United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 14-0715**
	)	**Issued: June 24, 2015**
DEPARTMENT OF THE ARMY, INSTALLATION MANAGEMENT COMMAND, Fort Drum, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2014 appellant filed a timely appeal from an August 29, 2013 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the filing of this appeal and the last merit decision, issued on July 18, 2012 and pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this claim.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record contains February 24 and April 9, 2014 OWCP nonmerit decisions denying reconsideration of the July 18, 2012 OWCP decision. The Board and OWCP cannot simultaneously exercise jurisdiction over the same issue. *See* 20 C.F.R. § 501.2(c)(3). As OWCP issued its decision while the Board has jurisdiction over the matter in dispute, they are null and void. *See Lawrence Sherman*, 55 ECAB 35 (2004); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 7, 2009 appellant, then a 56-year-old office aid, filed a traumatic injury claim alleging that on April 3, 2009 he sustained back pain while cutting grass, bending and lifting at work. He did not stop work. The employing establishment noted that no injury was reported at the time and that appellant never notified his supervisors of an injury. It also noted that he was on medical restrictions at the time of the claimed injury.

In a September 23, 2009 memorandum, Robert Sillik, the Chief of Facility Management, indicated that the claim was given to him on September 15, 2009 and listed April 3, 2009 as the date of injury. This date of injury was three days after appellant had been assigned to work for Mr. Sillik. Appellant did not notify Mr. Sillik that he had been injured or needed medical treatment. Mr. Sillik stated that management advised appellant to observe his existing restrictions, which included a five-minute break every hour, no repetitive elbow movements, and no pushing, pulling, lifting of more than 20 pounds for no more than two hours at a time.

On October 14, 2009 OWCP asked that appellant respond to Mr. Sillik's comments, further explain how his injury occurred, and submit medical evidence addressing causal relationship.

In a November 10, 2009 statement, appellant related that his pain began the day he started spot painting which also involved scraping, filling holes, and sanding. He related that most of the spots were overhead such that it required a lot of bending or stretching. Appellant noted telling managers about his pain the first time he mowed the grass. He stated that he complained that the tractor used for mowing was very bad on his back. Appellant indicated that, since he began his job, it involved about "99 percent" regular maintenance instead of light maintenance. He explained that he did not have "all this pain before I started" and now he had it constantly because of bending, stretching, and cutting grass on the tractor, instead of a lawn mower. Appellant advised that he requested a traumatic injury claim form in August, but did not get one until he asked a different manager.

Appellant also submitted medical evidence. This included a July 30, 2009 report from Dr. Edward N. Powell, a Board-certified orthopedic surgeon, who advised that appellant reported pain from between his shoulder blades down to his low back "ever since he went back to work." Appellant also indicated to Dr. Powell that he should not be working due to elbow pain caused by his work. He attributed his back pain to entering and exiting vehicles and the bumping of the vehicles. Dr. Powell stated that there was no specific injury to appellant's back. Appellant noted having previous back pain that was related to chronic pancreatitis, but appellant related that his current pain was caused by work. Dr. Powell reported an impression of back pain with no hard neurologic signs. In an August 20, 2009 treatment note, he advised that a lumbar magnetic resonance imaging (MRI) scan showed "just a little bit of a degenerative disc." Dr. Powell indicated that there was not "much to do, except symptomatic care."

By decision dated November 18, 2009, OWCP denied appellant's claim as he did not establish an injury as alleged. It found that the evidence did not substantiate that the actual event occurred as alleged.

On September 23, 2010 appellant requested reconsideration and submitted additional evidence.

In an October 28, 2010 memorandum, Mr. Sillik advised that, when appellant reported for work on March 30, 2009, he stated that he had upcoming medical appointments for prior injuries and also provided a work capacity evaluation showing his limitations. He reiterated that appellant was told not to violate his restrictions. Mr. Sillik explained that he tried to assign appellant computer duties but appellant indicated that he did not know how to use a computer. Because of this appellant was assigned light maintenance duties. Mr. Sillik noted that, even when appellant was assigned to cut grass with the riding lawn mower, he was told to take breaks as needed.

