United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
and	)	**Docket No. 17-1250**
	)	**Issued: April 24, 2018**
DEFENSE AGENCIES, CHEATHAM ANNEX, Williamsburg, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 17, 2017 appellant, through counsel, filed a timely appeal from a March 17, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed following the last merit decision dated April 1, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.

[1] 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.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

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

On appeal counsel argues that submission of new medical evidence required a new merit review.

FACTUAL HISTORY

On September 12, 1989 appellant, then a 35-year-old warehouse worker, filed a traumatic injury claim (Form CA-1) alleging that on August 2, 1989 he climbed seven feet to check a serial number on a pump when he slipped and fell on his back while at work. OWCP accepted his claim for lumbosacral strain and herniated nucleus pulposus L5-S1, central. Appellant stopped work immediately after the injury, but returned to work and sustained a subsequent injury on March 1, 1990, when he was twisting and turning his back while insulating and picking up pieces that weighed approximately 40 pounds. The subsequent claim was accepted for the condition of lumbosacral strain.[3] Appellant again worked intermittently, but OWCP ultimately placed him on the periodic rolls and began paying him compensation for temporary total disability on September 12, 1990.

In response to an OWCP request for an updated report from his treating physician, appellant submitted a January 13, 2012 report from Dr. Anthony C. Breuer, a Board-certified neurologist. Dr. Breuer indicated that appellant has a history of falling off a giant submarine propeller years ago, and that he saw appellant on April 14 and December 28, 2009, June 30, 2010, and July 6 and October 7, 2011. He noted that there had been no recent laboratory tests or x-rays or scans. Dr. Breuer indicated that appellant's diagnosis was chronic low back pain related to his work injury, waxing and waning over the months and years. He also noted that appellant had been seen for a more serious neurologic condition, which was not work or injury related.

On October 7, 2013 appellant submitted a letter indicating that Dr. Breuer was no longer in practice and asked for a list of approved physicians in his area

On May 12, 2014 OWCP referred appellant to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, for a second opinion to determine the status of his accepted conditions. In a medical report dated May 27, 2014, Dr. Moore diagnosed lumbar degenerative disc disease and spondylolisthesis. He opined that there were no medical findings to indicate that the condition of lumbosacral sprain was still active, however, he further opined that the condition of displacement of lumbar intervertebral disc was still active, with residuals of this condition being manifested by limited range of lumbar spine motion on physical examination and radiographic findings of disc space narrowing and osteophyte formation in the lumbar spine. Dr. Moore found that appellant's objective findings were consistent with his subjective complaints. He noted that appellant had symptoms of intermittent "giving way" of the lower extremity which he believed was more likely attributable to strokes rather than his lumbar spine condition. Dr. Moore opined that appellant was

[3] OWCP initially assigned a new file number for the March 1, 1990 employment injury, OWCP File No. xxxxxx959, but on April 30, 1990 consolidated the files under OWCP File No. xxxxxx410.

partially disabled, with an inability to perform bending, climbing, or lifting greater than 10 pounds as a result of his work-related lumbar spine condition. Within these restrictions, he believed that appellant could work an eight-hour day. Dr. Moore did not anticipate significant improvement in appellant's lumbar spine condition.

On November 21, 2014 OWCP referred appellant to vocational rehabilitation services. In a March 7, 2015 report, the rehabilitation counselor noted that the employing establishment was unable to accommodate appellant's work restrictions. The counselor indicated that appellant needed to acquire basic computer skills to be able to qualify for an entry-level position as a receptionist in the labor market. He noted that it should take three to six months to master the essential functions through on the job training and a regimen of short-term skill enhancement computer skills training through the Department of Labor's Human Resource Development at Pitt Community College. In an April 3, 2015 rehabilitation report, the counselor indicated that on March 18, 2015 he spoke to appellant about participating in computer technology awareness class beginning March 30, 2015, which included eight three-hour classes at the Greenville, North Carolina center (18 miles away). The counselor also noted that the career center offered a job seeking skills workshop daily Monday and Thursday. An appointment was made by the rehabilitation counselor to meet with appellant and the program coordinator on March 23 to register for the upcoming March 30, 2015 computer class. Appellant failed to appear for the March 23, 2015 meeting, so the rehabilitation counselor completed the registration form. On March 30, 2015 appellant did not appear and attend the computer class. On April 3, 2015 the counselor spoke with appellant who related that he could not drive while taking pain killers. He noted that almost every time he called on appellant, he was not at home.

