

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

_____)	
H.M., Appellant)	
)	
and)	Docket No. 17-1436
)	Issued: June 20, 2018
DEPARTMENT OF AGRICULTURE, FARM)	
SERVICE AGENCY, Gainesville, FL, Employer)	
_____)	

Appearances:
Fonda Miller, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 19, 2017 appellant, through his representative, filed a timely appeal from a January 20, 2017 nonmerit decision of the Office of Workers' Compensation Program (OWCP).² As more than 180 days elapsed from OWCP's last merit decision, dated July 1, 2016, to the filing

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 Together with his appeal request, appellant requested oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated November 2, 2017, the Board exercised its discretion and denied appellant's request finding that the appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-1436 (issued November 2, 2017).

of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.⁴

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).

FACTUAL HISTORY

On June 5, 2013 appellant, then a 51-year-old County Executive Director, filed a traumatic injury claim (Form CA-1) alleging that he was injured on May 10, 2013 when he fell backwards and hit his head in the hotel bathroom while in travel status. He stopped work on May 13, 2013 and did not return. OWCP accepted concussion with loss of consciousness of 30 minutes or less caused by the May 10, 2013 employment injury. It paid compensation benefits on the supplemental rolls, commencing June 25, 2013, and on the periodic rolls as of July 28, 2013.

To determine the status of appellant's accepted conditions, on April 24, 2014 OWCP referred appellant to Dr. Melvin Grossman, a Board-certified neurologist, for a second opinion evaluation. In a report dated May 20, 2014, Dr. Grossman opined that appellant's cognitive condition and inability to work was due to nonwork-related cognitive difficulties.⁵ As treating physicians, Dr. Tarannum Khan, a neurologist, and Dr. Jacqueline C. Valdes, a clinical neuropsychologist, believed that appellant's cognitive conditions and inability to work were related to the work-related head injury. OWCP referred appellant to Dr. Allan Teman, a Board-certified neurologist, for an impartial medical evaluation and to resolve the conflict in medical evidence. In a report dated August 27, 2014, Dr. Teman related that appellant had no injury-related residuals.⁶

On December 17, 2014 OWCP issued a proposed termination of appellant's medical and wage-loss compensation benefits, finding that the special weight of the medical opinion evidence rested with Dr. Teman, the impartial medical specialist.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The record provided to the Board includes evidence received after OWCP issued its January 20, 2017 decision. However, the Board's review is limited to evidence that was part of the record at the time OWCP issued its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

⁵ In a May 20, 2014 report, Dr. Grossman noted his review of the record and conducted both a physical and minimal status examination. He indicated that there was a question of aftermath of a concussion or post-traumatic syndrome and that it was believed that appellant had Alzheimer's, which was not associated with head trauma. Dr. Grossman stated that while appellant had a cognitive decline, there was no evidence of a traumatic encephalopathy and his complaints were not consistent with a mild closed-head injury. He opined that appellant was unable to work because of his nonwork-related cognitive difficulties.

⁶ In his August 27, 2014 report, Dr. Teman noted his review of the record and appellant's headache complaints. He opined that appellant could not return to work primarily due to psychiatric reasons. Dr. Teman explained that a minor concussion one and a half years ago was not a factor in why appellant could not return to work. He further explained that symptoms of a simple concussion are not expected to continue one and a half years later.

By decision dated February 23, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective the same day. It found that the special weight of the medical evidence rested with Dr. Teman, OWCP's impartial medical specialist, who determined that the May 10, 2013 concussion had resolved without residuals.

Appellant requested an oral hearing before an OWCP hearing representative and submitted additional medical reports. A telephonic hearing was held on October 20, 2015. By decision dated November 30, 2015, an OWCP hearing representative affirmed the termination of appellant's wage-loss compensation and medical benefits. She again found that Dr. Teman's report was entitled to the special weight of the medical evidence.

Appellant requested reconsideration on March 23, 2016 and submitted additional medical evidence. By decision dated July 1, 2016, OWCP denied modification of its November 30, 2015 decision. It found that the evidence submitted lacked a rationalized medical opinion supported by objective clinical findings which established that appellant continued to suffer from disabling residuals of the accepted work-related concussion.

On October 16, 2016 appellant again requested reconsideration. In support of his request, he submitted duplicative submissions of evidence previously considered prior to OWCP's February 23, 2015 termination decision and/or evidence considered in OWCP's November 30, 2015 and July 1, 2016 reconsideration decisions. This included: May 11, 2013 emergency room reports from the Cleveland Clinic and May 13, 2013 reports from Homestead Hospital; July 17, 2013 brain computerized tomography (CT) scan; work capacity evaluation forms (Form OWCP-5c) dated August 29, 2013 and May 20, 2014; December 10, 2013 referral forms for physical therapy and consult to psychiatry with handwritten notations; Dr. Khan's April 10, 2014 medical report; July 21, 2014 chart notes from the Cleveland Clinic; July 21, 2014 encounter notes; reports from Dr. Po-Heng Tsai, a neurologist, dated August 14, 2014 and March 14, 2016; Dr. Teman's August 27, 2014 report; August 27, 2014 magnetic resonance imaging (MRI) scan report; and March 10, 2015 and March 8, 2016 reports and medical statements from Dr. Aldo A. Buonanno, a Board-certified psychiatrist.

