

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

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| T.H., Appellant |) | |
| |) | |
| and |) | Docket No. 18-1572 |
| |) | Issued: March 11, 2019 |
| DEPARTMENT OF VETERANS AFFAIRS, |) | |
| CAPTAIN JAMES A. LOVELL FEDERAL |) | |
| HEALTH CENTER, North Chicago, IL, |) | |
| Employer |) | |
| |) | |

Appearances:
Stephanie N. Leet, 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 August 17, 2018 appellant, through counsel, filed a timely appeal from a July 30, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from the last merit decision, dated August 2, 2017, to the filing of this appeal,

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.

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.³

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 10, 2016 appellant, then a 56-year-old dentist, filed a traumatic injury claim (Form CA-1) alleging that on February 12, 2016 he sustained blunt trauma to his head and a reflex injury to his cervical spine when he hit his elbow and the center of his forehead on a mounted surgical lamp while treating a patient in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on March 2, 2016. It controverted the claim, indicating that appellant's disability was a result of an occupational disease or illness and not a traumatic injury.

In a letter dated March 15, 2016, the employing establishment challenged appellant's claim. It questioned whether appellant's alleged injury was actually sustained on January 11 or February 12, 2016.

In a development letter dated March 21, 2016, OWCP advised appellant that he had not submitted sufficient evidence to establish his claim. It noted that the evidence was insufficient to establish that he actually experienced the incident alleged to have caused injury. OWCP also indicated that no medical diagnosis of a condition resulting from appellant's alleged injury had been provided. It provided a questionnaire for completion regarding the alleged incident of February 12, 2016. OWCP also requested that appellant submit a narrative medical report which provided a medical diagnosis and an opinion regarding the cause of the diagnosed condition. It afforded him 30 days to respond with the requested information.

In a radiology report dated February 19, 2016, Dr. Mark Conneely, Board-certified in diagnostic radiology, reviewed a magnetic resonance imaging (MRI) scan of appellant's cervical spine. He noted that there was a slight levoconvex curvature of the cervical spine, mild disc space narrowing and a small osteophyte at C2-3, mild diffuse disc bulging at C3-4, diffuse disc bulging with a small superimposed central disc herniation and bilateral foraminal stenosis at C4-5, diffuse disc bulging and osteophyte causing mild indentation of the anterior thecal sac at C5-6, mild diffuse disc bulging causing mild indentation of the anterior thecal sac and moderate bilateral foraminal stenosis at C6-7, and minimal diffuse disc bulging without significant central canal or foraminal stenosis at C7-T1. Dr. Conneely related that appellant suffered from a degenerative

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence after the decision dated July 30, 2018. 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.*

disease and facet arthropathy of the cervical spine, but also indicated the primary diagnostic code to be “minor abnormality.”

In a letter dated April 11, 2016, appellant requested a 30-day extension to submit the requested information per the March 21, 2016 development letter. He indicated that on January 11, 2016, while traveling to work, he slipped on ice, struck his left foot on a concrete parking marker, and hit both elbows, back, and occipital area of his head on the ground. Appellant noted that the event was not witnessed. He related that he performed his normal duties that day until a coworker advised him to seek medical care for the injury to his foot and elbows. Appellant indicated that in a separate incident, in the performance of duty, on February 12, 2016, he hit his head on an “elbow joint” of a mounted surgical light and hyperflexed his neck. He noted that he was dazed for 30 minutes and the event was witnessed by his supervisor and dental technician. After approximately an hour, appellant resumed the performance of his regular duties. He related that symptoms of head and left eye pain started in the 24 to 48 hours after the February 12, 2016 employment incident. On February 18, 2016 appellant indicated that he was diagnosed with a dissection of his left internal carotid artery with pseudoaneurysm, ischemic stroke, and infarction of left motor strip.

In a medical report dated April 13, 2016, Dr. Hien D. Dang, a neurology specialist, indicated that he examined appellant on February 19, 2016. He took x-rays and diagnosed a dissection of the left internal carotid artery. Dr. Dang noted that the injury appellant sustained when he hit the center of his forehead on the mounted surgical lamp would not have caused the dissection of the left internal carotid artery.

