

FACTUAL HISTORY

On June 28, 2010 appellant, then a 55-year-old carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained low back and neck pain, trigger finger of the right thumb, and pain, strains, and spasms of the right arm, shoulder, hip, buttocks, and leg causally related to factors of his federal employment. OWCP accepted the claim for an aggravation of lumbar degenerative disc disease, right lumbar radiculitis, a temporary aggravation of right thumb arthritis, and a temporary aggravation of right thumb trigger finger.

On April 24, 2012 appellant filed a claim for compensation (Form CA-7) for time lost from work during the period February 9, 2011 to April 15, 2012.

By decision dated November 8, 2012, OWCP denied appellant's claim for compensation for intermittent dates from February 9 to April 14, 2012. It noted that he had requested compensation for disability on February 9, 10, and 12, July 22 and 23, 2011, and April 10, 11, 13, and 14, 2012. OWCP found that appellant had not submitted reasoned medical evidence supporting disability for the periods claimed. It noted that it had paid him compensation for four hours of time lost due to a February 9, 2011 medical appointment. OWCP further indicated that pain was a subjective finding rather than a diagnosis and thus insufficient to support disability from employment.

On November 14, 2012 appellant requested a telephone hearing, which was held before an OWCP hearing representative on February 14, 2013. He related that he received compensation for four hours a day from OWCP for some of his visits to his physician. On February 9, 10, and 12, 2011 appellant missed the entire day of work.

By decision dated April 30, 2013, OWCP's hearing representative affirmed the November 8, 2012 decision, finding that appellant was not entitled to compensation for intermittent dates between February 9 and April 14, 2012.³ She found that the medical evidence did not support that he received medical treatment or sustained disability for the dates claimed.

On September 26, 2013 appellant, through counsel, requested reconsideration of the April 30, 2013 decision.

In a decision dated November 18, 2013, OWCP affirmed in part and modified in part the April 30, 2013 decision. It found that appellant had established that he was totally disabled from April 10 to 14, 2012 (32 hours) due to his accepted work injury. OWCP determined, however, that he was not entitled to compensation for disability from February 9 to 12 (20 hours), or July 22 to 23, 2011 (16 hours).

On April 6, 2014 appellant requested reconsideration of the November 18, 2013 decision. In a decision dated April 24, 2014, OWCP denied his request after finding that he had not raised

³ In a report dated December 28, 2012, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed an aggravation of spinal stenosis primarily at L4-5, a disc protrusion at L5-S1, and facet arthropathy. He found that appellant was disabled from work beginning April 16, 2012.

an argument or submitted new and relevant evidence sufficient to reopen his case under section 8128(a).

On October 13, 2014 appellant again requested reconsideration of the November 18, 2013 decision. He contended that he was not always able to see his physician on the dates that he was unable to work due to scheduling difficulties. Appellant experienced extreme pain on the dates that he missed work. His physicians were unaware that pain was not recognized by OWCP as a reason to be off work. Appellant waited two years to have surgery and sustained permanent damage from working with radiculopathy. He alleged that OWCP disregarded the newly submitted evidence because it was not current even though it failed to timely adjudicate his request for compensation. Appellant maintained that an April 29, 2011 magnetic resonance imaging (MRI) scan study and physical therapy notes dated September 3, 2010 support the findings of his physicians.

Appellant submitted a September 15, 2014 report from Dr. Bruce E. Mullen, a Board-certified physiatrist. Dr. Mullen related:

“There is some confusion on previous reports in that [appellant] has had complaints of pain and numbness sensations down the leg. The numbing sensation is a subjective complaint. I do believe [he] did have numbness with radiculitis. This can be intermittent and was always aggravated by activities. Unfortunately, his symptoms are not objectively documented on physical examination.

“In coordinating with [appellant’s] MRI scan and physical therapy findings as well as his history, I do feel to a reasonable degree of medical certainty, that he did have a flare up of radiculitis with his work activities, which is why he was off for those days as previously described in my dictations.”

Dr. Mullen noted that appellant ultimately underwent a decompression in April 2012. He concluded that he missed days from work prior to his surgery because of “inflammation and radiculitis.”

By decision dated January 15, 2015, OWCP denied appellant’s request for reconsideration after finding that he had not raised an argument or submitted new and relevant evidence sufficient to warrant reopening his case for further consideration of his claim for disability compensation from February 9 to 12 and July 22 to 23, 2011. It noted that he had not submitted contemporaneous medical evidence supporting disability for the claimed dates of disability.

