United States Department of Labor
Employees' Compensation Appeals Board

H.H., Appellant	)	
and	)	**Docket No. 16-1213**
	)	**Issued: September 11, 2017**
DEPARTMENT OF THE NAVY, NAVAL SURFACE WAR CENTER, Port Hueneme, CA, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant[2]
Office of Solicitor, for the Director

Oral Argument June 20, 2017[1]

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 11, 2016 appellant, through counsel, filed a timely appeal from a March 4, 2016 merit decision and a May 4, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).[3] Pursuant to the Federal Employees' Compensation Act[4] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

[1] On August 28, 2017 counsel submitted a summary of arguments presented at the June 20, 2017 oral argument. As noted by counsel, these arguments were addressed at the oral argument before the Board.

[2] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[3] The Board notes that, following the May 4, 2016 nonmerit decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ISSUES

The issues are: (1) whether appellant has established total disability commencing July 19, 2010 causally related to her accepted employment conditions; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts as presented in the prior decision are incorporated herein by reference. The relevant facts relating to this appeal are as follows.

On July 15, 2010 appellant, then a 46-year-old systems accountant, filed an occupational disease claim (Form CA-2) alleging that on October 13, 2008 she first became aware of a mild degenerative neck condition, but did not realize its connection to her federal employment until June 22, 2010. She stopped work on July 15, 2010 and resigned from the employing establishment effective July 16, 2010.

On December 21, 2010 OWCP denied the claim, finding no causal relationship between the diagnosed conditions and the claimed employment factors. Appellant requested reconsideration.

By decision dated September 15, 2011, OWCP accepted appellant's claim for right shoulder joint pain and cervical intervertebral disc degeneration based on an August 22, 2011 report by Dr. William Curran, Jr., an OWCP second opinion Board-certified orthopedic surgeon.

On October 3, 2011 appellant filed a claim for wage-loss compensation (Form CA-7) beginning July 19, 2010.

In support of her claim for wage-loss compensation appellant submitted medical evidence including reports from Dr. Brigitta Hufnagel-Pinney a treating Board-certified family medicine physician; Dr. James R. McClurg, an examining physician; Dr. Kien Ta, a chiropractor; Dr. Lokesh S. Tantuwaya, an examining Board-certified neurological surgeon; Dr. William W. Winternitz, Jr., an examining Board-certified orthopedic surgeon; and Dr. Choll W. Kim, an examining Board-certified orthopedic surgeon.

In an August 31, 2010 attending physician's report (Form CA-20), Dr. Brigitta Hufnagel-Pinney, a treating Board-certified family medicine physician, diagnosed cervical joint spondylosis without myelopathy. She noted that appellant had just relocated to San Diego from Woodland Hills, CA. Dr. Hufnagel-Pinney advised appellant that she could return to work on August 31, 2010.

[4] 5 U.S.C. § 8101 *et seq.*

[5] Docket No. 15-0770 (issued October 8, 2015).

Dr. Ta, in reports dated July 7, 2010 and April 14, 2011, diagnosed upper thoracic ribs subluxation, thoracic and cervical myofascial pain syndrome due to upper thoracic ribs subluxation, cervical spine degenerative disc disease, and cervical disc syndrome. In the July 7, 2010 report, he noted that appellant related that she was unable to perform her normal job duties due to functional limitation and pain as the result of an October 13, 2008 accident and indicated that she has not worked since July 16, 2010. In an April 14, 2011 report, Dr. Ta noted that appellant's condition had improved.

Dr. McClurg, in reports and progress notes covering the period September 26, 2011 to June 26, 2013, diagnosed cervical sprain/strain and right impingement syndrome. He indicated that appellant was capable of working with restrictions in reports and progress notes from 2011 through 2013.

By decision dated August 28, 2012, OWCP denied any periods of disability based primarily on Dr. Curran's report. Appellant filed a request for a hearing and by decision dated April 22, 2013 the case was remanded for further development.

In a report dated July 9, 2013, Dr. Tantuwaya, based upon a review of medical evidence and physical examination, diagnosed C5-6 cervical spondylosis with bilateral neural foramen. He noted that appellant had related that she had resigned from the employing establishment on July 16, 2010 and that she has been off work due to the inability of the employing establishment to accommodate her work restrictions.

