

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

_____)	
A.H., Appellant)	
)	
and)	Docket No. 17-0652
)	Issued: April 25, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Baldwin Park, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 31, 2017 appellant filed a timely appeal from August 18, 2016 and January 13, 2017 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated January 21, 2016, 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 claim.

ISSUE

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

FACTUAL HISTORY

On September 11, 2006 appellant, then a 51-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging injury to his upper extremities due to performing his repetitive

¹ 5 U.S.C. § 8101 *et seq.*

work duties. He described his duties including casing of mail (letters and flats) about two to three hours a day, carrying and delivering mail about six to seven hours a day, and holding letters with a stack of flats on his left arm. OWCP accepted the claim for bilateral carpal tunnel syndrome; right lateral epicondylitis; right lesion of ulnar nerve; bilateral tenosynovitis of hand and wrists, and unspecified mononeuritis right upper limb, and paid appropriate compensation benefits. Appellant underwent OWCP-approved right wrist and right elbow surgery on April 11, 2007 and left wrist surgery on November 30, 2007. He eventually returned to modified light duty, working four hours per day delivering mail. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls as of August 18, 2006.

In February 2015, OWCP referred appellant to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of his employment-related injury and whether there were any residuals of the accepted conditions.

In a March 24, 2015 report, Dr. Einbund determined that appellant no longer had any objective residuals of the accepted injuries and could return to work in a full-time, full-duty capacity. He concluded that “the treating physician [Dr. Trieu Tran, an orthopedic surgeon] is providing work restrictions which are not associated with the accepted claim. As it relates to work restrictions associated with the upper extremities, there are no objective findings which support the high level limitations ... the only objective findings noted today re[garding] the surgical scars for both wrists and right elbow, otherwise there are no objective residuals. The physical examination is within normal limits.”

By decision dated June 12, 2015, OWCP terminated appellant’s wage-loss compensation and medical benefits, effective June 12, 2015, finding that the weight of the medical evidence rested with the opinion of Dr. Einbund.

On November 9, 2015 appellant submitted a request for reconsideration. In support of his request he submitted an October 19, 2015 report, from Dr. Basimah Khulusi, a physiatrist and family practitioner. Dr. Khulusi related that, based on July 31, 2015 nerve conduction study, appellant continued to have slowing of conduction of the neurological impulses traveling along the median nerve down to his hands. She opined that this objectively proved that the carpal tunnel condition was not resolved and explained appellant’s continued symptoms of numbness in his hands. Dr. Khulusi indicated that the objective finding showed that Dr. Einbund’s opinion was wrong. She noted that appellant continued to have significant symptoms affecting his right wrist and hand as a result of the tenosynovitis and continuing slowing of the median nerve. Appellant also continued to have slowing of conduction of the median nerve on the left. Dr. Khulusi noted that Dr. Einbund did not attempt to obtain any objective findings from medical testing before he offered his medical opinion.

By decision dated January 21, 2016, OWCP denied modification of its June 12, 2015 decision. It found that the October 19, 2015 report from Dr. Khulusi was insufficient to show that the previous decision was incorrect or created a conflict with Dr. Einbund’s second opinion.

On March 24, 2016 appellant requested reconsideration. In support of his request, appellant submitted a March 17, 2016 report from Dr. Khulusi. Dr. Khulusi referenced her October 19, 2015 report, in which she explained the objective findings affecting appellant’s wrists and elbows. She indicated that Dr. Einbund’s March 24, 2015 opinion was based only on his

physical examination. Dr. Khulusi stated that Dr. Einbund failed to test the function of the muscles that were innervated by the diseased nerves. Dr. Einbund also did not base his decision on any current diagnostic studies. Dr. Khulusi concluded that Dr. Einbund's opinion was based on cursory examination with no current clinical tests and therefore carried little weight, compared to her opinion that appellant continued to suffer residuals as a result of his work injury. She indicated that her evaluations included testing the muscles innervated by the diseased nerves and current medical studies including magnetic resonance imaging scans and electromyography.

