United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 15-0780**
	)	**Issued: September 3, 2015**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Fort Lauderdale, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2015 appellant filed a timely appeal from a September 17, 2014 merit decision and a November 3, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish back conditions causally related to factors of his federal employment; and (2) whether OWCP properly refused to reopen his case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

On appeal, appellant argues that he is disabled and unable to work, specifically due to his previous job as a transportation security officer and contends that there is a causal relationship that ties his injuries with the former job assignment.

FACTUAL HISTORY

On November 4, 2013 appellant, then a 51-year-old transportation security officer, filed an occupational disease claim (Form CA-2) alleging that he developed back conditions due to factors of his federal employment, including repetitive lifting, and loading of computerized tomography (CT) x-ray machines without proper rotations for eight hours a day, 700 to 900 bags daily. On the claim form, he indicated that he first became aware of his condition on July 5, 2013 and first attributed it to his federal employment on October 29, 2013.

In a December 3, 2013 letter, OWCP notified appellant of the deficiencies of his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted reports from Dr. Christopher Brown, a Board-certified orthopedic surgeon, who indicated that appellant worked at the airport and diagnosed low back pain (lumbago). In a November 22, 2013 report, Dr. Brown diagnosed lumbago and pain in joint, pelvic region, and thigh. He advised that appellant was able to return to work on December 22, 2013.

In a November 19, 2013 physical therapy note, Jeffrey R. Davis, a registered physical therapist, indicated that appellant was a transportation security officer who worked at the airport and complained of mid as well as lower back pain, specifically on the left side.

A December 6, 2013 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated slight levoscoliosis, mild disc bulge with mild multifactorial spinal stenosis at L3-4, disc protrusion with an annular tear at L4-5, multilevel facet arthropathy, and evidence of right sacroiliac joint disease.

By decision dated January 6, 2014, OWCP denied the claim finding the evidence failed to establish fact of injury.

On August 18, 2014 appellant requested reconsideration and submitted a patient chart from Associated Family Physicians of Boca Raton, Florida, indicating that his diagnosis history included hyperlipidemia, hypertension, and peripheral vascular disease.

In an October 8, 2013 report, Dr. Steven Liu, an emergency medicine specialist, indicated that appellant was seen and examined in the emergency room. He opined that appellant was not fit for work and needed two days of bed rest.

On October 31, 2013 Dr. Michael Kelly, a Board-certified orthopedic surgeon, indicated that appellant presented for orthopedic consultation regarding complaints of pain in the neck, upper back, and lower back. Appellant reported that he "had back problems since 1995, when he was involved in a motor vehicle accident." Dr. Kelly stated that appellant was treated by a chiropractor and was told he had two herniated discs. He noted that appellant was "put in a position where he moved baggage all day long and this is when his back pain really increased."

Dr. Kelly diagnosed thoracic spondylosis without myelopathy and lumbosacral spondylosis without myelopathy.

In a November 7, 2013 report, Dr. Kevin Bender, a cardiologist, indicated that appellant was seen for back pain and released him to work on November 12, 2013 with the following restrictions: no lifting more than 10 pounds, no standing more than 15 minutes, and no bending or reaching.

On December 18, 2013 Dr. Brown opined that appellant was able to return to work as of December 23, 2013 with the following restrictions: no heavy lifting, carrying, pushing, or pulling more than five pounds; bending from the waist occasionally in an 8-hour shift; standing; and walking 20 minutes per hour in an 8-hour shift.

By letter dated December 20, 2013, appellant tendered his resignation from the employing establishment effective December 22, 2013 for the following reasons: illness, discrimination, retaliation, and a hostile work environment.

A May 30, 2014 MRI scan of the lumbar spine revealed a disc bulge and desiccation with facet liagmentum flavum hypertrophy at L2-3, posterior disc herniations at L3-4 and L4-5, and facet hypertrophy at L5-S1.

Appellant also submitted medical literature regarding spondylolisthesis, bulging discs, degenerative disc disease (spondylosis), herniated discs, and degenerative discs in support of his claim.

By decision dated September 17, 2014, OWCP affirmed its prior decision as modified, finding that the evidence of record was sufficient to establish fact of injury, but failed to establish a causal relationship between the diagnosed conditions and the implicated employment factors.

On October 21, 2014 appellant requested reconsideration and resubmitted the November 19, 2013 physical therapy note from Mr. Davis. He also submitted two letters dated September 30, 2014 from the Office of Personnel Management (OPM) advising him that his application for disability retirement had been approved. OPM found appellant to be disabled from his previous position as a transportation security officer due to degenerative disc disease, bulging disc, cervicalgia, and sleep apnea.

By decision dated November 3, 2014, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP. It noted that OPM's approval of disability retirement did not establish disability under FECA.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[2] has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United

[2] *Id.*

States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, and that an injury[3] was sustained in the performance of duty. These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

To establish that an injury was sustained in the performance of duty in a claim for an occupational disease claim, an employee must submit the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.[5]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[6]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof to establish a claim that federal employment factors caused or aggravated his back conditions. While appellant identified the factors of employment that he believed caused his conditions, he must also submit rationalized medical evidence which explains how his medical conditions were caused or aggravated by those employment factors.[7]

On October 31, 2013 Dr. Kelly diagnosed thoracic spondylosis without myelopathy and lumbosacral spondylosis without myelopathy. Appellant reported that he had back problems since 1995, when he was involved in a motor vehicle accident. Dr. Kelly reported that appellant had been treated by a chiropractor and was told he had two herniated discs. He noted that appellant was put in a position where he moved baggage all day long and this is when his back pain really increased. The Board finds that Dr. Kelly failed to provide a rationalized opinion explaining how appellant's employment caused or aggravated his back conditions. Dr. Kelly indicated that appellant moved baggage at work, but he failed to address appellant's previous

[3] OWCP regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

[4] *See O.W.*, Docket No. 09-2110 (issued April 22, 2010); *Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *See D.R.*, Docket No. 09-1723 (issued May 20, 2010). *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[6] *See O.W.*, *supra* note 4.