Dr. Winternitz, in reports dated April 23 and September 16, 2014 report and progress notes for the period May 6 to July 14, 2014, provided physical examination findings and diagnoses of cervical degenerative disc disease, right shoulder rotator cuff tendinitis, subacromial impingement, and right C6 cervical radiculopathy. In the April 23, 2014 report, appellant related that she had not worked since July 15, 2010 and he wrote "no" to the question regarding work restrictions. In the subsequent progression notes, Dr. Winternitz noted that appellant was capable of working with restrictions and wrote "yes" to the question regarding work restrictions.

Appellant also submitted a July 10, 2014 report from Dr. Kim, who noted that appellant had not worked since July 15, 2010 and deferred to Dr. Winternitz on appellant's disability status. Dr. Kim provided physical examination findings and diagnoses of C5-6 disc herniation and right rotator cuff tendinitis.

OWCP reviewed the evidence of record following the remand but, by decision dated November 14, 2014, found no further evidence to establish disability after July 19, 2010.

By decision dated October 8, 2015, the Board set aside the November 14, 2014 OWCP decision and remanded the case for further proceedings consistent with its opinion. The Board found that further clarification was required from Dr. Curran, the second opinion physician, as he had failed to address whether appellant was disabled beginning July 19, 2010 due to her accepted conditions.[6]

[6] Docket No. 15-0770 (issued October 8, 2015).

By letter dated January 14, 2016, OWCP referred appellant for an updated second opinion evaluation with Dr. Curran. In a February 1, 2016 report, Dr. Curran reviewed the statement of accepted facts, the medical evidence, and his prior report. He performed a physical examination, noted appellant's complaints, and diagnosed C5-6 multilevel disc disease, C5-6 severe right foraminal stenosis, right C5-6 nerve root impingement, and right shoulder impingement syndrome. Based on the physical examinations performed and review of the medical evidence, Dr. Curran opined that appellant was able to work with restrictions from July 25, 2010 to August 23, 2011. In support of this conclusion, he referenced an April 14, 2011 report by Dr. Ta noting appellant stating she was unable to perform her normal job duties and that she had not worked since July 16, 2010 and a 2014 report from Dr. Kim, which attributed appellant's disability to the employing establishment's inability to accommodate her work restrictions.

On February 23, 2016 OWCP received a report dated September 20, 2013 by Dr. McClurg reiterating examination findings from his prior reports and diagnoses of cervical sprain/strain and right impingement syndrome. Dr. McClurg indicated that appellant was capable of working four hours per day with restrictions and a location close to her home.

By decision dated March 4, 2016, OWCP denied modification of the November 14, 2014 decision. It found the medical evidence failed to establish that appellant had any employment-related disability on and after July 19, 2010, the date appellant filed a Form CA-7 claiming wage-loss compensation.

The record reflects that following the March 4, 2016 decision, OWCP received a February 16, 2016 report from Dr. Winternitz containing examination findings, review of a February 8, 2016 MRI scan, and diagnoses of other cervical disc degenerative, unspecified cervical region.

On March 23, 2016 counsel requested reconsideration. He argued that appellant need not show she was totally disabled when the employing establishment was unable to accommodate her work restrictions.

Following appellant's request for reconsideration, OWCP received medical evidence previously considered including a November 11, 2013 report by Dr. McClurg; a July 9, 2013 report by Dr. Tantuwaya; reports dated August 29, 2012, July 10, September 8, 2014, from Dr. Kim. Appellant also submitted a March 31, 2016 report by Dr. Winternitz, an examining Board-certified orthopedic surgeon; January 7 and April 27, 2016 by Dr. Kim, and an April 12, 2016 nerve conduction study/electromyography study (NVC/EMG) by Dr. Robert S. Warren, a Board-certified neurologist.

In reports dated January 7 and April 27, 2016, Dr. Kim reported that appellant was seen for cervical spine complaints, which he attributed to an October 3, 2008 incident. He reiterated the history as noted in his prior reports, reviewed objective tests, and provided examination findings. Based on examination findings, review of objective tests, and medical history, Dr. Kim diagnosed C5-6 disc herniation with right stenosis, greater on the right side and right shoulder rotator cuff tendinitis.

