United States Department of Labor
Employees' Compensation Appeals Board

W.J., Appellant	)	
and	)	**Docket No. 14-2068**
	)	**Issued: February 26, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Laguna Niguel, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 29, 2014 appellant filed a timely appeal from a September 2, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of March 12, 2014 and the filing of this appeal, the Board lacks jurisdiction to review the merits of his claim 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 further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated January 22, 2001, the Board set aside May 21 and September 29, 1998 OWCP decisions which found that appellant

[1] 5 U.S.C. § 8101 *et seq.*

had not established a recurrence of disability on June 12, 1997.[2] The Board determined that the medical evidence submitted was sufficient to warrant further development and instructed OWCP to refer appellant for a second opinion examination. By decision dated November 6, 2002, the Board affirmed June 1, 2001 and February 26, 2002 OWCP decisions which found that appellant had not established an employment-related recurrence of disability beginning June 12, 1997.[3] The facts and circumstances as set forth in the Board's prior decisions are hereby incorporated by reference.

On October 25, 2012 appellant filed a claim for a schedule award. By letter dated January 4, 2013, he requested referral to a physician who performed impairment evaluations. In response, OWCP advised appellant that he should submit a report from his attending physician addressing whether he had reached maximum medical improvement. On January 31, 2013 at appellant's request OWCP authorized treatment by Dr. David Kahn, a chiropractor.[4] On June 19, 2013 OWCP, at appellant's request, authorized treatment by Dr. John J. Betz, who specializes in family and occupational medicine.

In an initial evaluation dated July 19, 2013, Dr. Betz diagnosed chronic lumbar pain after a two-level lumbar discectomy. He referred appellant to Dr. Christopher Twombly, a Board-certified physiatrist, for evaluation.

On August 1, 2013 Dr. Twombly diagnosed chronic mechanical low back pain, a history of lumbar surgery, to rule out a worsening of disc pathology, and to rule out lumbar radiculopathy or other neuropathic processes. He referred appellant for diagnostic studies.

In a report dated August 22, 2013, Dr. Twombly reviewed appellant's magnetic resonance imaging (MRI) scan study and diagnosed chronic mechanical low back pain, multilevel spondylosis, multilevel facet arthropathy, status post lumbar discectomy, and bilateral lower extremity pain and dysesthesias without evidence of nerve root compression or weakness. Regarding whether he was permanent and stationary, the physician stated, "At this point, I would recommend the above [six] visits of spinal decompression therapy. Once he is finished with the spinal decompression, in my medical opinion, he will have reached maximum medical improvement for any specific industrial injury." Dr. Twombly discharged appellant from care.

In reports dated October 2, 9, and 16, 2013, Dr. Kahn evaluated appellant for an acute exacerbation of his lumbar condition.

[2] Docket No. 99-820 (issued January 22, 2001). On October 10, 1990 appellant, then a 39-year-old letter carrier, filed an occupational disease claim alleging that he sustained a back condition causally related to factors of his federal employment. OWCP accepted the claim for lumbar intervertebral disc disorder with myelopathy, a closed dislocation of the lumbar vertebra, lumbar spinal stenosis and thoracic or lumbosacral neuritis or radiculitis. Appellant sustained intermittent periods of disability until September 2, 1994, when he resumed modified employment.

[3] Docket No. 02-1270 (issued November 6, 2002).

[4] In letters dated February 28 and April 25, 2013, OWCP again informed appellant that he needed to submit medical evidence showing that he was at maximum medical improvement.

By decision dated March 12, 2014, OWCP denied appellant's claim for a schedule award on the grounds that the medical evidence did not establish that he had attained maximum medical improvement. It noted that Dr. Twombly did not find he was permanent and stationary but rather that he required decompression therapy.

On August 3, 3013 appellant requested authorization to change to a physician that he found who was familiar with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). By letter dated August 15, 2014, OWCP advised him that Dr. Twombly was his attending physician and could address whether he was permanent and stationary.

On August 22, 2014 appellant requested reconsideration. He asserted that Dr. Twombly was only qualified to evaluate impairments using the fifth edition of the A.M.A., *Guides*. Appellant maintained that Dr. Twombly did not want to treat him anymore and again requested permission to see another physician. On August 26, 2014 he resubmitted Dr. Kahn's October 2, 9, and 16, 2013 chiropractic reports.

By decision dated September 2, 2014, OWCP denied appellant's request for reconsideration on the grounds that he did not raise an argument or submit evidence sufficient to warrant reopening his case for further merit review under section 8128.

On appeal, appellant maintains that Dr. Twombly no longer wants to treat him and that OWCP has not authorized another physician. He asserts that a prior attending physician found that he was permanent and stationary in March 1998 and submits evidence of record in support of his contention.

LEGAL PRECEDENT

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

[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 his own motion or on application."

[6] 20 C.F.R. § 10.606(b)(3).

[7] *Id.* at § 10.607(a).

[8] *Id.* at § 10.608(b).

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 March 12, 2014, OWCP denied appellant's schedule award claim after finding that he had not submitted medical evidence establishing that he had reached maximum medical improvement. On August 22, 2014 appellant requested reconsideration. In its September 2, 2014 decision, OWCP denied her request for reconsideration after finding that it was insufficient to warrant reopening his case for further merit review under section 8128.

As noted above, the Board does not have jurisdiction over the March 12, 2014 OWCP decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his August 22, 2014 request for reconsideration, appellant did not identify a specific point of law or show that it was erroneously applied or interpreted. He did not advance a new and relevant legal argument. Appellant argued that Dr. Twombly could only evaluate the extent of permanent impairment using the fifth edition of the A.M.A., *Guides*.[11] The underlying issue is whether he has reached maximum medical improvement.[12] This is a medical issue which must be addressed by relevant medical evidence.[13] 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. He submitted October 2, 9, and 16, 2013 chiropractic reports from Dr. Kahn, who diagnosed an exacerbation of a spinal condition. However, these reports duplicated reports already of record. Evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[14]

On appeal, appellant maintains that Dr. Twombly no longer wants to treat him and that OWCP has not authorized another physician. The Board's jurisdiction, however, is limited to

[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] Appellant further requested to change attending physicians; however, OWCP has not issued a final decision with appeal rights on this issue. Consequently, the issue is not before the Board as the Board's jurisdiction is limited to reviewing final adverse decisions of OWCP issued under FECA. *See* 20 C.F.R. §§ 501.2(c) and 501.3(a), respectively.

[12] Maximum medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Only when an impairment has reached maximum medical improvement can a permanent impairment rating be performed. *See* A.M.A., *Guides* 26; *Patricia J. Penney-Guzman*, 55 ECAB 757 (2004).

[13] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[14] *C.N.*, Docket No. 08-1569 (issued December 9, 2008); *Richard Yadron*, 57 ECAB 207 (2005).

reviewing final adverse decisions of OWCP.[15] OWCP has not issued a final decision on this issue and thus it is not before the Board at this time. Appellant additionally argues that his prior attending physician found that he was permanent and stationary in 1998, and cites evidence of record in support of his allegation. The issue, however, is his condition at the time he filed his schedule award claim in 2012.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). 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 constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of his claim pursuant section 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 26, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[15] *See supra* note 12.