

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

A.F., Appellant)
)
and)
)
DEPARTMENT OF DEFENSE, MARINE)
CORPS AIR GROUND COMBAT CENTER,)
DEFENSE COMMISSARY AGENCY,)
Twentynine Palms, CA, Employer)

**Docket No. 18-0295
Issued: July 18, 2018**

Appearances:
*Stephanie N. Leet, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 27, 2017 appellant, through counsel, filed a timely appeal from a July 3, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated April 11, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 CFR §§ 501.2(c) and 501.3 the Board lacks jurisdiction over the merits of the claim.

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 for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 30, 2015 appellant, then a 36-year-old produce department manager at a commissary, filed a traumatic injury claim (Form CA-1) alleging that on April 7, 2015 she sustained post-traumatic stress disorder (PTSD) when unknown persons shot three times at a bus in which she was riding while on travel status. She reported that the window behind her head was shattered and pierced by a bullet hole. The employing establishment noted that appellant had not sought medical attention and indicated that she was under discipline for her performance following the April 7, 2015 incident.

Appellant provided a performance appraisal dated July 1, 2014 through June 30, 2015 and two different series of e-mails. The first series of e-mails began on February 2, 2015 and discussed appellant's selection and travel arrangements for management training. The second series of e-mails began on April 25, 2015 regarding a customer complaint regarding produce at the commissary. On April 28, 2015 appellant's supervisor, S.T., informed her of a patron's complaint regarding recurring produce issues. She provided directives regarding improvement. Appellant responded on April 29, 2015 and protested a proposed improvement plan. She accused her superiors of "nit-picking," "harassing," and "bullying" for the previous six months. Appellant noted symptoms of feeling sick at her stomach, anxiety, stress, demoralization, and inadequacy. She also felt that she was accused of being dishonest, which led to depression. Appellant noted that, after being shot at on the bus while at training, she came to the conclusion that she needed to find relief from harassment and bullying.

In another e-mail to Supervisor A.T., appellant decried the negativity, the bullying, and harassment towards her and alleged that she was reprimanded for failing to follow instructions, which were initially presented as suggestions. She asserted, "On top of all the harassment, getting picked on, and bullied from my Store Administrator, I get shot at on a bus at [commissary] training which just added to my level of anxiety and sleep deprivation." Appellant further alleged that her supervisors did not discuss the shooting incident with her upon her return from training, did not inquire whether she required help, and acted as if the incident never happened. She noted that while it might not be a "big deal" to anyone else that her bus was shot at, her "dad was gunned down and shot to death, and my brother was shot trying to help my dad in MY house and the people who did it were never caught." Appellant reported that, following the bus shooting, she called her husband and cried. In a memorandum dated April 30, 2015, Supervisor S.T. noted that appellant had apologized to her for accusing her of harassing and bullying her. She reported that appellant felt her behavior was due to the April 7, 2015 shooting incident.

Dr. Michael C. Leitman, a clinical psychologist, examined appellant on May 19, 2015 and completed an attending physician's report (Form CA-20).³ He described the events of April 7,

³ This report contains a typographical error indicating that Dr. Leitman completed the report on May 5, 2015.

2015, noting that appellant was riding in a bus, which was shot at, but she was not hit. Dr. Leitman diagnosed intense anxiety, and indicated by checking the box marked “yes” that appellant’s diagnosed condition was caused or aggravated by an employment activity. He explained that appellant was riding in a bus with other employees on a work-related activity. In a duty status report (Form CA-17), dated June 5, 2015, Dr. Leitman diagnosed PTSD and indicated that appellant was disabled through July 6, 2015.

By decision dated June 17, 2015, OWCP denied appellant’s claim, finding that she had not provided sufficient factual information to establish that the employment incident occurred as alleged. On July 6, 2015 appellant requested an oral hearing before an OWCP hearing representative.

Dr. Leitman completed a note on June 9, 2015 and repeated his diagnosis of PTSD. He described appellant’s symptoms including sleep disturbance, difficulty concentrating, hypervigilance, and distressing recollection of the accident. Dr. Leitman noted that appellant experienced flashbacks, which made it difficult for her to direct her attention and emotions elsewhere. He concluded that appellant’s symptoms impeded her ability to focus on the details of her job, that the symptoms impacted on the physical requirements of appellant’s job, and resulted in risk for an accident.

In a note dated July 7, 2015, Dr. Leitman indicated that he had diagnosed PTSD and believed that appellant should stop work on May 5, 2015. He found that she continued to experience PTSD symptoms and recommend that she return to work on August 3, 2015.

On February 17, 2016 counsel provided a copy of the April 7, 2015 Sacramento County Sheriff’s Department report, which indicated that unknown suspects fired no less than three rounds at the bus, which resulted in injury to one person as well as to the bus. The bus driver noted that he was hired to transport persons to and from a hotel to training.

