

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

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D.K., Appellant)	
)	
and)	Docket No. 18-1541
)	Issued: June 11, 2019
DEPARTMENT OF HOMELAND SECURITY,)	
CITIZENSHIP & HOMELAND SECURITY,)	
Seattle, WA, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 9, 2018 appellant filed a timely appeal from a July 13, 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 April 19, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

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 September 18, 2007 appellant, then a 52-year-old district adjudications officer, filed a traumatic injury claim (Form CA-1) alleging that on July 19, 2007 he sustained a repetitive motion injury to his left and right shoulders due to excessive door opening, file handling, page turning, bar code reading, and extremely poor workstation configuration while in the performance of duty. He did not initially stop work. On November 16, 2007 OWCP accepted the claim for disorder of bursae and tendons in the left shoulder region. It paid appellant intermittent wage-loss compensation on the supplemental rolls as of July 30, 2007 and on the periodic rolls as of June 7, 2009.

On July 11, 2008 appellant underwent a left shoulder arthroscopy with extensive debridement, arthroscopic repair of Type II superior labral tear from anterior to superior (SLAP) tear, and arthroscopic subacromial decompression, performed by Dr. Peter R. Mandt, a Board-certified orthopedic surgeon. On September 2, 2008 OWCP expanded acceptance of the claim to include loose body of the left shoulder and left shoulder impingement. On May 27, 2009 appellant underwent a left shoulder arthroscopy -- arthroscopic debridement, glenohumeral joint, arthroscopic release, biceps long head, arthroscopic rotator cuff repair, and open sub pectoral long head biceps tenodesis. On January 22, 2010 OWCP expanded acceptance of the claim to include right shoulder, Type II SLAP tear of rotator cuff, tendinitis-impingement, and right shoulder acromioclavicular (AC) joint arthritis.

In a November 19, 2013 report, Dr. Michael S. McManus, Board-certified in occupational medicine, requested that OWCP expand acceptance of appellant's claim to include the diagnoses of major depression, single episode, and generalized anxiety disorder. He opined that the diagnoses were the "direct result of his workplace injury and chronic shoulder pain and insufficiency."

In a January 27, 2017 report, Dr. Kari C. Heistand, a psychiatrist, indicated that appellant related that he developed depression, anxiety, difficulty sleeping, and chronic pain from his employment injury. She noted that he denied preexisting conditions and that this was corroborated by the medical record. Dr. Heistand opined that "to a reasonable medical certainty the chronic pain experienced by [appellant] from his accepted work injuries has contributed to his diagnoses...." She noted that the diagnoses included major depressive disorder, single episode, moderate (was severe before starting mental health treatment), anxiety, and chronic pain.

On February 3, 2017 appellant requested approval for acceptance of additional psychiatric conditions to include: major depressive disorder, single episode, moderate, general anxiety, insomnia, and chronic pain syndrome, as a consequence of his accepted injuries. He argued that his physician, Dr. McManus, on November 19, 2013 had requested the addition of these psychiatric conditions to his claim. Appellant also included a February 1, 2017 report from Dr. Amado Daylo, a Board-certified psychiatrist, who requested that the diagnosis of chronic pain

be added as an accepted work-related condition. He opined “to a reasonable medical certainty that the chronic pain experienced by [appellant] from his accepted work injuries contributed to his diagnoses” of major depressive disorder, single episode, moderate, generalized anxiety disorder, and insomnia.

By letter dated March 1, 2017, OWCP referred appellant for a second opinion examination with Dr. Christine Lloyd, a Board-certified psychiatrist, to address appellant’s current conditions, their relationship to his work activities, and his ability to work.

In a March 15, 2017 report, Dr. Lloyd related that appellant had chronic pain and a feeling that he was unable to use his shoulders and arms in any meaningful way, which left him chronically sad, unmotivated, anxious, and isolated. Regarding whether he had additional work-related conditions, she opined that he had major depressive episode, recurrent, with anxious distress, which was “directly related to the industrial injury of 2007.” Dr. Lloyd explained that as long as appellant had chronic pain, he would suffer from some element of depression and she did not believe that any other psychiatric treatment would be curative or restorative. In an April 14, 2017 addendum, she noted that she reviewed the additional medical evidence provided to her and had not changed her assessment.

On April 19, 2017 OWCP expanded acceptance of the claim to include major depressive disorder, recurrent, moderate, with specifier of anxious distress.

By separate decision also dated April 19, 2017, OWCP denied further expansion of the acceptance of appellant’s claim. It explained that the additional diagnoses of general anxiety, insomnia, and chronic pain were denied as the evidence of record did not demonstrate that those medical conditions were related to the established employment injury/illness as required for coverage under FECA. OWCP indicated that the second opinion physicians had not opined that such diagnoses were current or active after having reviewed the pertinent medical records and completing thorough physical and psychiatric examinations.

In letters dated April 25, 27, and 30, and August 7, 2017, appellant inquired why the additional condition of chronic pain had not been accepted.

OWCP received an April 28, 2017 report from Dr. Heistand, who repeated her diagnoses of major depressive disorder, recurrent episode, moderate, with anxious distress, and chronic pain.

In a June 15, 2017 report, Dr. Daylo indicated that he performed a psychiatric examination on September 20, 2016, and there was no change to his opinion. A copy of his previously submitted report dated February 1, 2017, was also received. Dr. Daylo diagnosed major depressive disorder, single episode, moderate, generalized anxiety disorder, and insomnia. He opined that appellant’s accepted conditions contributed to these diagnoses.

In a letter dated October 3, 2017, appellant’s then-counsel argued that appellant’s case had not been properly developed with regard to chronic pain syndrome. He also argued that Dr. Heistand’s report was not provided to Dr. Lloyd.

