

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

S.M., Appellant)	
)	
and)	Docket No. 18-1158
)	Issued: January 16, 2019
DEPARTMENT OF STATE, BUREAU OF)	
DIPLOMATIC SECURITY, Washington, DC,)	
Employer)	
)	

Appearances:

L. Christopher Breard, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 17, 2018 appellant, through counsel, filed a timely appeal from a February 26, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated March 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 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

On March 5, 2013 appellant, then a 48-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on May 15, 1998 he sustained injury while engaging in a "Red Man" drill at the Federal Law Enforcement Training Center (FLETC) in Glynco, GA. He alleged injuries to his forehead, both hands, and right thumb.

By decision dated February 19, 2014, OWCP denied the claim, finding that it had not been timely filed pursuant to 5 U.S.C. § 8122.

In a letter postmarked March 13, 2014, appellant timely requested an oral hearing before an OWCP hearing representative. He also submitted additional evidence. A telephonic hearing was held on September 10, 2014.

By decision dated December 4, 2014, an OWCP hearing representative set aside the February 19, 2014 decision as the evidence then of record established that the employing establishment had actual knowledge of the alleged injury on the date of the incident. The case was remanded to OWCP to determine whether a traumatic injury had been established and to issue a *de novo* decision.

On remand, OWCP issued a December 16, 2014 decision denying the claim, finding that the medical evidence of record was insufficient to establish that a medical condition was diagnosed in connection with the accepted May 15, 1998 employment incident.

In a letter postmarked January 9, 2015, appellant timely requested an oral hearing before an OWCP hearing representative, which was held telephonically on July 16, 2015. By decision dated September 29, 2015, the hearing representative modified the December 16, 2014 decision to reflect "that the claimant has not presented sufficient evidence establishing a condition or diagnosis as a result of the accepted work event." The hearing representative, however, affirmed the denial of the claim finding that causal relationship had not been established.

Appellant, through counsel, requested reconsideration on January 29, 2016. Additional medical evidence was subsequently received, along with letters/pleadings. By decision dated February 22, 2016, OWCP denied modification of its prior decision. It found that the medical evidence submitted was insufficient to establish that his diagnosed medical conditions were causally related to the accepted May 15, 1998 employment injury.

In a report dated January 12, 2017, Dr. Oliver L. Kesterson, a neurologist, reviewed appellant's medical history in detail. He concluded that appellant's 1998 "Red Man drill mishap" was the proximate cause of his spinal cord compression, resulting in central spinal cord syndrome.

On February 13, 2017 appellant, through counsel, requested reconsideration. Additional medical evidence was submitted. By decision dated March 7, 2017, OWCP denied modification

of its prior decisions. It reviewed the January 12, 2017 medical narrative from Dr. Kesterson, a neurologist, and found that it lacked the convincing quality necessary to establish causal relationship between appellant's nonarthritic cervical spondylitic myelopathy and the accepted May 15, 1998 employment incident. OWCP noted that there was no medical evidence contemporaneous to the injury or any other medical evidence of the injury for more than seven years after the fact. It found that Dr. Kesterson's theory on causal relationship relied upon the history provided by appellant and stacked "improbably upon improbability."³

On February 15, 2018 appellant, through counsel, again requested reconsideration. In his February 1, 2018 letter, counsel argued that the claims examiner's denial was predicated seemingly upon his own review and effective reversal of the medical component of fact of injury, as opposed to causal relation. He indicated that the claims examiner's bias was largely based upon his own opinion concerning appellant's "mental state" as it regarded his employment activities in the weeks following the injury. Counsel argued that Dr. Kesterson had provided a "medically reasonable and well thought out" opinion based upon the medical evidence and explained why appellant would have remained ignorant of the severity of his injury for many years and why the injury, while temporarily painful, would not have prevented him from participating in required employment activities immediately following the injury, but that the injury progressed into the diagnosed disabling condition. He concluded that there was no contrary medical evidence to the conclusion of multiple attending physicians that the injury caused the condition of an undiagnosed cervical injury which resulted in permanent disability.

