

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

S.V., Appellant)	
)	
and)	Docket No. 17-2012
)	Issued: October 18, 2018
DEPARTMENT OF VETERANS AFFAIRS,)	
OUTPATIENT CLINIC, Redding, CA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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 September 28, 2017 appellant, through counsel, filed a timely appeal from a July 19, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated May 2, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over 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 for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows. On July 16, 2012 appellant, then a 56-year-old physician, filed an occupational disease claim (Form CA-2) for injuries to his right thumb and left ring finger due to the change in use of endoscopes. He identified October 1, 2010 as the date he first became aware of his condition, and also the date he first realized it was caused or aggravated by his federal employment. Appellant received treatment at the time, which included an injection in the left finger, and with use of splints/gloves appellant's condition improved. However, his right thumb and left finger pain returned after appellant started working with new, stiffer endoscopes beginning in February 2012. The employing establishment indicated that it had since reduced the number of consecutive days appellant performed the procedures that exacerbated his condition.

OWCP initially denied the claim on October 4, 2012, finding that the medical evidence of record failed to establish a causal relationship between appellant's diagnosed condition of right elbow lateral epicondylitis and his accepted employment exposure. By decision dated June 10, 2013, the Board affirmed OWCP's October 4, 2012 decision.⁴

OWCP twice denied modification by decisions dated September 23, 2013 and November 12, 2014. In a September 10, 2015 decision, the Board affirmed OWCP's November 12, 2014 merit decision finding that the medical evidence of record failed to establish a causal relationship between appellant's diagnosed condition(s) and his accepted employment exposure.⁵

On February 3, 2016 counsel requested reconsideration and submitted additional medical evidence.

In a January 7, 2016 report, Dr. Jacqueline T. Hanna, III, a Board-certified orthopedic surgeon, noted that the 60-year-old appellant had ongoing complaints of right thumb pain and locking after working at the employing establishment from 2009 until January 2014 while performing 70 to 100 endoscopic procedures a month. She explained that appellant stated he was "always given new equipment that required him to perform a very firm grip and lots of squeezing that caused continuous pressure in his [right] hand" while twisting the scope into position and advancing it. Appellant complained that his hand would become "very fatigued and painful" and his right thumb had a "locking sensation."

³ Docket No. 13-0555 (issued June 10, 2013) and Docket No. 15-0377 (issued September 10, 2015).

⁴ Docket No. 13-0555 *id.*

⁵ Docket No. 15-0377, *supra* note 3.

Dr. Hanna related that appellant had undergone multiple steroid injections of his right thumb, but he experienced continued discomfort and wore splints on both hands to decrease the pain while performing endoscopic procedures. Appellant reported the discomfort to the employing establishment. Dr. Hanna noted that appellant last worked in January 2014 (modified duties). She examined appellant's right thumb and found pain along the A1 pulley region of the thumb, with flexion at the interphalangeal (IP) joint and active extension. Dr. Hanna diagnosed overuse syndrome with a right trigger thumb. She opined that it was 100 percent medically probable that appellant's condition resulted from his work with the employing establishment as a gastroenterologist performing hundreds of endoscopic procedures. Dr. Hanna concluded: "I feel this is clearly an overuse syndrome due to the particular motion that he has to perform while gripping and grasping the endoscopy unit."

On May 2, 2016 OWCP denied modification of its prior decision, which had been affirmed by the Board.⁶ It explained that there was no rationalized medical evidence establishing that appellant's thumb and trigger finger condition were causally related to the employment factors of performing endoscopic procedures. OWCP also found that Dr. Hanna's opinion was "equivocal."

On April 24, 2017 counsel again requested reconsideration and submitted new medical evidence.

In a March 28, 2017 report, Dr. Hanna noted that appellant presented for evaluation of his right thumb pain and locking. She reiterated appellant's history of his symptoms which developed while performing multiple endoscopic procedures each month at the employing establishment from 2009 to 2014. Dr. Hanna evaluated appellant on March 7, 2017 for pain involving his right thumb and they discussed his "thorough description" of his job duties as a gastroenterologist with the employing establishment.

Dr. Hanna explained that appellant had to hold the endoscope with his left hand and use his right hand to maneuver the knobs of the endoscope "in a very tortuous structure" to obtain the most optimal visualization of the areas of interest. Then, appellant had to switch hands and push buttons with his left hand throughout the procedure. Dr. Hanna added that appellant used both hands in the same motion several times throughout the day on several days during the week.

Dr. Hanna opined that based upon the extensive amount of gripping and twisting that appellant performed while at work, it was easily conceivable that he had overuse syndrome and that his injury is 100 percent work related.

By decision dated July 19, 2017, OWCP denied appellant's April 24, 2017 request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review of the May 2, 2016 decision. It reasoned that the March 28, 2017 medical report was cumulative and thus substantially similar to evidence or documentation already in the case file and previously considered. OWCP explained that Dr. Hanna failed to address how appellant's condition worsened after he stopped work in 2014 and was no longer exposed to the claimed employment activities. It also noted that Dr. Hanna's latest report restated the same findings and conclusory

⁶ *Id.*

causality statements in her January 7, 2016 report, but with slightly different wording, and did not discuss the deficiencies noted in OWCP's May 2, 2016 decision.

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

Counsel disagreed with the May 2, 2016 decision and timely requested reconsideration on April 24, 2017. The underlying issue on reconsideration is the medical question of causal relationship. Thus, the Board must determine if counsel presented sufficient evidence or argument regarding causal relationship to warrant a merit review pursuant to 5 U.S.C. § 8128(a).

Section 10.608(b) provides that OWCP will deny an application for review which does not meet at least one of the requirements under section 10.606(b)(3). The Board finds that OWCP's refusal to reopen appellant's case for further consideration of the merits of his claim did not constitute an abuse of discretion. In the April 24, 2017 request for reconsideration, counsel did not 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. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

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. The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.608(a), (b).

Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his or her burden of proof.¹² If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹³ The Board has also held that the submission of evidence which duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.¹⁴

In 2016, Dr. Hanna diagnosed overuse syndrome with a right trigger thumb and opined that it was 100 percent medically probable that appellant's condition resulted from his work with the employing establishment as a gastroenterologist performing hundreds of endoscopic procedures. She further noted that she felt this was clearly an overuse syndrome due to the particular motion that he had to perform while gripping and grasping the endoscopy unit. In 2017, Dr. Hanna again diagnosed overuse syndrome resulting in a right thumb condition and opined that based upon the extensive amount of gripping and twisting that appellant performed while at work, it was easily conceivable that his injury is 100 percent work related. Although newly submitted, Dr. Hanna's March 28, 2017 report is essentially duplicative of evidence previously of record, and therefore, does not justify further merit review.¹⁵ Accordingly, as appellant's request for reconsideration did not meet the requirements for reopening his case, the Board finds that 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).

¹² See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹³ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).

¹⁴ *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

¹⁵ See *supra* note 12.

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 18, 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