United States Department of Labor
Employees' Compensation Appeals Board

P.H., Appellant	)	
and	)	**Docket No. 18-1020**
	)	**Issued: November 1, 2018**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, St. Louis, MO, Employer	)	

Appearances:
Paul H. Felser, Esq., for the appellant[1]
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 April 19, 2018 appellant, through counsel, filed a timely appeal from a February 28, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated December 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 over the merits of the 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 for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 4, 2011 appellant, then a 39-year-old screener, filed a traumatic injury claim (Form CA-1) alleging that, on December 4, 2011, he sustained injury while at work when pulling a heavy bag from an x-ray machine. He stopped work on the date of injury and returned to work the next day.

OWCP initially accepted appellant's claim for thoracic and cervical sprains.

On February 10, 2012 appellant underwent OWCP-authorized surgery, including anterior arthrodesis and removal of disc osteophyte complex with hardware placement device at C4-5.[3]

OWCP later expanded the acceptance of appellant's claim to include conditions of cervical herniated disc at C4-5, cervical myelopathy, dysphagia, complete left rotator cuff rupture, deep vein thrombosis of the left leg, and pulmonary embolism.

Appellant stopped work on February 10, 2012 and received disability compensation on the daily rolls beginning February 11, 2012. He received disability compensation on the periodic rolls beginning October 21, 2012.

In a November 19, 2012 report, Dr. Lizette Alvarez, an attending Board-certified physical medicine and rehabilitation physician, noted that appellant reported that he had been experiencing bladder urgency since his February 10, 2012 surgery, but was too embarrassed to tell anyone. She recommended that appellant visit a urologist to evaluate whether he had a neurogenic bladder and noted that she suspected his bladder problems were a result of the cervical myelopathy.

On January 9, 2013 OWCP referred appellant for a second opinion examination to Dr. Robert Sciortino, a Board-certified orthopedic surgeon. It requested that Dr. Sciortino evaluate the current nature of appellant's cervical condition and determine whether any additional conditions were associated with the injury.

In a January 25, 2013 report, Dr. Sciortino noted that appellant reported that he had developed bladder and sexual dysfunction symptoms. Regarding any additional diagnoses, he reported that appellant's large herniated C4-5 disc created significant cord compression which caused weakness in the entire left side of his body, as well as in his right upper extremity. This condition produced some urinary difficulties and sexual dysfunction, which Dr. Sciortino opined that were entirely related to the December 4, 2011 work injury.

[3] On July 6, 2012 appellant fell off a swimming platform at a lake when his left knee buckled. He fell onto his right side, hitting a jet ski, and then landed face first in the water.

In a March 4, 2013 report, Dr. Luis Anglo, an attending Board-certified urologist, noted that appellant reported that over the past seven plus months he had noticed more urgency to urinate and occasional urge incontinence. He advised that appellant also reported complaints of sexual dysfunction since his cervical accident. Dr. Anglo diagnosed urge incontinence and impotence of organic origin.

On March 27, 2013 Dr. Anglo performed an unapproved cystoscopy, documenting that appellant's bladder/urethra was normal. In several reports from mid-2013, Dr. Alvarez continued to note that appellant had possible erectile dysfunction.

On July 19, 2013 appellant underwent cervical surgery, including C4-5 hardware removal, anterior fusion, and discectomies with hardware placement from C5-7. On August 15, 2013 he underwent left shoulder labral repair, subacromial decompression, and distal clavicle resection.

In a December 9, 2013 report, Dr. Anglo noted that he first saw appellant on March 4, 2013 for multiple urinary complaints and most notably urge incontinence. He indicated that a post void residual check was performed as a spinal injury or surgery could predispose a person to urinary difficulty secondary to retention from loss of motor function or bladder hyperactivity. Dr. Anglo indicated that appellant reported that his symptoms seemed to occur with his injury and certainly were worse after surgical intervention. He noted that appellant also related difficulties attaining and maintaining erections after his injury/surgery, which appellant indicated that certainly could be neurogenic in origin. Dr. Anglo indicated that, although he could not conclusively say that appellant's troubles with his voiding and erectile dysfunction were not exactly related, it did seem "from a history and timing standpoint that it certainly was contributory in light of him not reporting problems previously."