In a May 10, 2017 affidavit, Special Agent L.A. provided his recollection of appellant's injury following the 1998 trauma.

In an August 24, 2017 letter, Dr. Kesterson indicated that he had reviewed a witness statement. He also related that appellant's complaints were consistent with a diagnosis of an undiagnosed cervical injury. Dr. Kesterson indicated that he had not changed his previous diagnoses or the cause of appellant's injury. He explained that, while a patient may have transient improvement following an initial injury, it was well known that patients with symptomatic cervical spondylitic myelopathy will have persistent worsening clinical symptoms ultimately requiring surgical treatment. In appellant's case, Dr. Kesterson indicated that the compression of the spinal cord and nerve roots had manifested itself as neurological impairment with loss of use and severe pain in the hands and fingers, which ultimately resulted in a need for disc replacement.

By decision dated February 26, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim. It found that the evidence submitted was irrelevant or immaterial to the issue of causal relationship.

³ OWCP noted that Dr. Kesterson had opined that it was possible, though improbable, for a person to perform a physically demanding job, seemingly without symptoms severe enough to prompt the patient from seeking medical attention for several years following a cervical spine injury.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁴ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁵ 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.⁶ 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.⁷ 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.⁸

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁹ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹⁰ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(3) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹¹

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. The Board has also held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case. 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.¹²

⁴ 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).

⁵ 20 C.F.R. § 10.607.

⁶ *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.

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.608(a), (b).

⁹ *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

¹⁰ *C.F.*, Docket No. 18-0360 (issued July 19, 2018); *Mark H. Dever*, 53 ECAB 710 (2002).

¹¹ *C.F.*, *id.*; *Annette Louise*, 54 ECAB 783 (2003).

¹² *M.E.*, 58 ECAB 694 (2007).

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 did not show that OWCP erroneously applied or interpreted a specific point of law. In his February 15, 2018 reconsideration request, counsel argued that the claims examiner's denial was predicated seemingly upon his own review and effective reversal of OWCP's acceptance of the medical component of fact of injury. However, the issue in this case is causal relationship. Counsel's argument is irrelevant to the critical issue of causal relationship, which is determined by rationalized medical evidence.¹³ As such, his argument does not have a reasonable color of validity and does not comprise a basis for reopening the case on its merits.¹⁴ As appellant did not allege that OWCP had erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP he is not entitled to a review of the merits of his claim based on the first and second requirements under section 10.606(b)(3).

The Board further finds that appellant has not submitted relevant and pertinent new evidence in support of his reconsideration request. As previously noted, the underlying issue in this case is causal relationship. As the issue is medical in nature, it can only be resolved through the submission of medical evidence.¹⁵ On reconsideration, appellant submitted an affidavit from Special Agent L.A. However, the statement of a lay person is not competent evidence on the issue of causal relationship.¹⁶

Appellant also submitted an August 24, 2017 letter from Dr. Kesterson. In this new letter Dr. Kesterson noted that he has reviewed a witness statement describing appellant's injury. He also related that appellant's complaints were consistent with an undiagnosed cervical injury and that he had not changed his previous diagnoses or the cause of appellant's injury. While this evidence was new, it did not constitute relevant and pertinent new medical evidence as it is duplicative of Dr. Kesterson's previous opinion and does not provide a rationalized medical explanation of causal relationship. 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.¹⁷

The Board accordingly finds that 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.

¹³ *E.D.*, Docket No. 18-0138 (issued May 14, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁴ *Supra* note 12.

¹⁵ *See M.A.*, Docket No. 18-0395 (issued July 17, 2018).

¹⁶ *See R.M.*, Docket No. 08-2084 (issued April 7, 2009); *James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988).

¹⁷ *See L.R.*, Docket No. 18-0400 (issued August 24, 2018).

On appeal, counsel contends that the evidence submitted on reconsideration was relevant and responsive. He specifically asserts that the evidence submitted on reconsideration supplemented the evidentiary deficiencies and misinformation contained or identified in previous OWCP decisions and the file of record maintained by OWCP. As explained above, the newly submitted letter of Dr. Kesterson is irrelevant and therefore insufficient to require a 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 February 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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