On appeal appellant argues that he injured three discs in 2009 and 2010 walking nine miles a day and carrying as much as 70 pounds. He experienced radiculopathy and permanent nerve damage, as found by OWCP’s referral physician and his attending physicians. Appellant asserts that OWCP did not timely consider his reconsideration request.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's 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.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁶ 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.⁷

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.⁸ 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.⁹ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹⁰

ANALYSIS

OWCP accepted that appellant sustained an aggravation of lumbar degenerative disc disease, right lumbar radiculitis, a temporary aggravation of right thumb arthritis, and a temporary aggravation of right thumb trigger finger causally related to factors of his federal employment. Appellant filed a claim for compensation for periods of disability from February 9, 2011 to April 15, 2012. In its last merit decision on this issue dated November 18, 2013, OWCP found that he had established that he was totally disabled from April 10 to 14, 2012 due to his accepted work injury. It further found, however, that appellant had not submitted sufficient medical evidence to support disability from February 9 to 12 or July 22 to 23, 2011. In a decision dated April 24, 2014, OWCP denied his request for merit review of its November 18, 2013 decision. On October 13, 2014 appellant again requested reconsideration. By decision dated January 15, 2015, OWCP denied merit review.

As noted above, the Board does not have jurisdiction over the merits of this case. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R.

⁴ 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."

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁹ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁰ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

§ 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his October 13, 2014 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He argued that he could not always see his physicians on the dates because he was in too much pain to work due to scheduling issues. Appellant also asserted that his physicians were not aware that OWCP considered pain an insufficient reason to miss work. He maintained that he sustained permanent damage from working with radiculopathy. Appellant referred to an April 29, 2011 MRI scan study and physical therapy notes from September 3, 2010 as support for his physician's findings. The underlying issue in this case, however, is whether appellant submitted sufficient medical evidence to establish that he was unable to work on February 9 to 12 and July 22 and 23, 2011 due to his accepted employment injury. This is a medical issue which must be addressed by relevant medical evidence.¹¹ The diagnostic study and physical therapy notes do not address the question of disability and thus, are not pertinent to the issue at hand. Evidence or argument that does not address the particular issue involved does not warrant reopening a case for merit review.¹² Additionally, appellant's lay opinion regarding his disability is not probative regarding the issue in this case, which, as noted, is medical in nature.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. In a report dated September 15, 2014, Dr. Mullen related that the MRI scan study and the findings in physical therapy reports supported that he experienced radiculitis such that he was unable to work for various days prior to his April 2012 operation. He did not address the relevant issue, however, of whether appellant was disabled for the specific dates of February 9 to 12 and July 22 and 23, 2011. Consequently, Dr. Mullen's opinion is insufficient to warrant reopening the case for further merit review as he did not address the pertinent issue.¹⁴

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

On appeal appellant argues that he injured three discs in 2009 and 2010 walking nine miles a day and carrying as much as 70 pounds. He experienced radiculopathy and permanent nerve damage, as found by OWCP's referral physician and his attending physician. The underlying issue, however, is whether the medical evidence supports disability from employment on February 9 to 12 and July 22 and 23, 2011.

¹¹ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

¹² *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

¹³ See *B.H.*, Docket No. 15-0978 (issued October 22, 2015); *Gloria J. McPherson*, 51 ECAB 441 (2000).

¹⁴ See *supra* note 12.

Appellant further contends that OWCP did not timely consider his reconsideration request. He requested reconsideration on October 13, 2014 and OWCP issued its decision denying his request for reconsideration on January 15, 2015, just over 90 days from the date of his request. OWCP's procedures provide that if a reconsideration decision is delayed more than 90 days and the delay jeopardizes a claimant's right to appeal the merits of the case to the Board, it should conduct a merit review.¹⁵ The procedures further indicate, however, that there is "no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request."¹⁶ Appellant requested reconsideration of the November 18, 2013 decision on October 13, 2014, more than 180 days after the date of the last merit decision. Consequently, OWCP's failure to issue a decision on his October 13, 2014 reconsideration within 90 days did not impact his appeal rights to the Board.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen his case for further merit review under 5 U.S.C. § 8128(a).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(a) (October 2011).

¹⁶ *Id.*; see also *B.G.*, Docket No. 15-0399 (issued April 15, 2015).

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board