New evidence included: a July 25, 2012 paperwork for an accommodation request; an August 19, 2013 letter from the Office of Personnel Management (OPM), finding appellant disabled from his position due to malabsorption and immune deficiency with symptoms; copies of Merck Manual articles pertaining to intestinal lymphangiectasia (idiopathic hypoproteinemia), immunodeficiency disorders, traumatic brain injury, and depressive disorders; copies of decisions issued by the Board dated April 4, 2002, November 9, 2007, and January 10, 2012; appellant's narrative statements dated December 14, 2014 and October 16, 2016; and the copy of the National Institutes of Health (NIH) Public Access reviews of an MRI scan and diffusion tensor imaging findings in mild traumatic brain injury.

By decision dated January 20, 2017, OWCP denied appellant's reconsideration request. It found that he had not established that OWCP erroneously applied or interpreted a specific point of law, and had not advanced a relevant legal argument not previously considered. As to the evidence and documents submitted, OWCP found that the evidence was duplicative of earlier submissions which had been previously reviewed in its decisions, or not relevant and pertinent new evidence.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁷ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁸ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁹ A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that 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.¹⁰ 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.¹¹

ANALYSIS

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).

On October 16, 2016 appellant requested reconsideration of OWCP's July 1, 2016 decision which denied modification of the termination of his wage-loss compensation and medical benefits. In his request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP.¹² As such, he was 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

The underlying issue in this case is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective February 23, 2015. This is a medical issue which can only be resolved through the submission of medical evidence.¹⁴

⁷ 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 own motion or on application." 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.607.

⁹ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.608(a), (b).

¹² *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

¹³ 20 C.F.R. § 10.606(b)(3).

¹⁴ *See B.S.*, Docket No. 17-0697 (issued April 25, 2018).

A claimant may also be entitled to a merit review by submitting relevant and pertinent new evidence,¹⁵ but, in this case, he did not submit any relevant and pertinent new evidence with his October 16, 2016 reconsideration request. Appellant submitted a July 25, 2012 accommodation request; an August 19, 2013 disability letter from OPM, copies of articles from the Merck Manual articles pertaining to various diagnoses, copies of decisions from the Board, signed narrative statements dated December 17, 2014 and October 16, 2016, and a NIH review of MRI scan and diffusion tensor imaging findings in mild traumatic brain injury and narrative statements.

Appellant's narrative statements, accommodation request paperwork, and OPM's findings on disability concerning a nonaccepted OWCP condition¹⁶ do not discuss the critical question of whether appellant had ongoing residuals of his accepted condition, which is a medical issue. As these documents are irrelevant to the termination issue, they do not require reopening of the case.¹⁷

Copies of Merck Manual articles and the NIH Public Access reviews are insufficient to warrant a merit review of a case as the evidence is general in nature does not pertain specifically to appellant. While a physician may reference findings from such articles to support their medical opinions, the submission of such articles alone does not support that OWCP erred in its determination regarding entitlement to ongoing benefits.¹⁸ Similarly, the submission of Board decisions must be pertinent to the issue at hand. While the Board decisions provided may discuss similar cases, such decisions do not include evidence that OWCP erred or did not consider all the evidence of record in this particular case.¹⁹

Additionally, the numerous duplicative emergency room reports, physician reports, diagnostic studies, and form reports which appellant had resubmitted was already of record and considered by OWCP in prior decisions and, thus, did not warrant further merit review as the evidence is duplicative in nature.²⁰

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) and thus OWCP properly denied merit review. Appellant did not establish that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered.²¹

On appeal appellant's representative asserts that the claims examiner had violated multiple standards under the FECA Procedure Manual." These arguments included errors in OWCP's

¹⁵ *Supra* note 10.

¹⁶ The Board has held that that findings of other government agencies are not dispositive with regard to questions arising under FECA. *A.B.*, Docket No. 10-2108 (issued July 13, 2011); *Ernest J. Malagrida*, 51 ECAB 287, 291 (2000).

¹⁷ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

¹⁸ *See Gaetan F. Valenza*, 35 ECAB 763 (1984); *Kenneth S. Vansick*, 31 ECAB 1132 (1980).

¹⁹ *Id.*

²⁰ *Denis M. Dupor*, 51 ECAB 482(2000).

²¹ *See B.R.*, Docket No. 17-1213 (issued January 18, 2018).

development of the case, failure to rectify an inaccurate statement of accepted facts, and failure to follow its procedural manual prior to the termination of compensation and wage-loss benefits. Appellant also contended that he has continuing residuals of his work-related injury. As explained above, the Board lacks jurisdiction over the merits of the claim. The Board's jurisdiction is limited to review of appellant's request for reconsideration and OWCP's January 20, 2017 decision denying merit review.

The Board accordingly finds that, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

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).

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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