United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 17-0694**
	)	**Issued: June 22, 2017**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Quantico, VA, 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
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 6, 2017 appellant filed a timely appeal from a November 3, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision dated July 14, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 15, 2007 appellant, then a 41-year-old supervisory special agent, filed an occupational disease claim (Form CA-2) alleging that he sustained cervical disc injuries as a result of his federal employment. He alleged that in November 1993 as well as from 1999 to 2002, he was a member of a special weapons and tactics team, and his duties included numerous physical activities while wearing a heavy vest and helmet. Appellant also indicated that from November 15 to 16, 2006 he was in charge of a work-related exercise and had sharp pain in his neck.

OWCP accepted the claim on October 24, 2008 for aggravation of cervical disc displacement without myelopathy. There is no indication that appellant claimed or received wage-loss compensation at the time.

Appellant filed a claim for compensation (Form CA-7) on November 10, 2008, indicating that he was claiming a schedule award. By decision dated March 12, 2009, OWCP issued a schedule award for 14 percent left upper extremity permanent impairment. The period of the award was 43 weeks, commencing December 8, 2008.

On January 11, 2016 appellant filed a claim for a recurrence (Form CA-2a) commencing December 1, 2015. He indicated that on the claim form that the recurrence was for medical treatment only.

OWCP advised appellant by letter dated January 14, 2016 that further medical evidence was necessary to establish his recurrence claim. Appellant was afforded 30 days to submit the necessary evidence.

In response to the January 14, 2016 OWCP letter, appellant wrote that he had chronic, recurring pain.

By decision dated February 17, 2016, OWCP denied the claim for a recurrence of a medical condition. It indicated that no medical evidence had been received regarding the need for further medical treatment.

OWCP thereafter received a February 2, 2016 report from Dr. H. Edward Lane, III, a Board-certified orthopedic surgeon, on February 19, 2016. Dr. Lane wrote that appellant had an existing C5-7 disc issue from 2005 to 2006 that was aggravated by required weight training for the employing establishment. He reported that appellant's cervical pain had worsened as of December 2015 and appellant was unable to do any physical training.

Appellant requested reconsideration on June 15, 2016. He submitted a May 25, 2016 report from Dr. Lane. Dr. Lane reported that appellant had persistent cervical pain, as demonstrated by a January 15, 2016 magnetic resonance imaging scan confirming changes at the C5-6 and C6-7 levels. He opined that this was an ongoing issue related to appellant's original work injury and he would benefit from a cervical discectomy and fusion surgery.

By decision dated July 14, 2016, OWCP reviewed the merits of the claim and the February 2 and May 25, 2016 reports from Dr. Lane and had found that the medical evidence was insufficient to establish the recurrence claim.

Appellant again requested reconsideration on November 1, 2016. In a letter of that date, he wrote that in the July 14, 2016 OWCP decision there was "no reference or consideration" of Dr. Lane's May 25, 2016 report. Appellant argued that Dr. Lane's report made it clear that his original injury had become more symptomatic over time. He resubmitted the May 25, 2016 report from Dr. Lane.

By decision dated November 3, 2016, OWCP declined to review the merits of the claim. It found that appellant had not met any of the requirements for a merit review pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[2] OWCP's regulations provides 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: "(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."[3] 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.[4]

ANALYSIS

Appellant submitted a November 1, 2016 reconsideration request from a July 14, 2016 OWCP decision denying his claim for a recurrence of a medical condition.

Appellant did not show that OWCP had erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. His argument on reconsideration was that OWCP had failed to consider Dr. Lane's May 25, 2016 report, but in the July 14, 2016 merit decision OWCP noted that it had received and reviewed Dr. Lane's May 25, 2016 report. While it quoted from Dr. Lane's February 2, 2016 report, OWCP also explained that there was a gap in the medical record from approximately 2010 through 2016. It found that the medical evidence of record was insufficient to establish an employment-related condition as of December 2015. There is no indication that OWCP failed to consider the May 25, 2016 report. It is well established that the reopening of a case is not

[2] 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.")

[3] 20 C.F.R. § 10.606(b)(3).

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

required where the legal contention has no reasonable color of validity.[5] The Board finds that appellant's argument has no reasonable color of validity in this case.

As to the submission of evidence, appellant resubmitted the May 25, 2016 report from Dr. Lane. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.[6] Since this report was previously of record and considered by OWCP, it did not constitute relevant and pertinent new evidence not previously considered by OWCP.

The Board accordingly finds that appellant has not met 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 submit relevant and pertinent new evidence not previously considered by OWCP. OWCP therefore properly denied merit review in this case.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

[5] *Elaine M. Borghini*, 57 ECAB 549 (2006); *Annette Louise*, 54 ECAB 783 (2003).

[6] *M.V.*, Docket No. 17-0132 (issued April 7, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 3, 2016 is affirmed.

Issued: June 22, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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