

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

J.L., Appellant)	
)	
and)	Docket No. 19-0586
)	Issued: August 9, 2019
)	
DEPARTMENT OF THE AIR FORCE,)	
HICKAM AIR FORCE BASE, HI, Employer)	
)	

Appearances:
Stephanie N. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 17, 2019 appellant, through counsel, filed a timely appeal from November 26 and December 14, 2018 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated December 7, 2017, 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 to review 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 requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 21, 2003 appellant, then a 46-year-old pipefitter, filed a traumatic injury claim (Form CA-1) alleging that on February 10, 2003 he severely twisted his back muscle when he tried to turn off a valve with a crescent wrench when on a step ladder while in the performance of duty. He stopped work on the date of the claimed injury and returned to light-duty work on March 27, 2003.

On April 7, 2003 OWCP accepted appellant's claim for lumbosacral strain with L5-S1 disc herniation, displacement of lumbar intervertebral disc without myelopathy, intervertebral disc disorder with myelopathy, lumbar region, and major depression, single episode, severe without mention of psychotic behavior. It paid him temporary total disability compensation on the daily rolls commencing April 7, 2003. On April 23, 2003 appellant was released to return to full-time, light-duty work. Thereafter, he was off work intermittently and completely stopped work on July 2, 2003. Appellant has not returned to work since August 3, 2003. He underwent authorized left L5-S1 laminotomy and excision of a calcified herniated disc on August 6, 2003 and L5-S1 laminotomy and discectomy on September 8, 2004.

By decision dated June 13, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective June 14, 2016, as he had no further residuals or disability due to his accepted February 10, 2003 employment injuries.

On June 24, 2016 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP subsequently received a report dated June 10, 2016 by Dr. Eric S. Furie, a Board-certified orthopedic surgeon. Dr. Furie diagnosed cervical degenerative disc disease at C4-5 and C5-6. He also diagnosed status post September 2004 lumbar fusion L5-S1.

By decision dated May 2, 2017, an OWCP hearing representative affirmed the prior decision, in part, finding that OWCP properly terminated his wage-loss compensation benefits, but, reversed in part, as OWCP had improperly terminated his medical benefits for his accepted emotional condition as Dr. R. Michael Prudent, Board-certified in psychiatry and neurology, noted that it was unclear as to whether his depressive and pain symptoms would resolve and, thus, he required further medical treatment. Following the hearing representative's decision, OWCP reinstated appellant's medical benefits for his accepted emotional condition.

OWCP thereafter received a medical report dated August 2, 2017 by Dr. Erick M. Salado, a general practitioner, who provided impressions of spinal stenosis, lumbar region, other intervertebral disc disorders, lumbar region, cervical disc disorder, unspecified, unspecified cervical region, cervical disc disorder with radiculopathy, high cervical region, and spinal stenosis, cervical region. Dr. Salado advised that appellant had residual symptoms and permanent severe

restrictions. He concluded that appellant was unable to return to his pipefitter position, but may be capable of performing sedentary office work with restrictions.

On September 19, 2017 appellant, through counsel, requested reconsideration of the May 2, 2017 decision. He submitted a progress note dated July 31, 2017 from Dr. Max R. Steuer, a Board-certified neurosurgeon. Dr. Steuer provided assessments of cervical and lumbar spondylosis. He reviewed a description of appellant's pipefitter position and opined that he was totally disabled from the position.

By decision dated December 7, 2017, OWCP denied modification of the May 2, 2017 decision. It found that Dr. Salado and Dr. Steuer did not provide a rationalized opinion explaining how appellant's diagnosed lumbar and cervical conditions, which had not been accepted by OWCP, and resultant disability were causally related to his February 10, 2003 employment injuries.

OWCP subsequently received a duplicate copy of Dr. Furie's June 10, 2016 report.

OWCP also received a report dated December 21, 2017 by Dr. Robert R. Reppy, an attending family practitioner. Dr. Reppy provided impressions of status post L5-S1 laminectomy and fusion, multilevel lumbar polyradiculopathy, bilateral spinal stenosis, lumbar and cervical, cervical disc disorder with radiculopathy, benign prostatic hypertrophy, and retrograde ejaculation.

On February 26, 2018 appellant, through counsel, requested reconsideration of the December 7, 2017 decision. Counsel asserted that the opinions of Dr. Prudent and Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, were not entitled to the weight of the medical evidence. She maintained that the physicians' reports were not based on a complete and an accurate medical history of appellant's current condition. Counsel further maintained that Dr. Prudent and Dr. Doman provided conclusory and inconsistent opinions without the necessary supporting rationale. She contended that the SOAF did not contain sufficient detail of appellant's pipefitter duties. Lastly, counsel contended that appellant's treatment from 2006 to 2017 was not considered or made a part of the record.

