United States Department of Labor
Employees' Compensation Appeals Board

S.F., Appellant	)	
and	)	**Docket No. 17-0733**
	)	**Issued: October 16, 2017**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Los Angeles, CA, 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 14, 2017 appellant filed a timely appeal from a December 22, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated October 28, 2015 to the date 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 his claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP first accepted that on April 9, 2003 appellant, then a 46-year-old agricultural quarantine inspector, slipped and fell on gangway steps while boarding a vessel, striking his left knee and resulting in a left medial meniscal tear and consequential osteoarthritis, OWCP File No. xxxxxx449.[2] He stopped work on the date of injury.[3]

Dr. Frank Giacobetti, an attending Board-certified orthopedic surgeon, noted on May 14, 2003 that appellant had undergone an open meniscectomy of the left knee in 1982, with resolution of symptoms following the procedure. He diagnosed a new left medial meniscus tear with patellofemoral chondromalacia and recommended an arthroscopic partial meniscectomy. Dr. Giacobetti performed a partial left meniscectomy on July 9, 2003. Following a course of physical therapy, he released appellant to full, unrestricted duty as of August 25, 2003. Appellant returned to full duty on August 29, 2003.

OWCP later accepted, under File No. xxxxxx638, that on April 13, 2004 appellant was struck by a falling 50-pound sack of pumpkin seeds, causing a cervical sprain. In an April 13, 2004 report, Dr. Perez diagnosed myofascial strains of the cervical and lumbosacral spine. He released appellant to full duty with no restrictions as of May 14, 2004. Under File No. xxxxxx755, OWCP also accepted thoracic and lumbar sprains due to a January 20, 2006 work-related motor vehicle accident. Dr. Perez released appellant to full duty with no restrictions as of February 17, 2006.[4] OWCP File Nos. xxxxxx638 and xxxxxx755 were combined with the present claim, OWCP File No. xxxxxx449, with the latter serving as the master file.

Appellant again stopped work on April 9, 2006 due to left knee pain. On May 25, 2006 OWCP accepted a "recurrence of left knee medial meniscus tear."[5] On June 14, 2006 Dr. Giacobetti performed an authorized left knee arthroscopy with partial medial meniscus resection, chondroplasty of the medial femoral condyle and medial tibial plateau, and synovectomy. OWCP paid wage-loss compensation from April 10 to June 10, 2006. It placed appellant's case on the periodic compensation rolls effective June 11, 2006.

The employing establishment separated appellant from federal service effective August 25, 2006, as he failed a required background check due to criminal convictions. OWCP continued to issue wage-loss compensation on the periodic rolls.

---

[2] The employing establishment issued an authorization for examination or treatment (Form CA-16) on April 9, 2003. Appellant was first treated on April 9, 2003 by Dr. Mark Perez, an attending Board-certified family practitioner, who diagnosed a left knee contusion and held appellant off work through May 1, 2003.

[3] An April 24, 3003 magnetic resonance imaging (MRI) scan of appellant's left knee showed effusion, a tear of the posterior horn of the medial meniscus, blunting of the anterior horn of the medial meniscus, and chondromalacia of the patella and medial joint space compartment.

[4] A February 12, 2006 MRI scan of the thoracic spine showed early spondyloarthritic and degenerative disc disease from T7 through T11, and 1 to 2 millimeter posterior disc bulges from T7 through T11 without neurological impairment.

[5] A May 10, 2006 MRI scan of the left knee showed increased chondromalacia of the medial compartment, a horizontal degenerative flap tear of the medial meniscus, and tricompartmental osteoarthritis.

In order to determine appellant's work capacity, on February 7, 2007 OWCP obtained a second opinion from Dr. William C. Boeck, Jr., a Board-certified orthopedic surgeon. Dr. Boeck reviewed the medical evidence and a statement of accepted facts (SOAF). He opined that appellant had sustained a permanent aggravation of the accepted left knee conditions, but found appellant able to perform full-time light-duty work with restrictions.[6]

In an October 10, 2008 report, Dr. Giacobetti related appellant's complaints of increased left knee pain. On examination, he found an equivocal medial McMurray sign for meniscus pathology, and flexion limited to 120 degrees. Dr. Giacobetti obtained x-rays showing "degenerative arthritic changes with worsening of the joint space narrowing." He found appellant able to perform modified work "with no climbing, no squatting, and kneeling and no lifting greater than 20 pounds with no prolonged standing or walking."[7] Dr. Giacobetti provided periodic reports renewing work restrictions.

