

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

A.H., Appellant)
)
)
and) **Docket No. 16-0829**
) **Issued: November 14, 2016**
)
DEPARTMENT OF THE NAVY, MARINE)
CORPS LOGISTICS BASE, Albany, GA,)
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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 1, 2016 appellant filed a timely appeal from a September 4, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated August 25, 2014 to 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 the case.

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. The facts relevant to the instant appeal will be set forth. Appellant, then a 27-year-old material handler, filed a traumatic injury (Form CA-1) on December 8, 1992 alleging that he injured his left hip and lower back on May 20, 1992, when he slipped and fell to the floor. OWCP accepted the claim for lumbar sprain. Appellant stopped work on May 20, 1992 and returned on June 1, 1992.

On July 11, 1996 OWCP terminated appellant's compensation benefits. Appellant appealed the termination of his compensation benefits to the Board on September 16, 1996. By decision dated December 2, 1998, the Board affirmed the termination.²

On September 24, 2003 appellant filed a recurrence of disability (Form CA-2a). On July 22, 2004 OWCP denied his recurrence claim. Appellant requested a hearing before an OWCP hearing representative on August 18, 2004. An OWCP hearing representative affirmed the denial of appellant's recurrence claim by decision dated September 19, 2005. On December 27, 2005 appellant appealed the September 19, 2005 decision to the Board. By decision dated September 7, 2006, the Board affirmed OWCP's September 19, 2005 decision.³

Appellant thereafter filed claims for compensation (Forms CA-7) on April 16, 2007 and May 7, 2008 alleging entitlement to wage-loss compensation as of September 6, 1995.

On June 18, 2008 OWCP expanded acceptance of the claim to include aggravation of displacement of intervertebral disc without myelopathy, lumbosacral neuritis, radiculitis, sciatica, and aggravation of preexisting degenerative lumbosacral intervertebral disc. This acceptance was based upon the March 12, 2008 report of appellant's treating physician, Dr. Wing K. Chang, Board-certified in physical medicine and rehabilitation, who diagnosed L5-S1 disc degeneration and disc protrusion causally related to appellant's employment injury, and the second opinion physician, Dr. Jeffrey Fried, Board-certified in orthopedic surgery, who concurred in a report dated April 15, 2008 that appellant's lumbar disc disease caused by his employment injury had progressed and he now had disc herniation and serve degenerative changes at L5-S1.

By decision dated June 19, 2008, OWCP denied appellant's claims for disability compensation commencing September 6, 1995. Appellant requested a hearing before an OWCP hearing representative on July 30, 2008. By decision dated January 8, 2009, an OWCP hearing representative affirmed the June 19, 2008 decision. Appellant requested reconsideration on July 7, 2009. By decision dated September 2, 2009, OWCP denied modification of its prior decision. Appellant again requested reconsideration on August 2, 2010. By decision dated September 15, 2010, OWCP again denied modification of its prior decision.

² Docket No. 97-0164 (issued December 2, 1998).

³ Docket No. 06-0468 (issued September 7, 2006).

Appellant appealed to the Board on February 11, 2011. By decision dated January 5, 2012, the Board affirmed the September 15, 2010 OWCP decision.⁴ The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference.

On May 2, 2008 appellant filed a Form CA-7 claim for a schedule award based on an impairment of his lower extremities.

In an August 27, 2009 report, Dr. John D. Marshall, a specialist in family medicine and appellant's treating physician, advised that appellant was experiencing severe pain in the L5-S1 region of the spine and that his condition had reached maximum medical improvement as of September 16, 1995.

By letter dated October 21, 2009, OWCP informed appellant that it required additional medical evidence in order to determine whether he was entitled to a schedule award. It specifically asked him to have his treating physician submit a medical report containing an impairment rating rendered pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed.). Appellant was afforded 30 days to submit the additional evidence.

By decision dated November 16, 2009, OWCP found that appellant had no ratable impairment causally related to his accepted lower back conditions and, therefore, was not entitled to a schedule award.

On February 3, 2010 appellant requested reconsideration of the November 16, 2009 decision.

In a November 23, 2009 report, Sammy Bonfin, a physical therapist, indicated that appellant had three percent right lower extremity impairment and three percent left lower extremity impairment pursuant to the A.M.A., *Guides*.

In a February 24, 2010 report, OWCP's medical adviser reviewed Mr. Bonfin's findings and found no ratable impairment of the lower extremities. He noted that there was no documentation of radiculopathy or findings of motor or sensory loss from the L4-5 levels, as required for an impairment rating under the A.M.A., *Guides*.

By decision dated March 12, 2010, OWCP denied modification of the November 16, 2009 decision. It found that appellant had submitted no impairment rating causally related to his accepted lower back conditions, which presented a basis for a schedule award.