In a December 11, 2013 report, Dr. Todd J. Stewart, an attending Board-certified neurosurgeon, indicated that appellant essentially had a spinal cord injury from the initial compression and he opined that appellant's problems with urinary urgency and erectile dysfunction were related to this cervical cord compression.

On March 3, 2014 OWCP referred appellant's case to Dr. Daniel Zimmerman, a Board-certified internist, to serve as an OWCP medical adviser. It requested that Dr. Zimmerman address the potential consequential conditions of erectile dysfunction and urge incontinence.

In a March 5, 2014 report, Dr. Zimmerman indicated that urge incontinence and erectile dysfunction could be the consequence of the cervical spine accepted conditions, behavioral health issues in terms of his marital breakup in April 2013 (in reference to his erectile dysfunction), and/or the use of medications. He noted that the post void residual check amount reported by Dr. Anglo did not suggest a neurogenic bladder, as claimed to be the diagnosis by Dr. Alvarez. Dr. Zimmerman indicated that urge incontinence was subjective and that there was nothing in the urologic records indicating that appellant had actual urinary incontinence, such as wet under clothing or using pads for dribbling. He opined that, for much the same reasons, erectile dysfunction could not be accepted as a consequential diagnosis. Dr. Zimmerman recommended pursuing urologic work up to further consider the symptoms in terms of consequential conditions.

In an April 16, 2014 discharge report, Dr. Stewart opined that appellant's bladder issues were directly and causally related to his cervical spinal cord compression.

In an August 4, 2014 letter, appellant's former counsel requested expansion of the acceptance of the claim for urinary incontinence and erectile dysfunction due to the employment-related compression on his cervical cord, based on Dr. Stewart's reports.

In a September 3, 2014 report, Dr. Michael Chehval, an attending Board-certified urologist, noted that appellant was being evaluated for erectile dysfunction, noting that he had a cervical neck injury one and a half years ago, with subsequent urinary urgency and urge leakage and poor erections.

On October 10, 2014 OWCP referred appellant for a second opinion examination with Dr. Carlos Deleste, a Board-certified urologist. It requested that Dr. Deleste evaluate whether appellant had employment-related urinary or erectile dysfunction conditions.

In an October 23, 2014 report, Dr. Deleste detailed appellant's factual history, noting that appellant reported urgency in urination as moderate and urinary incontinence as minimal, with no dysuria, hematuria, leakage, or pad usage. Appellant reported that erectile dysfunction was an issue a few weeks post injury. Dr. Deleste reported that the results of urinalysis were negative. He summarized appellant's findings as limited turning of motion of his neck, a left varicocele and walking with a slight drop foot, claims of numbness of his thighs anteriorly, absent bulbocavernosus, claimed depression, urgency incontinence without frequency, dysuria times three, and nocturia one time. Dr. Deleste indicated that there was "a conflict for cervical trauma causing urine urgency incontinence without frequency" because usually there was associated frequency. He advised that the absent bulbocavernosus reflex was caused by lower spinal cord injury in the lumbosacral region, and noted that the anal sphinctertone was normal. Dr. Deleste opined that the occurrence of erectile dysfunction and urgency incontinence could not be substantiated by cervical trauma alone and noted depression was a contributing factor. He determined that appellant did not require any work restrictions.

By decision dated January 8, 2016, OWCP denied expansion of the acceptance of appellant's claim for the conditions of urinary incontinence and erectile dysfunction, finding that the weight of the medical opinion evidence rested with the second opinion urologist, Dr. Deleste, who found that these conditions were not causally related or consequential to the December 4, 2011 employment injury.

On January 10, 2016 appellant, through his former counsel, requested a hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on September 16, 2016, appellant testified that his urinary incontinence and erectile dysfunction began after his December 4, 2011 employment injury.

By decision dated December 1, 2016, OWCP's hearing representative affirmed OWCP's January 8, 2016 decision. The hearing representative determined that the weight of the medical opinion evidence with respect to appellant's claim expansion continued to rest with the opinion of Dr. Deleste.

