

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

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J.S., Appellant)	
)	
and)	Docket No. 14-465
)	Issued: October 16, 2014
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS HEALTH ADMINISTRATION,)	
Loma Linda, CA, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Appellant, pro se</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 23, 2013 appellant filed a timely appeal of the July 10, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) which denied his request for reconsideration without conducting a merit review. Because more than 180 days elapsed since the most recent merit decision dated April 12, 2012 and the filing of this appeal on December 23, 2013, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act¹ (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 pursuant to § 8128(a).

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On August 18, 2009 appellant then a 48-year-old materials handler, injured his back while pulling a tire iron from his van at work. OWCP accepted his claim for sprain of the back, thoracic region. Appellant did not immediately stop work.

Appellant was treated at an employing establishment medical center. On August 19, 2009 he was treated by Dr. Bobby S. Chan, a Board-certified internist, for low back pain which developed after pulling a tire iron from his van. Appellant reported increasing back pain with numbness in the right hand and left leg. Dr. Chan diagnosed acute muscle spasm and strain and recommended light duty.

On October 7, 2009 appellant was treated by Dr. Roland K. Baranov, a Board-certified internist, for persistent back pain. Dr. Chan diagnosed back pain and prescribed medication. An October 16, 2009 magnetic resonance imaging (MRI) scan of the thoracic spine revealed mild degenerative disc disease at T8-9. In treatment notes dated November 18 to 20, 2009 from the employing establishment, appellant was noted to have drug seeking behavior and it was recommended that he be considered for referral to the addictions clinic. An employing establishment employee health record for March 30, 2010 noted his treatment for chronic thoracic back pain that was exacerbated a week prior due to a lifting incident. Appellant was diagnosed with thoracic back strain, underlying degenerative disc disease and disc bulge. He submitted physical therapy notes from April 23 and 30, 2010.

Appellant was treated by Dr. Sadia S. Khan, a resident physician, on May 5, 2010, for follow up of persistent middle and low back pain due to a work-related back sprain. Dr. Khan diagnosed chronic lumbar and thoracic pain and work-related back sprain injuries in 2008 and 2009. Appellant continued working within restrictions.

In a decision dated June 18, 2010, the employing establishment removed appellant from the position of materials handler effective June 18, 2010. In a June 18, 2010 notification of personnel action, it noted that he was removed from employment effective that date for failure to report to duty as scheduled and failure to follow proper leave request procedures.

On July 20, 2010 OWCP referred appellant for a second opinion to Dr. Bunsri T. Sophon, a Board-certified orthopedist. It provided Dr. Sophon with appellant's medical records, a statement of accepted facts dated July 20, 2010 as well as a detailed description of his employment duties. In an August 6, 2010 report, Dr. Sophon diagnosed thoracolumbar strain. He noted that appellant stopped work on June 16, 2010 and total disability ceased on August 6, 2010. Dr. Sophon noted that appellant continued to have residuals of the injury based on subjective complaints and objective findings.

On July 27, 2011 appellant filed a Form CA-7, claim for compensation, for the period beginning June 21, 2010. He submitted a report from Dr. Williard L. Gilbert, Board-certified in emergency medicine, who treated him for chronic thoracic back pain and diagnosed exacerbation of chronic thoracic back pain. On June 10, 2009 appellant was seen by Dr. Anita Lee, a Board-certified anesthesiologist, for multiple trigger point injections for an exacerbation of pain after a physical therapy appointment. On August 19, 2010 he was treated by Dr. Adewale B. Ajumobi,

a Board-certified internist, for anxiety and back pain. Dr. Ajumobi noted that appellant had osteoarthritis involving the spine. He diagnosed chronic back pain secondary to a work injury and anxiety. On March 11, 2011 Dr. Shawn Koh, a Board-certified internist, treated appellant for knee arthralgia and low back pain. He diagnosed hypertension, anxiety and degenerative spinal disease with back pain.

In a decision dated December 14, 2011, OWCP denied appellant's claim for compensation beginning June 21, 2010. It noted that the medical evidence was insufficient to support that he was temporarily totally disabled from June 21, 2010. Rather the evidence supported that appellant could have worked but for his removal for cause on June 18, 2010.

On January 10, 2012 appellant requested a review of the written record. He submitted a July 31, 2008 x-ray of the lumbar spine which revealed a small posterior disc protrusion at L5-S1, no central canal stenosis and no neural foramina stenosis.