[7] *A.C.*, Docket No. 08-1453 (issued November 18, 2008); *Donald W. Wenzel*, 56 ECAB 390 (2005); *Leslie C. Moore*, 52 ECAB 132 (2000).

motor vehicle accident and the history of his condition since 1995. Such generalized statements merely repeat appellant's allegations and are unsupported by adequate medical rationale explaining how his physical activity at work actually caused or aggravated the diagnosed conditions.[8] The Board has held that the mere fact that his symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between his condition and his employment factors.[9]

In his reports, Dr. Brown diagnosed low back pain (lumbago) and pain in joint, pelvic region, and thigh. He reported that appellant worked at the airport and opined that appellant was able to return to work as of December 23, 2013 with restrictions. Dr. Brown limited appellant to no heavy lifting, carrying, pushing, or pulling more than five pounds. He allowed appellant to bend from the waist occasionally in an 8-hour shift; and limited standing and walking for 20 minutes an hour in an 8-hour shift. The Board finds that Dr. Brown's diagnosis of low back pain (lumbago) and pain in joint is a description of a symptom rather than a clear diagnosis of the medical condition.[10] Therefore, the Board finds the reports from Dr. Brown are insufficient to establish appellant's claim.

On October 8, 2013 Dr. Liu examined appellant in the emergency room and opined that he was not fit for work and needed two days of bed rest. On November 7, 2013 Dr. Bender stated that appellant had been seen for back pain and released him to work on November 12, 2013 with restrictions. The Board has held that medical evidence without any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[11]

The November 19, 2013 physical therapy note by Mr. Davis is of no probative value because FECA does not recognize physical therapists as physicians.[12] The December 6, 2013 and May 30, 2014 MRI scans, medical literature, and patient charts do not constitute probative medical evidence because they do not contain rationale by a physician relating appellant's disability to his employment.[13]

As appellant has not submitted any rationalized medical evidence to support his allegation that he sustained an injury causally related to the indicated employment factors, he failed to meet his burden of proof to establish a claim.

[8] *See K.W.*, Docket No. 10-98 (issued September 10, 2010).

[9] *See Richard B. Cissel*, 32 ECAB 1910, 1917 (1981); *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

[10] The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis. *See P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

[11] *See C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[12] *See* 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." *See M.M.*, Docket No. 14-1021 (issued July 1, 2015).

[13] *See Barbara J. Williams*, 40 ECAB 649 (1989).

On appeal, appellant argues that he is disabled and unable to work, specifically due to his previous job as a transportation security officer and contends that there is a causal relationship that ties his injuries with the former job assignment. However, his arguments are not substantiated by medical evidence.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.[14] OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).[15]

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by 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.[16] 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.[17] 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.[18]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[19] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[20]

[14] 5 U.S.C. § 8101 *et seq.* Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

[15] *See Annette Louise*, 54 ECAB 783, 789-90 (2003).

[16] 20 C.F.R. § 10.606(b)(3). *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

[17] *Id.* at § 10.607(a).

[18] *Id*. at § 10.608(b).

[19] *See supra* note 15. *See also Eugene F. Butler*, 36 ECAB 393, 398 (1984).

[20] *Id. See also Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

ANALYSIS -- ISSUE 2

Appellant did not attempt to demonstrate that OWCP erroneously applied or interpreted a point of law. Moreover, he did not advance a legal argument not previously considered by OWCP.

In support of his October 21, 2014 reconsideration request, appellant submitted two letters dated September 30, 2014 from OPM advising him that his application for disability retirement had been approved. OPM found him to be disabled from his previous position as a transportation security officer due to degenerative disc disease, bulging disc, cervicalgia, and sleep apnea. In its November 3, 2014 decision, OWCP noted that OPM's approval of disability retirement did not establish disability under FECA.[21] The Board notes that findings of other federal agencies are not dispositive with regard to questions arising under FECA.[22]

Appellant also resubmitted the November 19, 2013 physical therapy note from Mr. Davis. The Board finds that this evidence was previously reviewed by OWCP. As the reports duplicate evidence already in the case record, it does not constitute relevant and pertinent new evidence. Thus, appellant has not established a basis for reopening his case.[23]

Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP, nor did he submit any relevant and pertinent new evidence not previously considered. The Board finds that he did not meet any of the necessary requirements and is not entitled to further merit review.[24]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish back conditions causally related to factors of his federal employment. The Board further finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

[21] The Board has consistently held that a disability determination under one statute or by one agency does not establish disability under the other statute. *See Rufus C. Woodward*, Docket No. 92-2033 (issued September 10, 1993).

[22] *See Daniel Deparini*, 44 ECAB 657 (1993). In determining whether an employee is disabled under FECA, the findings of other administrative agencies, such as OPM, are not determinative of disability under FECA. OPM and OWCP have different standards of medical proof on the question of disability. Under FECA, for a disability determination, appellant's injury must be shown to be causally related to an accepted injury or factors of his federal employment. Under the rules of the OPM, conditions which are not employment related may be considered in rendering a disability determination. For this reason, the determinations of other administrative agencies or courts, while instructive, are not determinative with regard to disability under FECA. *Id.*

[23] *See D.K.*, 59 ECAB 141 (2007).

[24] *See L.H.*, 59 ECAB 253 (2007).

ORDER

IT IS HEREBY ORDERED THAT the November 3 and September 17, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 3, 2015
Washington, DC

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

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

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