Appellant testified at the oral hearing on February 17, 2016. She noted that 15 to 25 people were on the bus. Appellant noted that she was in travel status attending a work-directed training class and was returning to the hotel when the shots were fired. She stopped work because she was having trouble concentrating and experiencing emotional breakdowns. Appellant noted that at the employing establishment she frequently heard loud noises during training exercises, which were so loud that windows rattled. She related that she initially returned to full-duty work because she experienced a delay in obtaining medical treatment. Appellant stopped work for almost two months and then returned to full duty.

In a report dated March 17, 2016, Dr. Leitman described the events of April 7, 2015, noting that the bus appellant was riding in was fired upon. He opined, “As a result of this potentially life-threatening trauma, [appellant] developed [PTSD].” Dr. Leitman recommended that appellant stop work on May 5, 2015.

By decision dated April 11, 2016, OWCP’s hearing representative found that appellant had established a compensable factor of employment, the shooting incident on April 7, 2015 when three shots were fired and the window behind her shattered from the gunfire. She reviewed Dr. Leitman’s reports and found that appellant had established a diagnosed medical condition,

PTSD. However, the hearing representative concluded that Dr. Leitman's reports were insufficient to establish causal relationship between appellant's diagnosed PTSD and the accepted employment events as there was no medical rationale explaining why appellant could not return to work for two months after the accepted employment incident, and whether her subsequent work stoppage was due to allegations of harassment, bullying, and a hostile work environment as well as a history of family members shot at her home.

On April 6, 2017 appellant, through counsel, requested reconsideration of OWCP's April 11, 2016 decision. Counsel contended that appellant's claim for PTSD should be accepted based on Dr. Leitman's reports. She submitted notes from Dr. Leitman dated May 19, June 1 and 9, and July 7, 2015. Dr. Leitman noted that appellant was undergoing training for her work and on the way back her bus was hit by gunshots. The only window that had a hole in it was behind appellant's head. Appellant reported nightmares, poor appetite, and sleep loss. She felt that she was distracted and missing things at work. Appellant informed Dr. Leitman that her father was shot to death and her brother was shot in their home. She noted some difficulty with her new supervisor.⁴ Counsel also resubmitted Dr. Leitman's June 9 and July 7, 2015 narrative reports.

By decision dated July 3, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that to be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁷ To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁸ 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.⁹ When a claimant failed to meet one of the above standards, OWCP will deny the application for review without reopening the case for a review on the merits.¹⁰

⁴ Dr. Leitman's handwritten notes are mostly illegible.

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

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a).

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

⁹ 20 C.F.R. § 10.606(b)(3).

¹⁰ *Id.* at § 10.608(b).

The submission of evidence which repeats or duplicates evidence already in the case record¹¹ and that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

ANALYSIS

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

Appellant attributed her diagnosed emotional condition to an employment incident on April 7, 2015 during which the bus on which she was riding was hit by gun shots. By decision dated April 11, 2016, OWCP found that the employment incident occurred in the performance of duty and that appellant had established a diagnosed medical condition, PTSD. However, it denied appellant's claim as there was insufficient rationalized medical opinion evidence based on a complete factual background to establish a causal relationship between her PTSD and the April 7, 2015 employment incident.

On April 6, 2017 appellant, through counsel, requested reconsideration. By decision dated July 3, 2017, OWCP denied appellant's request for reconsideration on the merits. The underlying issue in the case is medical in nature.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, nor has she advanced a relevant legal argument not previously considered by OWCP. Thus, appellant 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).¹³

Appellant's request for reconsideration was accompanied by notes from Dr. Leitman dated May 19, June 1 and 9, and July 7, 2015. As noted, the underlying issue is whether appellant submitted sufficient medical evidence based on a complete factual and medical history to establish that her emotional condition was causally related to the accepted work incident on April 7, 2015. A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but appellant did not submit any such evidence in this case. Dr. Leitman's notes are substantially similar to his earlier reports of June 5 and 9, and July 7, 2015 as well as his March 17, 2016 report. In addition, counsel also resubmitted Dr. Leitman's June 9 and July 7, 2015 reports. Providing additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim.¹⁴ Because appellant did not provide OWCP with any relevant and

¹¹ *T.H.*, Docket Nos. 17-1578 and 17-1651 (issued April 26, 2018); *M.D.*, Docket No. 17-1250 (issued April 24, 2018); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹² *T.H., M.D., id.*; *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

¹³ 20 C.F.R. § 10.606(b)(3)(i) and (ii); *D.P.*, Docket No. 17-0290 (issued May 14, 2018).

¹⁴ *D.P., id.*; *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

pertinent new evidence, she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(3).¹⁵

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law, nor did it advance a point of law not previously considered by OWCP. It also failed to provide any relevant and pertinent new evidence. Accordingly, the Board finds that OWCP did not abuse its discretion in refusing to reopen her claim for review of the merits in its July 3, 2017 decision.

On appeal counsel contends that the medical evidence of record establishes appellant's entitlement to benefits under Board precedent. The Board notes that counsel's arguments relate to the merits of appellant's claim, which the Board has not reached in this decision.

CONCLUSION

The Board 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 July 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2018
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹⁵ *D.P., id;* 20 C.F.R. § 10.606(b)(3)(iii).