On June 12, 2013 appellant filed another Form CA-7 claim for a schedule award based on an impairment of his lower extremities.

In order to determine whether appellant had any permanent impairment from his accepted lower back conditions, OWCP referred him to Dr. Douglas P. Hein, Board-certified in orthopedic surgery, for a second opinion examination and impairment rating. In a November 13,

⁴ Docket No. 11-0848 (issued January 5, 2012).

2013 report, Dr. Hein opined that appellant had no ratable impairment stemming from his accepted lower conditions. He advised that on examination appellant had a subjective L3, L4, L5, and SI decreased sensation in the left lower extremity. Dr. Hein reported that the electrodiagnostic tests he underwent in May 1995, including a magnetic resonance imaging (MRI) scan and a computerized axial tomography scan, did not show any evidence of compressive neuropathy or radiculopathy. He reported that more recent MRI scans did show definite progressive degeneration at the L5-S1 levels with some foraminal stenosis. Dr. Hein administered radiographic tests on the date of the examination, which showed significant L5-S1 disc space degeneration and protrusion with minimal changes at higher levels.

Dr. Hein opined that appellant had a lumbar strain with aggravation of his degenerative disc changes at the time of his work injury of May 20, 1992, with subsequent resolution of the acute lumbar strain. He noted that appellant had experienced ongoing symptoms since then, but advised that these were more compatible with progressive degeneration, which was not a direct result of the May 20, 1992 work injury. Dr. Hein asserted that this was the normal progression of appellant's disease. He reported decreased range of motion on examination, but opined that this was greater than would be expected based on his objective findings, which were outweighed by his objective findings. Dr. Hein concluded that appellant had zero percent permanent impairment of the affected member from the accepted injuries. He asserted that all of appellant's symptoms were attributable to preexisting abnormalities.

By decision dated December 12, 2013, OWCP found that appellant had no ratable impairment causally related to his accepted lower back conditions and, therefore, was not entitled to a schedule award. It noted that Dr. Hein had asserted in his second opinion report that there was no basis for a schedule award stemming from appellant's accepted lower back conditions.

On December 17, 2013 appellant requested an oral hearing before an OWCP hearing representative, which was held on June 9, 2014.

By decision dated August 25, 2014, an OWCP hearing representative affirmed the December 12, 2013 decision denying appellant's schedule award claim. He explained that appellant had not submitted evidence from a treating physician, establishing that appellant had permanent impairment pursuant to the A.M.A., *Guides*. Dr. Hein, the second opinion physician had provided a proper report, which concluded that appellant did not have ratable impairment pursuant to the A.M.A., *Guides*.

On August 24, 2015 appellant requested reconsideration. With his request for reconsideration he submitted a number of documents that did not pertain to his schedule award claim. Appellant also submitted additional medical evidence.

In reports dated August 5, September 3, and November 25, 2014, Dr. Lamar Moree, Board-certified in pain medicine, advised that appellant was experiencing chronic lower back pain secondary to degenerative disc disease of the lumbosacral spine and osteoarthritis. He noted in his September 3, 2014 report that on examination appellant showed moderate tenderness to palpation to the lumbosacral spine. In his November 25, 2014 report, Dr. Moree attributed his lower back pain to a previous work-related trauma.

In a December 11, 2014 report, Dr. Marshall advised that appellant was experiencing work-related back spasms and numbness in his left foot. He opined that appellant had lumbar disc disease and paresthesias of the left leg.

In a May 19, 2015 report, Dr. Marshall advised that appellant had sharp pain in his right side, lumbosacral back pain with movement, and cramping of the left leg.

By decision dated September 4, 2015, OWCP denied appellant's application for review as it neither raised substantive legal questions, nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁵ Section 10.608(a) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁶ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷ Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁸

ANALYSIS

In the present case, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, nor has he advanced a relevant legal argument not previously considered by OWCP. He did submit a series of reports from Drs. Moree and Marshall from 2014 and 2015.

The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.⁹ The issue in this case is medical; *i.e.*, whether appellant had any ratable impairment causally related to his accepted lower back conditions entitled him to a schedule award. The reports from Drs. Moree and Marshall are not relevant as they do not contain an impairment rating rendered pursuant to

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.608(a).

⁷ *Id.* at § 10.606(b)(3).

⁸ *Id.* at § 10.606(b).

⁹ *See David J. McDonald*, 50 ECAB 185 (1998).

the A.M.A., *Guides*. These reports merely state findings on examination and indicate that appellant was experiencing continuing lower back pain generally attributable to the May 20, 1992 work injury.

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law, nor did it advance a point of law not previously considered by OWCP. The additional evidence submitted by appellant with his request for reconsideration did not constitute pertinent new and relevant evidence. The Board thus finds that OWCP did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2016
Washington, DC

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

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

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