By decision dated May 2, 2016, OWCP denied appellant's reconsideration request. It found that Dr. Khulusi's report was cumulative of evidence already contained in the case file and that she provided the same arguments previously addressed.

On May 25, 2016 appellant requested reconsideration. In a May 12, 2016 report, Dr. Khulusi related that in her last report dated March 17, 2016, she had offered new evidence which showed that Dr. Einbund's opinion was deficient and "based on cursory examination and no current clinical tests, and therefore carries little weight compared to our opinion." She requested that appellant's benefits be reinstated because her evaluations showed that appellant continued to suffer residuals as a result of his employment injury.

By decision dated August 18, 2016, OWCP denied appellant's reconsideration request. It found that Dr. Khulusi's May 12, 2016 report did not support that OWCP erroneously applied or interpreted a point of law. OWCP further found that Dr. Khulusi's report was irrelevant or immaterial as her responses did not directly address or provide an explanation as to how the current diagnostic findings were related to the work injury such that appellant's compensation benefits should be reinstated.

On January 6, 2017 appellant again requested reconsideration. In support of the request, he submitted a December 22, 2016 report from Dr. Khulusi. In her report, Dr. Khulusi asserted that there was a conflict in medical opinion between appellant's treating physician and the second opinion evaluator. She cited to sections in the Federal (FECA) Procedure Manual pertaining to referral to a referee evaluation and requested that appellant be referred for a referee evaluation.

By decision dated January 13, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that Dr. Khulusi's December 22, 2016 report was cumulative and repetitious of evidence previously of record.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.² OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.³ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that

² This section provides in pertinent part: "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on [his/her] own motion or on application." 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.607.

OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁴ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

The Board finds that OWCP properly denied appellant's requests for reconsideration.

In his May 25, 2016 and January 6, 2017 requests for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

In support of his May 25, 2016 reconsideration request, appellant submitted a May 12, 2016 report from Dr. Khulusi in which she noted that new medical opinion was related in her March 17, 2016 report which showed that Dr. Einbund's opinion was deficient and "based on cursory examination and no current clinical tests, and therefore carries little weight compared to our opinion." OWCP's May 2, 2016 decision had previously addressed the information contained in Dr. Khulusi's March 17, 2016 report and found that it was cumulative and substantially similar to evidence of record. This information is also cumulative as it adds no new findings as to whether appellant had continuing disability or residuals following the termination of his compensation benefits. The Board has held that newly submitted evidence which is only repetitive or duplicative of evidence existing in the record is not sufficient to warrant further merit review.⁶

In support of his January 6, 2017 reconsideration request, appellant submitted a December 22, 2016 report of Dr. Khulusi in which she asserted that there was a conflict in medical opinion between appellant's treating physicians and the second opinion evaluator. Dr. Khulusi cited to sections in Federal (FECA) Procedure Manual pertaining to referral to a referee evaluation and requested that appellant be referred for referee evaluation. To the extent Dr. Khulusi is referring to her opinion that appellant continued to suffer residuals as a result of his work injury which conflicts with Dr. Einbund's opinion, this argument was previously considered by OWCP in its January 21, 2016 decision, who determined that the weight of the medical evidence remained with Dr. Einbund. This evidence is cumulative and thus substantially similar to evidence that was already contained in the case file and previously considered.⁷

The Board accordingly finds that appellant was not entitled to a merit review of the claim. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law,

⁴ *Id.* at § 10.606(b)(3).

⁵ *Id.* at § 10.608(a), (b).

⁶ *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁷ *Id.*

advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP. Pursuant to 20 C.F.R. § 10.606(b)(3), OWCP properly denied merit review.

On appeal appellant indicates that he still has pain, numbness, and tingling in his hands and wrists and that his doctor had submitted several reports showing that Dr. Einbund's opinion was wrong. He requested to have his case reopened or be sent to a referee examiner. However, as noted above, the Board does not have jurisdiction over the merits of the termination decision. The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3) that would require OWCP to review the merits of the claim. For the reasons discussed, appellant was not entitled to a review of the merits of the claim in this case.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2017 and August 18, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 25, 2018
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