Dr. Perez provided an October 29, 2008 report, diagnosing cervical, thoracic, and left arm and shoulder sprains. He released appellant to modified work effective that day.[8]

Dr. Giacobetti opined on May 21, 2010 that appellant required a repeat left knee arthroscopy to address a recurrent meniscal tear. On May 28, 2010 OWCP authorized left knee arthroscopy

In a December 8, 2010 report, Dr. Kambiz Hannani, an attending Board-certified orthopedic surgeon, diagnosed spinal cord compression at C5 with myelomalacia, and left C6 radiculopathy.

On March 16, 2011 OWCP again attempted to determine appellant's work capacity and referred him for a second opinion from Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon. Dr. Ha'Eri reviewed the medical evidence of record and a SOAF. He noted nonoccupational conditions of hypertension, diabetes mellitus type 2, and hyperlipidemia, with a history of a retinal detachment procedure in the right eye which did not restore appellant's vision. On examination, Dr. Ha'Eri found limited cervical spine motion, surgical scars on the left knee, left knee flexion limited to 100 degrees with crepitus, and tenderness to palpation above the joint line. He opined that the accepted left knee injury had resolved and he had similar degenerative findings in the right knee due to idiopathic causes. Dr. Ha'Eri commented that appellant might require a total left knee arthroplasty in the future. He also found that the accepted cervical and thoracolumbar strains had resolved without residuals. Dr. Ha'Eri characterized appellant's symptoms to nonindustrial degenerative changes and congenital cervical stenosis. He found appellant able to perform full-time modified duty, with pushing, pulling, and lifting limited to 10 pounds, and walking, standing, and bending limited to one hour.

[6] Appellant participated in a vocational rehabilitation effort in 2008. OWCP closed the vocational rehabilitation effort on March 12, 2009 due to unresolved medical issues.

[7] An October 30, 2008 left knee MRI scan showed tricompartmental osteoarthritis, a small joint effusion, status post partial medial meniscectomy, high grade chondromalacia of the medial compartment "with pseudoextrusion of the remnant of the medical meniscus," and mild chondromalacia of the patella.

[8] Appellant participated in physical therapy for cervical and lumbosacral strains from March through May 2010.

In a May 20, 2011 report, Dr. Giacobetti disagreed with Dr. Ha'Eri's recommendation of a left knee surgery as appellant's osteoarthritis was "not severe enough at his age."

In a June 16, 2011 report, Dr. Kourosh K. Shamlou, an attending Board-certified orthopedic surgeon, reviewed medical reports. He obtained left knee x-rays showing bone on bone osteoarthritis. Right knee imaging studies showed internal derangement and a medial meniscus tear. Dr. Shamlou opined that appellant's long history of left knee injuries and surgeries caused "compensatory injury to the right knee," requiring a right knee arthroscopy. He also found that the accepted April 13, 2004 employment injury was sufficient to cause C5 myelomalacia and current C6 radiculopathy. Dr. Shamlou recommended an anterior cervical discectomy and fusion. He found appellant totally disabled for work.

OWCP determined that there was a conflict of medical opinion between Dr. Ha'Eri, for the government, who opined that the accepted conditions had ceased without residuals, and appellant's physicians, who found continuing work-related residuals. To resolve the conflict, it selected Dr. Blair C. Filler, a Board-certified orthopedic surgeon, as the impartial medical specialist.