In a decision dated April 12, 2012, an OWCP hearing representative affirmed the December 14, 2011 decision denying appellant's claim for compensation. The hearing representative noted that the evidence supported that appellant had stopped working not because of his work injury but because his employment was terminated.

On April 8, 2013 appellant requested reconsideration. He asserted that he was entitled to disability compensation because he had a permanent back injury and developed depression. Appellant referenced medical reports dated August 19, 2010 from Dr. Ajumobi and March 11, 2011 from Dr. Koh and indicated that these reports supported that he was totally disabled due to his work injury. He noted that he was permanently disabled due to his back injury and unable to perform his limited-duty materials handler job. Appellant asserted that he was denied medical care, that there was a medical conflict and the employing establishment poorly managed his case. He submitted a July 31, 2008 x-ray report of the lumbar spine, reports from the employing establishments medical center dated August 18, 2009 to August 19, 2010, a Form CA-1 dated October 15, 2009, an MRI scan of the thoracic spine dated October 16, 2009, a physical therapy note dated June 24, 2010 and a second opinion report from Dr. Sophon dated August 6, 2010, all previously of record.

Appellant submitted new reports from the employing establishment providers dated June 20 to September 3, 2008, who treated him for low back pain and advised that he was totally disabled from July 21 to 31, 2008. He submitted occupational health reports and progress notes dated July 9, 2008 and March 30, 2010 from Dr. Andrew Guo, a Board-certified physiatrist, who treated him for a work-related thoracic spine injury and opined that he was disabled from July 9 to 13, 2008. Occupational health reports dated July 31, 2008 to September 24, 2009 from a nurse practitioner who noted that appellant was treated for a work-related thoracic spine injury and could work with restrictions. Appellant submitted light-duty job offers dated July 31 and September 24, 2008. He submitted a physical therapy report dated April 22, 2010.

In an authorization to release information, Dr. Ajumobi noted appellant's condition began in August 2009 and was chronic and limited his ability to perform certain tasks. He noted that appellant was able to work eight hours a day. In an August 12, 2010 physical capacities form, Dr. Ajumobi noted that appellant could work eight hours a day with restrictions. He further

noted appellant's medication caused him to be drowsy. Dr. Koh noted appellant's condition began in August 2009, was chronic and limited his ability to perform certain tasks, but found appellant was able to work eight hours a day. In a March 11, 2011 physical capacities form, he also noted that appellant could work eight hours a day with restrictions. May 25, 2012 to June 21, 2013 reports from Dr. Koh diagnosed hypertension, anxiety disorder, mild depression, degenerative spinal disease with back pain and nicotine dependence. An April 4, 2012 report from Dr. Lee noted performing multiple trigger point injections into the thoracic spine. In reports dated July 5, 2012 and January 4, 2013, Dr. Anne T. Cipta, a Board-certified anesthesiologist, diagnosed bilateral S1 joint dysfunction and lumbalgia and performed bilateral joint injections. In reports dated October 3, 2012 and March 19, 2013 from Dr. David Kim, a Board-certified anesthesiologist, diagnosed bilateral S1 joint dysfunction and lumbalgia and performed trigger point injections. Appellant was treated by Dr. Ciprian R. Spenser, a psychiatrist, from November 26, 2012 to June 19, 2013, who diagnosed major depressive disorder, hypertension and chronic back pain. On February 15, 2013 he was treated by Dr. Mark Patuszynski, a Board-certified internist, for low back pain from a 2009 work injury. Dr. Patuszynski diagnosed chronic back pain. On February 19, 2013 appellant was treated by Dr. Daniel Saint-Elie, a Board-certified physiatrist, who diagnosed chronic low back pain, lumbar radiculopathy and history of lumbar myofascial pain syndrome and S1 joint arthropathy. On May 14, 2013 appellant was treated by Dr. Menandro Cunanan, a Board-certified physiatrist, for chronic low back pain and lumbar radiculopathy. He reported trigger point injections provided some relief but he still had pain.

In a July 10, 2013 decision, OWCP denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review.

LEGAL PRECEDENT

Under section 8128(a) of FECA,² OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provide that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(1) Shows that OWCP erroneously applied or interpreted a specific point of law;
or
- (2) Advances a relevant legal argument not previously considered by OWCP; or
- (3) Constitutes relevant and pertinent new evidence not previously considered by OWCP.”³

² *Id.* at § 8128(a).

