

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

S.S., Appellant)	
)	
and)	Docket No. 18-0647
)	Issued: October 15, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
San Francisco, CA, Employer)	
)	

Appearances:
Mark Coby, 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 February 5, 2018 appellant, through counsel, filed a timely appeal from an August 7, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).² As more than 180 days elapsed from OWCP's last merit decision, dated April 5, 2017, to the filing of this

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 A claimant has 180 days from the date of OWCP's decision to timely file an appeal. 20 C.F.R. § 501.3(e). In this case, the 180-day period for the August 7, 2017 decision expired on Saturday, February 3, 2018. If the last day to file an appeal falls on a Saturday, Sunday, or Federal holiday, the 180-day period runs until the close of the next business day. 20 C.F.R. § 501.3(f)(2). The appeal in this case, received by the Board on Monday, February 5, 2018, was therefore timely filed.

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 this case.

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.⁴ The facts and circumstances as presented in the prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 13, 1987 appellant, then a 40-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that, on March 9, 1987, as he was stepping out of his truck in the performance of duty, the step gave way causing him to fall facedown. He alleged that he injured his lower back, left shoulder and hips.

OWCP accepted appellant's claim on August 14, 1987 for aggravation of an existing disability, and on April 11, 1988 for aggravation of degenerative disc disease in the lumbar spine and sprain of the lumbar back. It paid him wage-loss compensation and medical benefits on the periodic rolls.

OWCP referred appellant for a second opinion evaluation with Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, on October 23, 2012. In a report dated December 30, 2012, Dr. Swartz reported normal motor function in the lower extremities, but give-way collapsing weakness with strength testing of the feet and toes. He noted that almost every movement brought a response of groaning, moaning, and expressions of agony. Dr. Swartz found substantial pain behavior during appellant's examination. He concluded that there were no valid objective findings, but rather substantial pain behavior, with exaggerated and magnified responses. Dr. Swartz diagnosed resolved strain of the lumbar spine with nonindustrially-related underlying and preexisting multilevel degenerative disc disease without any neurologic deficit or injury. He opined that appellant's multilevel disc disease at L3-4 and L4-5 with multiple disc bulges, facet hypertrophy and spinal stenosis were temporarily aggravated by his March 9, 1987 employment injury. Dr. Swartz noted that he believed that the temporary aggravation would not have lasted more than three years and that appellant's temporary total disability would have ceased by March 9, 1990. He reviewed appellant's date-of-injury position and noted that appellant could not currently lift 75 pounds due to his age. Dr. Swartz opined that he could lift up to 25 pounds for four to six hours a day.

OWCP proposed to terminate appellant's medical and compensation benefits in a letter dated April 8, 2013. It relied on the findings in Dr. Swartz' December 30, 2012 report. By

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 15-1160 (issued January 11, 2016).

decision dated May 13, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective May 13, 2013.

Appellant requested an oral hearing before an OWCP hearing representative on May 22, 2013.

OWCP received a report dated July 29, 2013 from Dr. Fred F. Naraghi, a Board-certified orthopedic surgeon. Dr. Naraghi noted appellant's history of stepping down from his truck when the step broke and related that appellant flipped over and backwards. He examined appellant and found limited range of motion and pain to palpation in the lumbar spine. Dr. Naraghi reported palpable paraspinal muscle spasms with mild decreased light-touch sensation in the right S1 distribution. He diagnosed herniated nucleus pulposus, radiculopathy right lower extremity, lumbar spinal stenosis, and cervical radiculopathy. Dr. Naraghi noted, "In absence of evidence to the contrary, it is with reasonable medical probability and more than likely that injuries to his neck and back are as a result of his work-related injuries." He found that appellant was permanently disabled.

Dr. Naraghi completed a supplemental report on August 23, 2013 and reviewed the medical records. He opined that appellant also sustained a cervical injury in 1987 as a result of his fall. In a report dated September 26, 2013, Dr. Naraghi reviewed a September 9, 2013 magnetic resonance imaging (MRI) scan and found herniated nucleus pulposus at L5-S1 with right S1 nerve root impingement, multilevel disc bulges, radiculopathy of the right lower extremity, lumbar spinal stenosis, and cervical radiculopathy.

By decision dated November 20, 2013, OWCP's hearing representative found that OWCP had met its burden of proof to terminate appellant's compensation benefits.

Counsel requested reconsideration through a letter dated February 12, 2014 and received by OWCP on February 18, 2014. He argued that Dr. Naraghi's reports created a conflict in medical opinion evidence. In a report dated February 10, 2014, Dr. Naraghi noted appellant's history of injury in 1987 and again noted that appellant flipped and fell backwards. He reviewed appellant's recent MRI scan and found a dorsal annular tear at L4-5 with a disc bulge. Dr. Naraghi diagnosed herniated nucleus pulposus of L5-S1 with right nerve root impingement. He noted this condition was likely as a result of progression of the pathology that started from the 1987 employment injury. Dr. Naraghi opined that appellant's symptoms of back pain, right leg pain and numbness and weakness radiating into the lateral aspect of his right foot and plantar aspect of his right foot was a classic presentation for right S1 pathology. He noted that appellant had no prior back pain preceding the 1987 employment injury. Dr. Naraghi opined that appellant's 1987 fall was a traumatic injury and that injury to the disc in 1987 could cause a rapid progression of any degenerative process.

By decision dated March 6, 2014, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions. It found that Dr. Naraghi was relying on an inaccurate description of the employment injury and appeared to be unaware of appellant's history of back conditions. OWCP further noted that as appellant's initial MRI scan did not demonstrate a herniated disc at L5-S1, a more recent test with this finding would have to be supported by medical

reasoning explaining how appellant's March 9, 1987 employment injury resulted in an additional condition almost 20 years later.