Dr. Filler provided a December 4, 2012 report reviewing the medical evidence of record and SOAF. On examination, he found no paraspinal spasm or other abnormality of the cervical, thoracic, and lumbar spines. There was a normal motor and sensory examination, full range of upper extremity motion, and slight loss of left knee flexion. Dr. Filler found that the accepted April 9, 2003 left knee injury had ceased without residuals, as it was fully resolved by the July 9, 2003 and June 14, 2006 surgeries. Any subsequent findings or symptoms were due only to idiopathic causes. Dr. Filler also opined that the accepted cervical, thoracic, and lumbar conditions resolved without residuals, and that any ongoing symptoms were due to a nonindustrial degenerative process. He found appellant able to perform full-time light duty within specified restrictions.[9]

In a May 20, 2013 statement, appellant alleged that Dr. Filler repeatedly used racial slurs during the examination and stuck him "more than 50 times with a safety pin."

In an April 9, 2013 report, Dr. Giacobetti found that appellant could perform modified-duty work, but checked a box on a form report finding him temporarily totally disabled.

By notice dated January 21, 2014, OWCP notified appellant and his attorney of its proposal to terminate his wage-loss and medical compensation benefits, based on Dr. Filler's opinion as impartial medical examiner. It afforded appellant 30 days to submit additional evidence or argument. Appellant did not submit any additional evidence or response.

[9] By pretermination notice dated March 21, 2013 and finalized April 29, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits that day, based on Dr. Filler's opinion as the special weight of the medical evidence. In an October 29, 2013 letter, counsel contended that OWCP had not provided him with a copy of the April 29, 2013 termination decision and asked that the decision be reversed. On December 19, 2013 OWCP reversed the April 29, 2013 termination decision, finding that OWCP had improperly failed to provide counsel with a copy of the pretermination notice and the termination decision.

By decision dated February 24, 2014, OWCP finalized the January 21, 2014 notice, and terminated appellant's wage-loss and medical compensation benefits effective that day. It found that Dr. Filler's opinion established that the accepted left knee, cervical, thoracic, and lumbar spine injuries had ceased without residuals.

In a March 5, 2014 letter, counsel requested a telephonic hearing before OWCP's Branch of Hearings and Review, held September 10, 2014. At the hearing, he contended that Dr. Filler's report was insufficiently rationalized to resolve the conflict of medical opinion between appellant's physicians and Dr. Ha'Eri.

By decision dated November 25, 2014, OWCP's hearing representative affirmed OWCP's February 24, 2014 decision.

Appellant requested reconsideration on July 15, 2015. He alleged that Dr. Ha'Eri examined him for less than three minutes. Appellant reiterated that Dr. Filler used ethnic slurs, stuck him more than 50 times with a safety pin, and conducted himself in a hostile and unprofessional manner. Additional evidence included a February 17, 2015 report from Dr. Shamlou, who recommended a total left knee arthroplasty, cervical spine decompression and fusion, pain management for lumbar spine, and possible lumbar surgery.

Dr. William W. Brien, an attending Board-certified orthopedic surgeon, provided April 13 and May 13, 2015 reports reviewing appellant's history of injury and treatment. He diagnosed cervical degenerative disc disease, cervical spine strain, lumbar degenerative disc disease, lumbar spondylosis, bilateral knee osteoarthritis. Dr. Brien opined that all diagnoses appeared to be industrially related.

In a June 9, 2015 memorandum, the Department of Veterans Affairs indicated that appellant received Veteran's benefits for a right eye condition, left meniscal tear, and right knee strain. Effective December 1, 2014, appellant received $1,159.36 a month.

By decision dated October 28, 2015, OWCP denied modification, finding that the additional evidence submitted was insufficiently rationalized to outweigh Dr. Filler's opinion.

On October 7, 2016 appellant requested reconsideration. In an undated statement received on November 8, 2016, he reviewed his history of treatment. Appellant contended that OWCP had not adequately assisted him with vocational retraining and election of benefits, and failed to provide adequate medical supervision. He repeated his allegations against Dr. Filler.

Appellant provided July 18, 2016 nerve conduction velocity and electromyography (NCV/EMG) studies showing possible mild left carpal tunnel syndrome, and possible left C6-7 nerve root irritation.

In a September 17, 2016 report, Dr. Christopher Ninh, an attending Board-certified orthopedic surgeon, related appellant's history of injury and treatment, beginning with a 1981 left knee injury, and the accepted occupational injuries. On examination of the left knee, he found swelling and a positive McMurray's sign. Dr. Ninh opined that unspecified x-rays demonstrated "severe medial compartment arthritis, bone on bone." He recommended a total left knee arthroplasty and right knee arthroscopic surgery.