³ 20 C.F.R. § 10.606(b)(2).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.⁴

ANALYSIS

OWCP denied appellant's claim for compensation for the period beginning June 21, 2010 on the grounds that the medical evidence was not sufficient to establish that his total disability was due to his accepted work injury but, rather, that he was removed from his job. Thereafter, it denied his reconsideration request, without a merit review.

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 April 8, 2013 statement, appellant asserted that he was entitled to disability compensation as he had a permanent work injury and depression. He noted that he was permanently disabled due to his back injury and unable to perform his limited-duty materials handler job. Appellant asserted that he was denied medical care, that there was a conflict of medical opinion in his case and the employing establishment poorly managed his case. These general assertions do not show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. The underlying issue in this case is whether the claimed period of disability was due to the accepted work injury. That is a medical issue which must be addressed by relevant new medical evidence.⁵

A claimant may be entitled to a merit review by submitting new and relevant evidence, however, no such evidence was forthcoming. While appellant submitted a July 31, 2008 x-ray report of the lumbar spine, reports from various health care providers at the employing establishment dated August 18, 2009 to August 19, 2010, a Form CA-1 dated October 15, 2009, an MRI scan of the thoracic spine dated October 16, 2009, a physical therapy note dated June 24, 2010 and second opinion report from Dr. Sophon dated August 6, 2010. These reports are duplicative of evidence previously submitted and were considered and found insufficient by OWCP in its decision dated April 12, 2012. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁶

Appellant submitted a statement from Dr. Ajumobi who noted appellant's condition began in August 2009 and was chronic and limited his ability to perform certain tasks. Dr. Ajumobi noted that appellant was able to work eight hours a day. In a physical capacities form dated August 12, 2010, he noted that appellant could work eight hours a day with restrictions. Dr. Ajumobi noted appellant's medication caused him to be drowsy. Similarly, Dr. Koh noted appellant's condition began in August 2009, was chronic and limited his ability to perform certain tasks. In a physical capacities form dated March 11, 2011, however, he noted

⁴ 20 C.F.R. § 10.608(b).

⁵ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁶ See *Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

that appellant could work eight hours a day with restrictions. In other reports dated May 25, 2012 to June 21, 2013, Dr. Koh diagnosed hypertension, anxiety disorder and mild depression, degenerative spinal disease with back pain and nicotine dependence. However, these reports do not support appellant's claim for compensation beginning June 21, 2010. Rather Drs. Ajumobi and Koh opined that appellant could work full time subject to restrictions. The record indicates that appellant, in this case, stopped working in his light-duty position for reasons unrelated to his employment injuries.⁷

Appellant submitted an April 4, 2012 report from Dr. Lee, reports dated July 5, 2012 and January 4, 2013 from Dr. Cipta and reports dated October 3, 2012 and March 19, 2013 from Dr. Kim. Although these reports are new, they are not relevant because they do not address the particular issue involved, namely whether appellant was totally disabled beginning June 21, 2010 causally related to his employment injury. Therefore, this new evidence is not relevant and is insufficient to warrant reopening the case for a merit review. Likewise, the February 15, 2013 report from Dr. Patuszynski, the February 19, 2013 report from Dr. Saint-Elie, the May 14, 2013, report from Dr. Cunanan and the November 26, 2012 to June 19, 2013 reports from Dr. Spenser are not relevant because they do not specifically address the issue of whether appellant was totally disabled beginning June 21, 2010 causally related to his employment injury. Other newly submitted medical evidence is not relevant because it significantly predates the time in which appellant claimed compensation.

Other evidence submitted included occupational health reports and progress notes dated July 31, 2008 to September 24, 2009 from a nurse and a physical therapy report dated April 22, 2010. The Board has held that treatment notes signed by a nurse or physical therapist are not considered medical evidence as these providers are not a physician under FECA.⁸ Appellant submitted reports from a nonspecific health care provider dated June 20 to September 3, 2008, but there is no evidence that these documents are from a physician. Medical documents not signed by a physician are not probative medical evidence and do not establish appellant's claim.⁹

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

⁷ When a claimant stops working at the employing establishment for reasons unrelated to his or her employment-related physical condition, he has no disability within the meaning of FECA. *See John W. Normand*, 39 ECAB 1378 (1988).

⁸ *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

⁹ *See R.M.*, 59 ECAB 690 (2008); *Bradford L. Sullivan*, 33 ECAB 1568 (1982) (where the Board held that a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a "physician" as defined in FECA).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the July 10, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 16, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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