Counsel submitted a letter dated January 18, 2018 from Dr. Reppy. Dr. Reppy diagnosed L5-S1 disc herniation, displacement of lumbar intervertebral disc without myelopathy, intervertebral disc disorder with myelopathy, lumbar region, and major depression, severe, without mention of psychotic behavior. He noted that his diagnosis of lumbar disc disorder with myelopathy was based on an electromyogram (EMG) performed by Dr. Sonal R. Hazariwala, a Board-certified neurologist, which showed an abnormal study with electrophysiological evidence of moderately severe, chronic multilevel lumbosacral polyradiculopathies bilaterally, worse in the right L5 and left S1 myotomes. Dr. Reppy opined that appellant's current lumbar conditions were directly caused by his accepted February 10, 2003 employment injury. He related that surgery was required to resolve his conditions, but that such treatment had failed. Dr. Reppy advised that appellant still suffered from residuals of his above-noted accepted conditions, which prevented him from returning to full-duty work as a pipefitter without restrictions.

By decision dated June 27, 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 Dr. Furie's June 10, 2016

report was repetitious. OWCP further found that Dr. Reppy's December 21, 2017 and January 18, 2018 reports were irrelevant as he did not provide a rationalized opinion explaining the causal relationship between appellant's diagnosed conditions and resultant disability and the accepted February 10, 2013 employment injury.

In a letter received on November 15, 2018 by OWCP, counsel requested reconsideration of OWCP's decision. She reiterated her prior contentions that the opinions of Dr. Prudent and Dr. Doman did not constitute the weight of the medical evidence, the SOAF was deficient, and appellant's treatment from 2006 to 2017 was not considered or made a part of the record. Counsel maintained that he still suffered from residuals of his accepted conditions.

Counsel submitted an additional letter dated November 6, 2018 from Dr. Reppy who repeated the exact findings and conclusions made in his January 18, 2018 report. She also submitted an undated report from Dr. Reppy. Dr. Reppy advised that, based on subjective and objective findings of continuing residuals of the accepted lumbar conditions, appellant was unable to perform the duties of his pipefitter position. He related that, while an EMG performed by OWCP's second opinion physician was a surface EMG conducted by a nurse and not as accurate as the later EMG that showed an abnormal study, with electrophysiological evidence of moderately severe, chronic multilevel lumbosacral polyradiculopathies bilaterally, worse in the right L5 and left S1 myotomes. Dr. Reppy claimed that Dr. Doman did not review the more recent EMG performed on January 25, 2017, which showed chronic multilevel lumbosacral polyradiculopathies bilaterally. He maintained that the January 25, 2017 EMG was more accurate as it was an intermuscular EMG while Dr. Prudent's EMG was only a surface EMG. Additionally, Dr. Reppy indicated that a new magnetic resonance imaging (MRI) scan was also not reviewed by the second opinion physicians. He concluded that these objective tests confirmed physical examination results which showed that appellant was physically incapable of performing his physical work duties.

By decision dated November 26, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a), finding that the evidence submitted was repetitious.

On December 4, 2018 counsel requested reconsideration. She continued to assert that appellant still suffered from residuals of his accepted conditions. Counsel again reiterated her prior contentions that the opinions of Dr. Prudent and Dr. Doman did not constitute the weight of the medical evidence, the SOAF was deficient, and appellant's treatment from 2006 to 2017 was not considered or made a part of the record.

OWCP, by decision dated December 14, 2018, denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a), again finding that the evidence submitted 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. It may review an award for or against payment of compensation at any time based on its own motion or on application.³

A claimant seeking reconsideration of a final decision must present arguments or provide evidence which: (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.⁴ If OWCP determines that at least one of these requirements is met, it reopens and reviews the case on its merits.⁵ 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.⁶

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. In her November 15 and December 3, 2018 requests for reconsideration, counsel contended that the opinions of Dr. Prudent and Dr. Doman, OWCP's referral physicians, were not entitled to the weight of the medical evidence as their reports contained conclusory and speculative opinions without a complete and an accurate medical history of appellant's current condition and necessary rationale explaining why his current conditions were not causally related to the accepted employment injury. She maintained that the physicians relied upon a deficient SOAF as it did not sufficiently detail his pipefitter duties. Counsel further maintained that OWCP failed to consider appellant's treatment from 2006 to 2017 was not considered or made a part of the record. She, however, presented no new arguments, rather she reiterated arguments previously addressed by OWCP in its June 27, 2018 decision. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record and the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.⁷ Because these arguments have been previously considered, they were insufficient to require OWCP to conduct a merit review.

³ *Id.* at § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3); *see also M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ *Id.* at § 10.608(a); *see also C.K.*, Docket No. 18-1019 (issued October 24, 2018).

⁶ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁷ *See S.B.*, Docket No. 18-1535 (issued April 3, 2019); *M.N.*, Docket No. 16-1410 (issued June 28, 2017).

Accordingly, 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).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered by OWCP in support of his request for reconsideration. Appellant submitted a November 6, 2018 report from Dr. Reppy, while new, repeated the exact findings and conclusions made in his January 18, 2018 report. Similarly, Dr. Reppy's undated report is new, but reiterated his prior opinion on the causal relationship between appellant's current lumbar conditions and disability and the accepted February 10, 2003 employment injuries. The reports of Dr. Reppy, therefore, do not constitute relevant and pertinent new evidence related to the issue of causal relationship.⁸ Accordingly, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirements under section 10.606(b)(3).

As appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3), pursuant to 20 C.F.R. § 10.608 OWCP properly denied merit review.⁹

CONCLUSION

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

⁸ *H.M.*, Docket No. 17-1436 (issued June 20, 2018).

⁹ *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the December 14 and November 26, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 9, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board