By decision dated December 22, 2016, OWCP denied appellant's request for a further review of his case on the merits, finding that the additional evidence submitted was cumulative or irrelevant. It found that his statement was repetitive of his contentions previously of record. Additionally, Dr. Ninh's report was irrelevant as he did not address the critical issue of why the proposed surgeries would be necessitated by the accepted injuries.

LEGAL PRECEDENT

To require the office to reopen a case for merit review under section 8128(a) of FECA,[10] section 10.606(b)(3) of Title 20 of the Code of Federal Regulations provides 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.[11] Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.[12]

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.[13] Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.[14] When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.[15]

ANALYSIS

OWCP accepted that appellant sustained a left meniscal tear, osteoarthritis, cervical, thoracic, and lumbar sprains. Appellant underwent a partial left meniscectomy on July 9, 2003, authorized by OWCP. He stopped work on April 9, 2006 and did not return. Appellant underwent a June 14, 2006 left knee arthroscopy with partial medial meniscus resection, authorized by OWCP.

On March 26, 2011 Dr. Ha'Eri, an OWCP referral physician, opined that the accepted conditions had ceased without residuals, and that appellant could perform full-time modified duty. Dr. Shamlou, an attending physician, found appellant totally disabled for work as of June 16, 2011 due to the accepted injuries. Dr. Giacobetti, a treating physician, also found that the accepted left knee injury remained present and active. OWCP found a conflict of medical

[10] 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(3).

[12] *Id*. at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

[13] *Helen E. Tschantz*, 39 ECAB 1382 (1988).

[14] *See supra* note 11. *See also Mark H. Dever*, 53 ECAB 710 (2002).

[15] *Annette Louise*, 54 ECAB 783 (2003).

opinion, and selected Dr. Filler, a Board-certified orthopedic surgeon, to resolve it. Dr. Filler's December 4, 2012 report found that the accepted left knee and paraspinal conditions had ceased without residuals. Based on his opinion, OWCP terminated appellant's wage-loss compensation and medical benefits. An OWCP hearing representative affirmed the termination on and, on October 28, 2015, OWCP denied modification of the November 25, 2014 decision.

Appellant requested reconsideration on October 7, 2016. In support of his request, he provided a November 8, 2016 statement repeating his allegations against Dr. Filler, and discussing election of benefits and vocational training. He also provided July 18, 2016 NCV/EMG studies of the upper extremities, and a September 17, 2016 report from Dr. Ninh recommending a total left knee arthroplasty. By decision dated December 22, 2016, OWCP denied reconsideration, finding that the additional evidence submitted was irrelevant or cumulative.

The Board finds that OWCP properly denied reconsideration. The critical issue in the October 28, 2015 merit decision was whether appellant's physicians had provided sufficient medical rationale to support that the accepted left knee and spinal conditions had not ceased. To be relevant, the evidence submitted on reconsideration must address that issue.

Appellant's statement, received by OWCP on November 8, 2016, discussed election of benefits and vocational rehabilitation, matters irrelevant to the critical issue of causal relationship. Similarly, he submitted July 18, 2016 electrodiagnostic studies and Dr. Ninh's September 17, 2016 report, neither of which addressed causal relationship. As these documents do not discuss the critical question of whether appellant's ongoing condition remained related to the accepted injuries, they do not comprise a basis for reopening the case.[16] Additionally, appellant's unsubstantiated accusations against Dr. Filler are repetitive and insufficient to warrant reopening a claim for merit review.[17]

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence or argument. Appellant did not do so in this case. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant contends that he filed a timely request for reconsideration. The Board notes that the timeliness of his request is not at issue. Appellant also alleges that OWCP wrongfully denied him medical treatment and vocational rehabilitation. These arguments pertain to the merits of the claim, which are not before the Board on the present appeal.

CONCLUSION

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

[16] *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

[17] *Denis M. Dupor*, 51 ECAB 482 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 22, 2016 is affirmed.

Issued: October 16, 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