In a March 11, 2015 report, Dr. Dmitri S. Kolychev, a Board-certified neurologist, noted that appellant continued with numbness and trace weakness with dorsiflexion. He noted that appellant did not want to pursue surgical options.

In an April 15, 2015 letter, OWCP noted that appellant had not undertaken the training because of chronic back pain and an inability to drive while taking medication. It noted that the rehabilitation counselor attempted to meet with appellant and review the proposed plan activities and transferable skills, but each time the counselor would call or schedule a meeting, appellant was either not available or did not attend the meeting. Based on the counselor's assessment, it was determined that appellant would benefit from training and that he had the ability to successfully complete the training program. OWCP directed appellant to undergo the training program in computer technology awareness. It informed him that the case would be held open for 30 days to afford him the opportunity to contact OWCP or the rehabilitation counselor to make the necessary arrangements to enter the training program. OWCP advised appellant if he did not comply with the instructions to undergo the approved training program or did not show good cause for not undergoing the training program, the rehabilitation effort would be terminated and action would be initiated to reduce his compensation to reflect the probable work-earning capacity had he completed the applicable programs. It noted that, pursuant to section 8113(b) of FECA,[4] an individual who without good cause fails to apply for and undergo vocational rehabilitation when so directed, OWCP may reduce compensation prospectively based on what probably would have

[4] 5 U.S.C. § 8113(b).

been the individual's wage-earning capacity had he not failed to apply for and undergo vocational rehabilitation.

By letter to OWCP dated April 28, 2015, counsel stated that appellant's problem with class attendance was transportation. He noted that appellant lived 30 miles from the training site and he indicated that he could not drive all that way.

The vocational counselor registered appellant for a basic personal computer literacy class at Pitt Community College that were to be held from June 29 through August 17, 2015. In a July 1, 2015 note, the counselor indicated that appellant did attend the first computer skills class, but the school changed the location to the Senior Center in Greenville, NC, and appellant stated that he was not comfortable driving the additional three to seven miles to the senior center. He encouraged appellant to continue with the class, but appellant indicated that he was not interested in a return to work and complained about back pain and the effects of the medication.

In an August 11, 2015 report, the counselor discussed appellant's sporadic attendance at classes. Appellant attended class on June 29, 2015; on July 6, 2015 appellant indicated that he would not be attending class that day because he had family visiting; appellant did attend July 13, 2015 class; appellant did not attend the July 20, 2015 class because his back was hurting; appellant attended the July 28, 2015 class, but left after 1.5 hours of a 3-hour class; appellant did not attend the August 3, 2015 class because he was hurting; and on August 11, 2015 appellant attended class, but left after 1.5 hours of a 3-hour class. The counselor stated that appellant was not taking full advantage of the skill advancement training that was provided to assist him in being marketable for a telephone sales/customer service or reception job. In a September 7, 2015 closure report, the rehabilitation counselor noted that this was the second time that appellant had not taken full advantage of skill advancement training that was provided to assist him in being marketable. He noted that appellant's instructor indicated that he was able to accommodate appellant by allowing him to alternate his body position as needed. The counselor concluded that it did not appear at this time that appellant was a good candidate for receipt of vocational rehabilitation services.

By decision dated September 30, 2015, OWCP found that appellant failed without good cause to apply for or undergo vocational rehabilitation when so directed, and that in the absence of the failure, his wage-earning capacity would have been $352.80 per week. Accordingly, effective October 1, 2015, it reduced his benefits in accordance with section 8113(b) of FECA.