In a December 5, 2010 letter, appellant contended that certain physical exertions entailed in spot painting caused his back pain. He noted that he had to cut grass on a small tractor, which had no shocks which caused his back to hurt, and not a riding lawn mower. Appellant contended that, before September 15, 2009, he performed regular maintenance, not light maintenance. He indicated that his job was structured to allow for 40 percent light maintenance, not 100 percent regular maintenance. Appellant asserted that he was forced to take a job he was not qualified for and that this caused his pain. He further asserted that Mr. Sillik lied about aspects of his claim because he had filed complaints about Mr. Sillik.

In a decision dated December 22, 2010, OWCP modified the November 18, 2009 decision to reflect that, while the factual component of fact of injury had been established, the claim was denied for failure to establish the medical component of fact of injury. It noted that the treating physician did not connect the back condition to his employment.

Appellant submitted additional evidence and requested reconsideration on February 14, September 12, 2011 and April 16, 2012. OWCP denied modification in decisions dated May 23, November 15, 2011 and July 18, 2012, finding that the medical evidence was insufficient to establish his claim.[3]

On July 7, 2013 appellant requested reconsideration. He argued that a breach of contract existed because the employing establishment forced him to sign an agreement to take a job. Appellant indicated that the contract was broken because his duties were supposed to be 60 percent clerical and 40 percent maintenance. He explained that he was supposed to work with a small riding lawn mower and instead was given a tractor, which had no shock absorbers and was a primary reason for his back pain. Appellant asserted that he should receive full compensation since the end of his job.

[3] In support of his April 16, 2012 reconsideration request, appellant submitted a November 29, 2011 treatment note from Dr. Powell who opined that "mowing and work probably did not cause" his arthritis but it "might have precipitated the symptoms." Dr. Powell noted that it was "hard to prove from a medical standpoint."

In a decision dated August 29, 2013, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant review of its prior decision.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[4] OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
>
> "(ii) Advances a relevant legal argument not previously considered by OWCP; or
>
> "(iii) Constitutes relevant and pertinent new evidence not previously considered by OWCP."[5]

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.[6]

ANALYSIS

Appellant disagreed with the denial of his traumatic injury claim and timely requested reconsideration on July 7, 2013. The underlying issue on reconsideration is medical in nature, whether the April 3, 2009 work incident caused or contributed to an injury.

On reconsideration, appellant argued that a breach of contract existed because the employing establishment forced him to sign an agreement regarding a job.[7] Additionally, he argued that the contract was broken because he had been promised duties that were 60 percent clerical and 40 percent maintenance. Appellant explained that he was supposed to work with a small riding lawn mower and instead was given a tractor which had no shock absorbers. OWCP denied the claim because the medical evidence did not contain medical opinion evidence explaining how his back condition was caused or aggravated by specific factors of his employment.[8] Appellant made arguments about his duties and the employing establishment's

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b).

[6] *Id*. at § 10.608(b).

[7] Although appellant makes references to signing an agreement regarding a job, he did not submit a copy.

[8] *See for example, A.D.,* 58 ECAB 149 (2006).

personnel practices. He did not sufficiently explain how this demonstrated a legal error by OWCP or how it advanced a relevant legal argument not previously considered by OWCP. The Board has held that the submission of evidence which does not address the particular issue involved is not a basis on which to reopen a case.[9]

Furthermore, appellant did not submit new and relevant medical evidence addressing whether his employment contributed to his claimed condition. As noted, OWCP accepted that appellant was performing certain job duties. The reason it denied the claim was that the medical evidence did not sufficiently explain how particular job duties caused or contributed to his claimed back condition. To have his claim reopened for a merit review, appellant needed to submit new medical evidence addressing how his job duties caused or contributed to a diagnosed medical condition.

Appellant therefore 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 new and relevant evidence not previously considered.

On appeal, appellant argues that he felt that he was being called a "liar or a cheat" every time his claim was denied. He argued that his physician indicated that it was possible for the tractor and grass cutting to cause pain in his back. Appellant asserted that his job was not a genuine position but was an odd-lot sheltered employment position and that OWCP mishandled his claim. The Board does not have jurisdiction to review the merits of the case. These arguments go to the substantive issues of the claim. The issue on appeal is not whether appellant's claim is compensable but whether OWCP erred by declining to review that issue. Appellant did not submit any evidence or argument in support of his reconsideration request that warranted reopening of his claim for a merit review under section 8128(a).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a).

[9] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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