 2009 while working in glove bags at the New York steam generator inspection. In a letter dated April 9, 2010, OWCP requested additional factual and medical evidence from him and allowed 30 days for a response. Appellant submitted a magnetic resonance imaging (MRI) scan report on March 24, 2010 which demonstrated a full thickness rotator cuff tear on the left with subscapularis and rotator cuff tendinosis and no apparent labral tear.

On April 6, 2010 Dr. Bruce Christen, a physician Board-certified in preventative medicine, diagnosed left rotator cuff tear and stated that the proximate cause of the tear was nonoccupational, but that the rotator cuff may have been degenerated by work-related activities. In a note of the same date, he stated that appellant reported a significant episode while body surfing in Hawaii in March 2010. Dr. Christen stated, "[Appellant] is not sure that he was injured but since the body surfing he had much worse pain in the left shoulder." He also noted that appellant's work required raising his arms above the shoulders and overhead work. Dr. Christen concluded, "It is unknown how much the work-related exposure contributed to his rotator cuff injury. However, there was a clear increase in symptomatology [after] the body surfing episode. The full thickness rotator cuff tear would more likely be associated with a single episode. Therefore, the work-related exposure is unlikely to have been the proximate cause of the tear on a more probable that not basis."

On April 9, 2010 Dr. Peter Ciani, a Board-certified family practitioner, examined appellant and diagnosed left rotator cuff tear developing for years and no history of an acute event. He noted that appellant reported that he attempted to swim once on vacation and experienced such severe pain in his shoulder that he stopped. Appellant denied body surfing or any other nonwork-related activity that created a problem for his shoulder. Dr. Ciani noted that appellant was required to work in a glove bag to protect him from radiation aboard submarines. He noted that appellant was required to perform strenuous, forceful and awkward movements involving the shoulder including working overhead with strenuous lifting. Dr. Ciani also noted that he had treated appellant for a right shoulder rotator cuff tear which was found to be work related. He concluded, "Based on the past events involving [appellant'] right shoulder, review of his work history, and the medical records, it would be my opinion that this is more probable than not related to his job with repetitive, microtrauma to the rotator cuff until it ruptured and not related to an acute event like swimming in the surf in Hawaii."

Appellant submitted a narrative statement dated April 20, 2010 describing his history of right rotator cuff tear and a small tear in his left shoulder diagnosed in 2005. He stated that on October 30, 2009 he began working in New York performing steam generator inspection which required working 12-hour days 6 or 7 days a week until February 15, 2010. Appellant stated that he noticed an increase in his left shoulder symptoms in October 2009 and stated that the project required working in a glove bag in tight restricted areas utilizing awkward arm placement and lifting of heavy tools and equipment. He stated that due to staff shortages he was required to work in a glove bag between 4 and 8 hours in a 12-hour shift. Appellant noted that he went to Hawaii on March 6, 2010 and tried to catch a small wave to body surf, but that when he raised

his arms the pain in his shoulders was overwhelming. He stated that he did not catch the wave or engage in body surfing and did not remember any violent or extreme movements.

In a note dated April 7, 2010, Dr. Richard B. Spinak, a family practitioner, noted appellant's history of working in New York and developing slight left shoulder pain. He stated that the pain increased dramatically while appellant was on vacation. Dr. Spinak diagnosed nontraumatic tendon rotator cuff tear complete.

By decision dated June 16, 2010, OWCP denied appellant's claim finding that there were factual inconsistencies in the record regarding how the injury occurred. It stated that the factual portion of his claim is not established as there is doubt as to whether the claimed condition occurred from employment exposure, rather than from his attempt to body surf.

Appellant requested a review of the written record on July 12, 2010. In a note dated March 26, 2010, Dr. Kent P. Van Bueckon, an orthopedic surgeon, reviewed appellant's MRI scan and stated that appellant had full-thickness rotator cuff tear on the left. He stated that appellant reported "on and off pain" for a few years and stated, "The injury in Hawaii just kind of pushed it over the limits for him." By decision dated December 1, 2010, OWCP's hearing representative found that appellant had provided several descriptions of how and when his left arm first started hurting and that these factual discrepancies raised serious doubt that he suffered injury due to his federal employment.

Appellant requested reconsideration on May 14, 2011 and submitted physical therapy notes. He also submitted information regarding a beach in Hawaii. Appellant argued that treating physicians could not create a conflict of medical evidence. He also asserted that his left shoulder first caused him pain in 2005. Appellant alleged that he did not engage in body surfing, but made one aborted attempt to do so.

By decision dated July 25, 2011, OWCP declined to reopen appellant's claim for consideration of the merits.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at anytime on its own motion or on application by the claimant.[2] 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 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.[3] Section 10.608 of OWCP's regulations provide that when a request for reconsideration is timely, but

[2] *Id*. at §§ 8101-8193, 8128(a).

[3] 20 C.F.R. § 10.606.

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.[4]

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.[5]

ANALYSIS

OWCP denied appellant's claim on the grounds that the medical evidence was not based on a consistent factual background and therefore was not sufficient to meet his burden of proof in establishing that he developed a left shoulder rotator cuff tear due to factors of his federal employment. In support of his request for reconsideration, appellant submitted a series of physical therapy notes. He also submitted several physical therapy notes. Physical therapist reports are not medical evidence as a physical therapist is not a physician under FECA.[6] As these notes were not signed by the physician the notes have no probative value in establishing appellant's claim.[7]

Appellant also argued that his physicians could not create a conflict of medical opinion evidence as defined by FECA. The Board agrees with his statement of the law, but notes that this argument is not supportive of his claim. While appellant's attending physicians cannot create a conflict requiring referral to an impartial medical examiner,[8] OWCP found instead that due to the factual disagreements between the physicians in the record regarding when and how appellant sustained his rotator cuff tear, he failed to meet his burden of proof in establishing that this condition was work related. Appellant has not submitted a relevant legal argument in this regard.

Appellant further repeated his factual allegations already contained in the record that he first experienced left shoulder pain due to rotator cuff injury in 2005 and that he did not actually engage in body surfing while in Hawaii. As these statements were reviewed by OWCP in prior

[4] *Id.* at § 10.608.

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

[6] 5 U.S.C. §§ 8101-8193, 8101(2); *Thomas R. Horsefall,* 48 ECAB 180 (1996).

[7] *Merton J. Sills*, 39 ECAB 572 (1988).

[8] When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination and resolve the conflict of medical evidence. 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007). This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. *R.C.*, 58 ECAB 238 (2006).

decisions, these statements are not relevant and pertinent new evidence not previously considered by OWCP.

The Board finds that appellant did not comply with the requirements of section 10.606(b) and that OWCP properly declined to reopen his claim for consideration of the merits.

The Board has addressed appellant's arguments on appeal as pertaining to the July 25, 2011 decision and as stated previously does not have jurisdiction to address or review the merits of his claim as he failed to satisfy any of the criteria.

CONCLUSION

The Board finds that OWCP properly declined to reopen appellant's claim for consideration of the merits.

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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