By letter dated and received by OWCP on December 29, 2015, appellant, through counsel, requested reconsideration. Counsel argued that appellant made the best effort he could under the circumstances to complete the classes. He argued that appellant's pain and medication would have a serious impact on his ability to function in a sedentary environment requiring protracted and accurate attention. Counsel also contended that FECA was not adversarial in nature.

In an October 10, 2015 report, Dr. David C. Miller, a Board-certified orthopedic surgeon, diagnosed lumbar spondylosis, degeneration of lumbar intervertebral disc, and spinal stenosis of lumbar region. He recommended an L4-S1 laminectomy and L5-S1 fusion.

By decision dated April 1, 2016, OWCP found that the additional submission of medical evidence was insufficient to modify the September 30, 2015 decision.

By letter received on March 14, 2017 appellant, through counsel, requested reconsideration. In support thereof, counsel submitted an October 14, 2016 letter, wherein Dr. Kolychev indicated that appellant has been a patient in his clinic for several years, that appellant fell off a giant submarine propeller many years ago, and had been diagnosed with chronic low back pain, waxing, and waning over the last couple of years. He noted that he treated appellant with medication and muscle relaxants, that he believed that appellant's problems were related to the work injury, and that appellant would continue to have chronic low back pain for the years to come.

By decision dated March 17, 2017, OWCP denied appellant's reconsideration request. It found that Dr. Kolychev's letter was substantially similar to prior evidence.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA[5] OWCP's regulations provide that the evidence or argument submitted by 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.[6] 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 within one year of the date of that decision.[7] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review of the merits.[8] The Board has held that submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[9] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[10]

ANALYSIS

OWCP issued a decision on September 30, 2015 finding that appellant, without good cause, failed to cooperate with vocational rehabilitation when so directed, and reduced his compensation pursuant to section 8113(b) of FECA. By merit decision dated April 1, 2016, it denied modification of the September 30, 2015 decision. By decision dated March 17, 2017, OWCP denied further merit review pursuant to 5 U.S.C. § 8128(a).

[5] Under section 8128(a) of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or application. *Id.* at § 8128(a).

[6] 20 C.F.R. § 10.606(b)(3).

[7] *Id.* at § 10.607(a).

[8] *Id.* at § 10.608(b).

[9] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

[10] *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim as he did not submit any evidence with his reconsideration request to warrant merit review under 5 U.S.C. § 8128(a).

In his application for reconsideration appellant, through counsel, did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a new and relevant legal argument not previously considered by OWCP.[11]

In the underlying merit decision, OWCP determined that appellant did not cooperate with the vocational rehabilitation efforts as he did not fully cooperate with the rehabilitation counselor or regularly attend classes. It therefore determined that appellant had the ability to work as a receptionist and reduced his compensation accordingly.

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence which addresses the underlying merit issue, but appellant did not submit such evidence in this case.[12] On reconsideration, appellant submitted an October 14, 2016 letter wherein Dr. Kolychev indicated that appellant had low back pain, waxing and waning over the last couple of years. He noted that appellant was being treated with medication and muscle relaxants; that he believed that appellant's problems were related to the work injury; and that appellant would continue to have chronic low back pain for many years to come. This report is repetitive of prior medical reports.[13] Furthermore, this evidence did not address the particular issue involved in the underlying decision, which was whether appellant failed to cooperate with vocational rehabilitation, and therefore does not constitute a basis for reopening a case.[14]

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP, it properly denied his reconsideration request.

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).

[11] *See J.G.*, Docket No. 16-1576 (issued November 18, 2016).

[12] *See L.C.*, Docket No. 17-0518 (issued July 21, 2017).

[13] *E.M.*, Docket No. 09-0039 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007). The Board has found that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.

[14] *V.T.*, Docket No. 17-0383 (issued April 18, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2017 is affirmed.

Issued: April 24, 2018
Washington, DC

Christopher J. Godfrey, 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