In a letter dated April 6, 2016, Dr. Sara Syeda, a family medicine specialist, indicated that appellant was not allowed to go back to work until completion of the recommended rehabilitation.

In a medical report dated April 20, 2016, Dr. Susan Keeshin, Board-certified in physical medicine and rehabilitation, examined appellant and opined that the carotid artery dissection diagnosis was most likely due to the injury to appellant’s head on February 12, 2016 or appellant’s fall on January 11, 2016. She related that appellant could return to work for 20 hours per week starting on April 20, 2016, in a clinical, nonsurgical setting under direct supervision of a colleague who could monitor his work performance.

By decision dated May 12, 2016, OWCP denied appellant’s claim, finding that the medical evidence submitted failed to establish that appellant’s left carotid dissection and stroke were caused by hitting his forehead on a mounted surgical lamp during the February 12, 2016 employment incident.

In a medical report dated May 17, 2016, Dr. Keeshin examined appellant and again indicated that appellant’s carotid artery dissection was most likely caused by the “fall/injury to his head/neck on February 12, 2016, or his fall on January 11, 2016.”

On May 2, 2017 appellant, through counsel, requested reconsideration of the May 12, 2016 decision. Appellant submitted additional medical evidence in support of his reconsideration request.

In a letter dated June 22, 2016, Dr. David P. Calimag, a neurologist, noted that he examined appellant on June 11, 2016 regarding his stroke symptoms due to a left carotid dissection. He indicated that appellant fell after hitting his elbow and forehead on the mounted surgical lamp in the February 12, 2016 employment incident. Dr. Calimag also related that appellant's diagnosis of a dissection of the left internal carotid artery was caused by the snapping reflex of his neck after hitting his forehead on the mounted surgical lamp.

By decision dated August 2, 2017, OWCP denied modification of the May 12, 2016 decision. It found that the evidence submitted was insufficient to establish the claim as it was speculative in nature, did not provide a definitive discussion of causation, and the additional evidence was not based on a factual history of the injury to support the diagnosed condition in connection to the February 12, 2016 employment incident.

On May 3, 2018 appellant, through counsel, requested reconsideration of the August 2, 2017 decision.

In support of his reconsideration request, appellant submitted counsel's statement and two coworker witness statements from Dr. Ritesh D. Radadia, a dentist, and Regilda Taylor, a dental technician, which detailed a factual recount of the February 12, 2017 employment incident.

By decision dated July 30, 2018, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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.⁵ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ He or she needs only to submit

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *P.L.*, Docket No. 18-1145 (issued January 4, 2019); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying a 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.¹⁰

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).

In support of appellant's request for reconsideration counsel alleged that the medical evidence of record established his claim. Counsel's belief concerning the adequacy of the previously reviewed medical evidence neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance relevant legal arguments not previously considered by OWCP.¹¹ Whether the previously submitted medical evidence was legally sufficient to establish appellant's claim had been previously considered in OWCP's merit decisions.¹² Appellant's request for reconsideration therefore did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently appellant is not entitled to review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board finds that appellant has not submitted relevant and pertinent new evidence in this case.¹³ Appellant submitted two witness statements from Ms. Taylor and Dr. Radadia with his request for reconsideration. The submission of this factual evidence does not require reopening of appellant's claim for review of the merits of the claim because this evidence is not relevant to the underlying issue of the present case. As noted, the underlying issue of the present case is medical in nature, *i.e.*, whether appellant submitted medical evidence sufficient to establish causal relationship between his diagnosed dissection of the left internal carotid artery and the accepted February 12, 2016 employment incident. 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.¹⁴ Thus appellant is not entitled to review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

⁹ *P.L., id.*; see *Mark H. Dever*, 53 ECAB 710 (2002).

¹⁰ *P.L., supra* note 8; *Annette Louise*, 54 ECAB 783 (2003).

¹¹ See *S.F.*, Docket No 16-1019 (issued May 4, 2017).

¹² See *L.B.*, Docket No. 18-0170 (issued August 28, 2018).

¹³ *B.T.*, Docket No. 18-1397 (issued January 15, 2019); 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).

¹⁴ *B.T., id.*

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, 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 her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 11, 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