In a March 31, 2016 report, Dr. Winternitz provided physical examination findings, briefly noted the history of illness, and diagnosed cervical disc degeneration, right C6 radiculopathy, and right shoulder pain. Lastly, he provided work restrictions.

A NVC/EMG performed by Dr. Warren on April 12, 2016 revealed a normal examination with no sign of motor radiculopathy.

By decision dated May 4, 2016, OWCP denied appellant's request for reconsideration. It found that the evidence submitted was either repetitive or had previously been considered.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[7] has the burden of proof to establish the essential elements of her claim by the weight of the evidence.[8] For each period of disability claimed, the employee has the burden of proof to establish that he was disabled for work as a result of the accepted employment injury.[9] Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of probative and reliable medical opinion evidence.[10]

Under FECA the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[11] Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.[12] An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning capacity.[13] When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.[14]

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[7] 5 U.S.C. §§ 8101-8193

[8] *See Amelia S. Jefferson*, 57 ECAB 183 (2005); *see also Nathaniel Milton*, 37 ECAB 712 (1986*); Joseph M. Whelan*, 20 ECAB 55 (1968).

[9] *See Amelia S. Jefferson, id.*; *see also David H. Goss*, 32 ECAB 24 (1980).

[10] *See Edward H. Horton*, 41 ECAB 301 (1989).

[11] *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

[12] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[13] *Merle J. Marceau*, 53 ECAB 197 (2001).

[14] *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS -- ISSUE 1

The Board finds that the record does not support appellant's claim for wage-loss compensation beginning July 19, 2010 due to her accepted cervical intervertebral disc degeneration and right shoulder pain.

Voluntary retirement does not, by itself, raise an issue of disability.[15] In order for appellant to be entitled to any disability compensation, she must establish that she is disabled from the modified duties she was performing at the time she retired.[16] There is no probative medical evidence establishing either total or partial disability due to the accepted employment-related accepted cervical intervertebral disc degeneration and right shoulder pain. Appellant voluntarily retired effective July 16, 2010. Prior to retiring, she had performed her regular-duty position without restrictions. The medical evidence of record does not establish that her accepted cervical intervertebral disc degeneration and right shoulder pain conditions precluded her from continuing to perform her duties as a systems account, the position she held prior to her July 16, 2010 retirement.

The Board has had occasion to review similar cases where appellant filed a claim for disability following voluntary retirement and resignation. For example, in the case of *M.S.*,[17] the claimant worked a modified duty as a result of her employment injury and continued to earn the wages she previously received in their date-of-injury jobs. She voluntarily retired and subsequently claimed compensation for wage-loss compensation. The Board found that OWCP properly denied her claim for wage-loss compensation as the medical evidence did not support that the accepted employment injury precluded the claimant from continuing to perform the modified position she held prior to her voluntary retirement.

In the case of *Joe H. Davis*,[18] the claimant contended that he was entitled to compensation after November 9, 1999, the date he voluntarily retired, because limited duty was not available from the employing establishment. The employing establishment noted, however, that limited duty would have been available after the date he retired if he had provided medical evidence establishing that he was in need of limited duty due to his employment injury, which evidence he did not provide. The Board found that the claimant was not entitled to disability compensation after the date of his voluntary retirement.

In the case of *Stephen J. Vescelus*,[19] the claimant contended that he was entitled to compensation beginning in 1995. OWCP accepted a right shoulder strain on September 29, 1995. Appellant resigned October 25, 1994 as he felt he had been denied a promotion due to his accepted employment injury. The Board found that OWCP properly denied claimant's claim for wage-loss compensation as the medical evidence in the case failed to show

[15] *V.C.*, Docket No. 14-1252 (issued March 11, 2015); *J.H.*, Docket No. 14-540 (issued July 1, 2014).

[16] *Terry R. Hedman*, 38 ECAB 222 (1986).

[17] Docket No. 08-1194 (issued October 22, 2008).

[18] Docket No. 04-1030 (issued February 2, 2005).

[19] Docket No. 05-183 (issued May 19, 2005).

that he was disabled from performing his duties on and after 1995 due to the accepted employment injury.