On November 30, 2017 appellant's present counsel requested reconsideration of the December 1, 2016 on behalf of appellant. In a November 30, 2017 memorandum, he argued that the medical evidence of record established appellant's claim for expansion of the accepted conditions to include urinary incontinence and erectile dysfunction. Counsel discussed various medical reports which he believed supported appellant's claim, including Dr. Sciortino's January 25, 2013 report, Dr. Anglo's December 9, 2013 report, and Dr. Stewart's December 11, 2013 report. He also argued that Dr. Deleste's October 23, 2014 report was insufficient to constitute the weight of the medical opinion evidence with respect to appellant's request for the expansion of the acceptance of his claim to include additional conditions. Counsel cited Board precedent which he believed showed that appellant's case should have been further developed with respect to the urinary incontinence and erectile dysfunction conditions.

Appellant submitted a November 28, 2016 report from Dr. Stewart who detailed appellant's continuing complaints of upper and lower extremity symptoms, as well as urinary incontinence and erectile dysfunction. Dr. Stewart indicated that appellant was able to perform limited-duty work with restrictions on lifting duties and noted, "[Appellant] has significant weakness in his distal left foot and is myelopathic with balance problems, urinary incontinence and erectile dysfunction related to his initial cord compression and injury to his cord."

By decision dated February 28, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence and argument submitted by him was repetitious or irrelevant.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. OWCP may review an award for or against payment of compensation at any time based on its own motion or on application.[4]

A claimant seeking reconsideration of a final decision must present arguments or provide evidence that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[5] If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.[6] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[7]

[4] 5 U.S.C. § 8128(a).

[5] 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[6] *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

[7] *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[8] For OWCP decisions issued on or after August 29, 2011, the date of the application for reconsideration is the "received date" as recorded in the Integrated Federal Employees' Compensation System (iFECS).[9]

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[10] and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.[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).

The Board must consider whether appellant's timely request for reconsideration met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim. The Board finds that his request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, advance a new and relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent new evidence not previously considered by OWCP.[12]

In support of his request for reconsideration, appellant submitted a November 30, 2017 memorandum in which counsel argued that the medical evidence of record established his claim for expansion of the accepted conditions to include urinary incontinence and erectile dysfunction. The Board notes that OWCP has already considered and rejected this argument. Counsel discussed various medical reports from attending physicians which he believed supported appellant's claim, including Dr. Sciortino's January 25, 2013 report, Dr. Anglo's December 9, 2013 report, and Dr. Stewart's December 11, 2013 report. He also argued that Dr. Deleste's October 23, 2014 report was insufficient to constitute the weight of the medical opinion evidence with respect to appellant's expansion claims. However, OWCP has already considered these reports, finding that the attending physician reports were insufficient to establish appellant's expansion claim and that Dr. Deleste's report constituted the weight of the medical opinion evidence. Counsel further argued that, at the very least, appellant's case should have been further developed with respect to the claimed urinary incontinence and erectile dysfunction conditions. This argument has already been considered and rejected by OWCP in that it has been determined that the weight of the medical evidence continues to rest with Dr. Deleste's opinion with no need for further development. Because counsel's argument repeats or duplicates argument in the case record, the

[8] *Id.* at § 10.607(a).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations,* Chapter 2.1602.4 (February 2016). *See also C.B.*, Docket No. 13-1732 (issued January 28, 2014).

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

[11] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[12] *See supra* note 5.

Board finds that appellant's submission of this argument does not require reopening his claim for review on the merits.[13]

The Board notes that the underlying issue of this case, *i.e.*, whether rationalized medical evidence establishes appellant's claimed additional conditions as causally related to his December 4, 2011 employment injury, is a medical issue which must be addressed by relevant medical evidence.[14]

Appellant submitted a November 28, 2016 report of Dr. Stewart in which he described appellant's current symptoms/condition and indicated that he could return to limited-duty work. Dr. Stewart noted that appellant had urinary incontinence and erectile dysfunction "related to his initial cord compression and injury to his cord." The Board finds, however, that this report is similar to previously considered reports of Dr. Stewart, including those dated December 11, 2013 and April 16, 2014, in which Dr. Stewart found that appellant had employment-related urinary incontinence and erectile dysfunction, but did not provide any explanation for such an opinion. Therefore, the submission of the Dr. Stewart's November 28, 2016 report does not constitute a basis for reopening a case.[15]

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).

[13] *See supra* note 10.

[14] *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

[15] *See supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the February 28, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 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