In a letter dated October 12, 2017, OWCP responded that the case was developed to determine if appellant suffered from additional psychiatric conditions. It confirmed that Dr. Lloyd

was specifically asked to provide her opinion in this regard. Furthermore, OWCP confirmed that Dr. Heistand's January 27, 2017 report was reviewed by Dr. Lloyd. It concluded that the addition of chronic pain syndrome was properly denied in the April 19, 2017 decision.

On April 17, 2018 appellant requested reconsideration. He asserted that the second opinion physician disagreed with the treating physician's diagnosis of chronic pain and a conflict had been created. Appellant argued that he should have been referred for an impartial medical examination. He also argued that Dr. Lloyd was not given Dr. Heistand's January 27, 2017 report.

In a letter dated April 18, 2018, appellant made additional arguments and submitted evidence. He noted that on October 3, 2017 his then-counsel requested that OWCP address the issue of chronic pain as related to appellant's accepted work injuries. Appellant referred to Dr. Heistand's letter dated January 27, 2017, and asserted that it preceded Dr. Lloyd's March 15, 2017 report and April 14, 2017 addendum. He argued that Dr. Heistand's opinion confirmed that his chronic pain was due to his accepted work-related injuries.

In an April 30, 2018 letter, appellant asserted that not all of the evidence submitted had been reviewed by OWCP. He reiterated that there was a disagreement between Dr. Lloyd and Dr. Heistand regarding the relationship of his chronic pain to his accepted work injuries. Appellant further asserted that Dr. Lloyd supported that appellant had "chronic pain that is causing depression and will continue to cause depression" as long as he had chronic pain. He argued that this supported that he had chronic pain that was causing him depression. Appellant further argued that Dr. Lloyd also indicated "[b]ecause his work-related injury left him in a chronic pain condition, it has caused him to become depressed." He claimed that the reports of Drs. Lloyd and Heistand supported that his chronic pain syndrome was a consequential injury.

In an undated statement received on May 2, 2018, appellant indicated that he was providing medical evidence to include the January 27, 2017 report from Dr. Heistand. He again argued that her report had not previously been considered.

In an April 28, 2017 report, Dr. Heistand noted that she last saw appellant on January 27, 2017. She diagnosed major depressive disorder, recurrent episode, moderate, with anxious distress, primary encounter diagnosis, and chronic pain.

In a May 6, 2018 report, Dr. David Martin, an occupational medicine physician, reviewed appellant's medical record for the employing establishment. He opined that because the second opinion and the treating psychiatrist had not provided restrictions, a second psychiatric examination was unnecessary.

In a letter dated May 13, 2018, appellant argued that the April 19, 2017 denial of his claim for the additional condition of chronic pain was improper. He referred to medical evidence and Board decisions.

By decision dated July 13, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128 (a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.³ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁴ 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.⁵

A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (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.⁶ 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.⁷

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).

Appellant's request for reconsideration did not establish that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. In a letter dated April 17, 2018, requesting reconsideration, appellant argued that Dr. Lloyd, the second opinion physician, disagreed with treating physician Dr. Heistand's diagnosis of chronic pain, and therefore a conflict had been created, warranting a referral for an impartial medical examination. He also argued that Dr. Lloyd had not been provided Dr. Heistand's report of January 27, 2017 for review. In an October 3, 2017 letter, his then-counsel argued that appellant's case had not been properly developed with regard to chronic pain syndrome. In multiple letters appellant questioned why chronic pain was not an accepted condition.

Following a referral of appellant and the case record to the second opinion specialist, Dr. Lloyd, OWCP expanded the acceptance of appellant's claim to include some emotional conditions, but denied his request for further expansion to include others. Appellant's continued

³ This section provides in pertinent part: the 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).

⁴ 20 C.F.R. § 10.607.

⁵ *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). Chapter 2.1602.4b.

⁶ 20 C.F.R. § 10.606(b)(3).

⁷ *Id.* at § 10.608.

arguments in this regard therefore have no color of legal validity.⁸ Furthermore, appellant's own disagreement with Dr. Lloyd's findings is irrelevant to the medical issue in the case, which can only be resolved through the submission of probative medical evidence from a physician.⁹

Appellant has not established that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, appellant is not entitled to a review of the merits of his case based on the first and second above-noted requirements under section 10.606(b)(3).

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case.¹⁰

In support of his reconsideration request, appellant submitted an April 28, 2017 report from Dr. Heistand. This report, while new, does not require the reopening of appellant's claim for review of the merits because OWCP had already considered Dr. Heistand's January 27, 2017 report which was substantially the same as his January 27, 2017 report. The April 28, 2017 report did not provide any relevant and pertinent new evidence or any opinion regarding why anxiety and chronic pain syndrome should be accepted as causally related to appellant's July 19, 2007 injury. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.¹¹ Similarly, Dr. Daylo's June 15, 2017 report was duplicative as he opined that there was no change from his prior report of February 1, 2017.

OWCP also received a May 6, 2018 report from Dr. Martin, however, he did not offer an opinion regarding whether the diagnosis of anxiety and chronic pain should be accepted. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3).

⁸ See *Marion Johnson*, 40 ECAB 735 (1989).

⁹ *K.H.*, Docket No. 17-0281 (issued July 17, 2018).

¹⁰ 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).

¹¹ *Id.*

¹² *Id.*

As appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) in his April 17, 2018 request for reconsideration, the Board finds that, pursuant to 20 C.F.R. § 10.608, 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).

ORDER

IT IS HEREBY ORDERED THAT the July 13, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 11, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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