Counsel requested reconsideration through a form completed on April 15, 2014 and received on April 21, 2014. Dr. Naraghi submitted a report dated April 3, 2014 and reviewed a recent electromyogram (EMG) test. He repeated his version of appellant's 1987 employment fall and opined that it made no difference whether appellant fell backward or forward. Dr. Naraghi opined that the disc bulge found on the MRI scan in 1988 could certainly be within the nomenclature for a herniated disc.

By decision dated December 3, 2014, OWCP reviewed the merits of appellant's claim and denied modification of its March 6, 2014 decision finding that the medical evidence did not establish that he continued to experience medical residuals or disability related to his March 9, 1987 employment injury. It noted that Dr. Naraghi's reports were not based on an accurate factual background, were not sufficiently detailed, and did not create a conflict or overcome the weight of Dr. Swartz' report.

On April 27, 2015 appellant filed an appeal with the Board. In its January 11, 2016 decision,⁵ the Board found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 13, 2013 and that appellant had not established any continuing medical condition on or after May 13, 2013 due to his March 9, 1987 employment injury.

On January 5, 2017 counsel requested reconsideration. He submitted an additional report from Dr. Naraghi dated October 19, 2016. Dr. Naraghi reviewed appellant's medical history and noted that appellant's right ankle reflex was absent prior to his 1987 employment injury. He further found that there was evidence in the record for L5-S1 changes in 1987. Dr. Naraghi contended that appellant had L5-S1 pathology present since 1983 which was significantly aggravated by the injury in 1987. He disagreed with Dr. Swartz that appellant's accepted aggravation of his underlying condition would have ended by 1990. Dr. Naraghi opined that appellant continued to experience permanent aggravation of his underlying lumbar spine condition. In a report dated December 23, 2016, he disagreed with Dr. Swartz's report that appellant exhibited substantial pain behavior and positive Waddell testing noting that Dr. Swartz only identified two of the three categories necessary to make a finding of positive Waddell testing.

By decision dated April 5, 2017, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions. It noted that he submitted two medical reports dated October 19 and December 23, 2016 in support of his request for reconsideration. OWCP extensively reviewed and quoted the December 23, 2016 report. It further noted that Dr. Naraghi attributed appellant's current condition to his March 9, 1987 employment injury, but found that he had not specifically addressed whether appellant's underlying degenerative disc disease was permanently or temporarily aggravated by the 1987 employment injury.

On July 31, 2017 counsel requested reconsideration and asserted that OWCP failed to appropriately consider the October 19, 2016 report from Dr. Naraghi in the April 5, 2017 merit

⁵ *Id.*

decision. He resubmitted Dr. Naraghi's October 19, 2016 report, as well as a report dated June 5, 2017, wherein Dr. Naraghi diagnosed chronic pain and found no changes in appellant's condition. Dr. Naraghi reported pain to palpation in the cervical spine, limited range of motion with palpable spasms, and weakness in muscle testing in the right hand with atrophy. He found that appellant exhibited loss of lumbar lordosis, mildly decreased sensory examination in the right lower extremity, with positive straight leg raising, as well as slight loss of motor strength in the right lower leg. Dr. Naraghi opined that appellant sustained an injury in 1983 at work which began a degenerative process which was permanently aggravated by the March 9, 1987 employment injury and which continued to deteriorate.

By decision dated August 7, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that it had previously considered the October 19, 2016 report as it was substantially similar to the successive December 23, 2016 report and therefore its resubmission was repetitious. OWCP further found that the June 5, 2017 medical report was repetitious and cumulative and did not constitute relevant and pertinent new evidence.

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.⁶ To require it to reopen a case for merit review under section 8128(a) of FECA, 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.⁷ 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.⁸ 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.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

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹¹ The Board has also held that the submission of evidence which does not address the particular issue involved does not

⁶ 5 U.S.C. § 8128(a); *A.D.*, Docket No. 18-0497 (issued July 25, 2018).

⁷ 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).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608(b).

¹¹ *M.E.*, 58 ECAB 694 (2007); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

constitute a basis for reopening a case.¹² While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹³

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 finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has he 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).¹⁴

The underlying issue in the case is whether appellant has provided sufficient medical evidence to establish that he sustained a permanent and ongoing aggravation of his underlying degenerative disc disease such that he is entitled to further wage-loss compensation and medical benefits on and after May 13, 2013 due to his accepted March 9, 1987 employment injury.

Appellant's request for reconsideration was accompanied by a new report from Dr. Naraghi dated June 5, 2017. 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.¹⁵ Dr. Naraghi's July 5, 2017 report is substantially similar to his February 10, 2014 report in which he noted appellant's history of injury in 1987 and opined that his condition was likely as a result of progression of the pathology that started from the March 9, 1987 employment injury. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.¹⁶ Appellant also resubmitted the report from Dr. Naraghi dated October 19, 2016. This evidence was previously considered by OWCP and it is therefore not pertinent new evidence.¹⁷

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law, nor did it advance a relevant legal argument not previously considered by OWCP. OWCP also failed to provide any relevant and pertinent new evidence. Accordingly, the Board finds that OWCP did not abuse its discretion in denying appellant's request to reopen his claim for merit review.

¹² *Id.*; see also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ *M.E.*, *supra* note 11.

¹⁴ 20 C.F.R. § 10.606(b)(3)(i) and (ii); *G.H.*, Docket No. 18-0384 (issued July 19, 2018).

¹⁵ *G.H.*, *id.*

¹⁶ See *L.R.*, Docket No. 18-0400 (issued August 24, 2018).

¹⁷ *Id.*

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 August 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 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