

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

_____)	
W.F., Appellant)	
)	
and)	Docket No. 15-0722
)	Issued: June 19, 2015
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Butler, PA, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 2, 2015 appellant, through counsel, filed a timely appeal of a December 31, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). The last OWCP merit decision in this matter was issued on October 30, 2013. Since more than 180 days elapsed since October 30, 2013 and the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that the last merit decision issued by OWCP, dated October 30, 2013, was reviewed by the Board in a decision dated July 9, 2014 (Docket No. 14-673).

FACTUAL HISTORY

The case was before the Board on two prior appeals with respect to the merits of the claim. To review the relevant factual history, on May 30, 2012 appellant, then a 55-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that he sustained low back and neck injuries in the performance of duty on May 17, 2012. He stated that he was driving a small bus on a bumpy road with his seat back against the wall of the cabin of the vehicle.

In a decision dated July 12, 2012, OWCP denied the claim for compensation as the medical evidence was insufficient to establish the claim. An OWCP hearing representative affirmed the denial of the claim in a decision dated January 31, 2013.

By decision dated August 1, 2013, the Board affirmed the January 31, 2013 hearing representative decision.³ The Board noted that appellant had submitted a September 21, 2012 report from Dr. John Steele, a Board-certified orthopedic surgeon, who provided a history that appellant was driving a bus on May 17, 2012 for nearly three hours and the bumps in the road “beat his back” during that time. Dr. Steele stated that appellant was injured on May 17, 2012 while driving a bus. Based on appellant’s injury description of being “jolted” for three hours, he stated that he believed appellant’s cervical sprain/strain and lumbar sprain/strain were directly related to his work injury on May 17, 2012. Dr. Steele also stated that appellant’s preexisting spinal stenosis was aggravated by the injury. The Board found that OWCP properly denied appellant’s claim as Dr. Steele had not provided a complete medical history or supported his opinion with medical rationale.

Appellant requested reconsideration and submitted a March 14, 2013 report from Dr. Steele. In this report Dr. Steele stated, “The mechanism of injury was the result of [appellant] hitting the retaining wall and him being ‘jolted up and down’ in his seat for several hours.” He noted there was a June 25, 2012 magnetic resonance imaging (MRI) scan showing moderately severe spinal stenosis at L5-S1 that was not previously found on a 1994 MRI scan.⁴ Dr. Steele opined that there was a causal relationship between the mechanism of injury and the diagnosed cervical and lumbar sprain/strains. He also opined that the spinal stenosis was aggravated by the employment incident.

OWCP reviewed the merits of the claim and denied modification by decision dated October 30, 2013. The Board affirmed OWCP’s decision in a decision dated July 9, 2014.⁵ With respect to Dr. Steele’s report, the Board found it was not sufficient to establish the claim for compensation. The Board noted that Dr. Steele did not provide a complete history and he again provided opinions without supporting medical rationale and explanation.

In a letter dated October 10, 2014, appellant, through counsel, requested reconsideration with OWCP. He submitted an August 23, 2014 report from Dr. Steele. The report consists

³ Docket No. 13-901 (issued August 1, 2013)

⁴ Dr. Steele also referred to a cervical MRI scan showing a C7-T1 protruding disc that was not present in 1990.

⁵ Docket No. 14-673 (issued July 9, 2014).

primarily of handwritten responses to questions on a form. Dr. Steele states that the mechanism of injury was appellant hitting a retaining wall while being jolted up and down for three hours while driving. He provided results on examination and diagnosed cervical and lumbar sprain/strain. Dr. Steele stated that appellant's diagnosed conditions were causally related to the facts of injury.

By decision dated December 31, 2014, OWCP denied merit review of the claim.⁶ It found the medical evidence from Dr. Steele was cumulative of prior reports.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁷ OWCP's regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."⁸ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁹

ANALYSIS

In the present case, appellant filed a claim alleging that he sustained injuries in the performance of duty on May 17, 2012 while driving a small bus on a bumpy road. The claim was denied by three OWCP decisions dated July 12, 2012, and January 31 and October 30, 2013. The issue is whether appellant's application for reconsideration dated October 10, 2014 was sufficient to require OWCP to review the merits of the claim for compensation.

At issue is the sufficiency of appellant's latest reconsideration request to OWCP. The October 10, 2014 application for reconsideration did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Rather, appellant submitted the latest report dated August 23, 2014 from Dr. Steele, the attending physician. The issue is whether this evidence was relevant and pertinent evidence not previously considered by OWCP.

Prior to the last merit decision on October 30, 2013, Dr. Steele had submitted a series of reports stating that appellant had sustained cervical and lumbar sprain/strains as a result of the May 17, 2012 employment incident. He also opined that appellant had aggravated a preexisting

⁶ Although the memorandum accompanying the decision refers to "modification" in the conclusion, the decision clearly states that a merit review was not performed and the evidence submitted was cumulative in nature.

⁷ 5 U.S.C. § 8128(a), (providing 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").

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

spinal stenosis. The August 23, 2014 report does not provide any new, relevant, and pertinent evidence on the issue of whether appellant sustained an injury causally related to the May 17, 2012 incident. Dr. Steele reported the mechanism of injury was being jolted up and down for three hours while driving and sitting against the cabin wall. He had provided a similar statement in his March 14, 2013 report. In the most recent August 23, 2014 report, Dr. Steele diagnosed cervical and lumbar/sprains, and provided a general statement that the diagnosed conditions were causally related to employment. He had previously provided the diagnoses and an opinion on causal relationship in his September 21, 2012 and March 14, 2013 reports.

The Board accordingly finds that the evidence submitted on reconsideration does not constitute the submission of relevant and pertinent evidence not previously considered by OWCP. Appellant therefore 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 evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly declined to review the merits of the claim for compensation.

CONCLUSION

The Board finds OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review of the claim.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 31, 2014 is affirmed.

Issued: June 19, 2015
Washington, DC

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

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

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