The reports from Dr. Hufnagel-Pinney, Dr. McClurg, Dr. Kim, Dr. Ta, Dr. Tantuwaya, and Dr. Winternitz, are of limited probative value because none of the physicians addressed whether appellant's disability during the claimed period was caused by the accepted employment conditions.[20]

OWCP also received reports from Dr. Curran, a second opinion Board-certified orthopedic surgeon. As instructed by the Board, it requested him to address whether the accepted employment injury had caused disability for any period since the date of appellant's retirement. In his February 1, 2016 report, Dr. Curran reviewed the medical evidence and statement of accepted facts, noted appellant's complaints, and performed a new physical examination. Based on a review of his past reports and the medical evidence from treating physicians, Dr. Curran opined that appellant was not totally disabled from working on and after July 19, 2010 causally related to the accepted employment conditions.

Appellant retired on July 16, 2010 and has not worked since that date. The record does not demonstrate that her accepted cervical intervertebral disc degeneration and right shoulder pain conditions precluded her from working.

At the oral argument counsel argued that appellant is entitled to wage-loss compensation because the employing establishment failed to offer her a modified job within her restrictions since her retirement in 2010. As discussed above, it is appellant's burden of proof to establish entitlement to wage-loss compensation for the period claimed. Appellant has not submitted any evidence that the employing establishment would not have honored work restrictions, had she not voluntarily retired on July 16, 2010.[21]

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[22] 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

[20] *See S.E.*, Docket No. 08-2214 (issued May 6, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship); *Conard Hightower*, *supra* note 11.

[21] *See J.C.*, Docket No. 16-1200 (issued June 5, 2017). The employee filed a claim for periods of disability after she relocated from California to Michigan and worked for a private employer. OWCP denied the claim for wage-loss compensation noting in part that the employee had not established that she had contacted her federal employer to verify whether work within her restrictions was available.

[22] 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

considered by OWCP.[23] 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 by OWCP within one year of the date of that decision.[24] 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.[25]

ANALYSIS -- ISSUE 2

The underlying issue on reconsideration is whether appellant has submitted sufficient evidence relevant to the issue of compensation for wage loss on and after July 15, 2010 causally related to her accepted employment conditions. The Board finds that counsel's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant did not provide any relevant or pertinent new evidence warranting the reopening of the case on the merits. The January 7 and April 27, 2016 reports from Dr. Kim diagnosed C5-6 disc herniation with right stenosis, greater on the right side and right shoulder rotator cuff tendinitis. Dr. Winternitz, in a March 31, 2016 report, diagnosed right shoulder pain, cervical disc degeneration, and right C6 radiculopathy. The April 12, 2016 NVC/EMG performed by Dr. Warren was normal. This evidence, while new to the present claim, is not relevant to the claimed period of lost wages from work on and after July 19, 2010. Thus, this information is insufficient to reopen appellant's claim for further merit review.[26]

Appellant also submitted a November 11, 2013 report by Dr. McClurg; a July 9, 2013 report by Dr. Tantuwaya; and reports dated August 29, 2012, July 10 and September 8, 2014, from Dr. Kim. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.[27] Since these reports were previously of record and considered by OWCP, they do not constitute relevant and pertinent new evidence not previously considered by OWCP.

The Board finds that appellant did not show that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered or submit relevant and pertinent new evidence not previously considered by OWCP. Appellant did not

[23] 20 C.F.R. § 10.606(b)(3). *See J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

[24] *Id.* at 10.607(a).

[25] *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

[26] *J.D.*, Docket No. 16-1253 (issued February 7, 2017); *D'Wayne Avila*, 57 ECAB 642 (2006).

[27] *M.V.*, Docket No. 17-0132 (issued April 7, 2017); *Candace A. Karkoff*, 56 ECAB 622 (2005).

meet any of the regulatory requirements and OWCP properly declined to reopen her claim for further merit review.[28]

CONCLUSION

The Board finds that appellant has not established entitlement to wage-loss compensation on and after July 15, 2010 causally related to her accepted employment conditions. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 4 and March 4, 2016 are affirmed.

Issued: September 11, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[28] *A.K*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, *supra* note 23 (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).