

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

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| S.J., BROWN, Appellant |) | |
| |) | |
| and |) | Docket No. 18-1513 |
| |) | Issued: May 15, 2019 |
| DEPARTMENT OF THE ARMY, FORT |) | |
| BENNING, Fort Benning, GA, Employer |) | |
| |) | |

Appearances:
Ronald S. Webster, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 2, 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 the last merit decision, dated February 3, 2017, to the filing of

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.

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.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 May 25, 2016 appellant, then a 52-year-old mobile equipment servicer, filed a traumatic injury claim (Form CA-1) alleging that, on May 9, 2016, he pulled a hydraulic lift from under a vehicle and tore his right rotator cuff while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that appellant was injured in the performance of duty. Appellant did not stop work.

In support of his claim, appellant submitted a May 11, 2016 magnetic resonance imaging (MRI) scan of the right shoulder read by Dr. Nishant M. De Quadros, a diagnostic radiology specialist. The scan revealed a partial thickness tear of the supraspinatus and infraspinatus tendons, mild tenosynovitis, minimal osteoarthritis in the acromioclavicular joint, and mild subacromial deltoid bursitis.

An August 18, 2016 report from Dr. Gary Dawson, Board-certified in physical medicine and rehabilitation, diagnosed effusion of the left shoulder, primary osteoarthritis of the left and right shoulder, long-term use of opiate analgesic, and chronic pain syndrome.

OWCP also received requests for functional capacity evaluations (FCE) on August 25 and September 15, 2016.

In a development letter dated September 22, 2016, OWCP advised appellant that, when his claim was first opened, it appeared to be a minor injury that resulted in minimal or no lost time from work and the employing establishment did not controvert continuation of pay. However, appellant's claim was now being reopened because requests for FCE's had been received. OWCP informed him of the type of evidence needed to establish his claim and afforded him 30 days to submit the necessary evidence.

OWCP subsequently received a September 27, 2016 FCE.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that appellant submitted additional evidence with his 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 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.*

By decision dated November 1, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that the diagnosed medical conditions were causally related to the accepted employment incident.

OWCP subsequently received a November 15, 2016 report, wherein Dr. Dawson noted that appellant reported injuring his shoulders at work on May 6, 2016 while pulling/lifting machinery. Dr. Dawson related that appellant described his shoulder pain as "aching, sharp and burning that is continuous in nature radiating to the arms and elbows." Appellant further related that his pain was aggravated by lifting and twisting. He determined that the September 2, 2015 left shoulder MRI scan revealed joint effusion, tendinopathy of the long head of the biceps tendon and supraspinatus tendon and partial tears, with acromioclavicular (AC) joint arthrosis. Dr. Dawson also reviewed the May 11, 2016 right shoulder MRI scan, which revealed mild subacromial/subdeltoid bursitis, minimum osteoarthritis of the AC joint, mild tenosynovitis involving the long head of the biceps tendon, partial thickness tears of supraspinatus and infraspinatus tendons at the insertions on the greater tuberosity. He diagnosed bilateral shoulder effusions, primary osteoarthritis of bilateral shoulders, chronic pain syndrome, partial tears of the rotator cuff muscles, and tendinopathy.

Dr. Dawson explained that appellant initially injured his left shoulder in 2014. He referred to a left shoulder arthrogram from July 3, 2014, and explained that it revealed a mild partial tear and tendinosis of the long head of the biceps, mild AC joint osteoarthritis, and a small tear of the rotator interval. Dr. Dawson noted that appellant received treatment at that time and appellant's pain improved such that he was able to return to work. However, he explained that appellant "then reinjured his left shoulder on May 6, 2016 while at work." Dr. Dawson again referenced the May 11, 2016 MRI scan and opined that appellant's symptomatology worsened because of the work injury, "specifically subacromial/subdeltoid bursitis, partial thickness tears." He opined that these injuries most likely occurred while appellant was pulling a hydraulic lift from under a vehicle.

On November 28, 2016 appellant requested reconsideration. In an undated letter also received by OWCP on November 28, 2016, he explained that he made an error on his claim form when he selected May 9, 2016, as the date of injury. He explained that May 5, 2016, was the actual date of injury, as that was the date he saw his physician.

By decision dated February 3, 2017, OWCP denied modification of the November 1, 2016 decision. It explained that Dr. Dawson had not described an incident that occurred on May 9, 2016. Instead, Dr. Dawson described an incident that occurred on May 6, 2016. OWCP found that he did not provide sufficient rationale to explain how the diagnosed conditions were caused by a one-time work incident, regardless of the specific date of injury.

In a letter dated June 21, 2017, counsel explained that he was representing appellant with regard to the present claim and a separate claim, OWCP File No. xxxxxx755 alleging a May 11, 2015 traumatic injury to the left shoulder. He requested that OWCP correct the date of injury to May 5, 2016, and consolidate the claims.

In a June 21, 2017 statement from L.B., a coworker, confirmed that on or about May 5, 2016 appellant sustained an injury to his "(Left/Right)" shoulder pulling and pushing a lift from

under a vehicle. L.B. noted that the lift weighed from 175 to 200 pounds and that afterwards appellant had difficulties with regard to his “right/left shoulder.”

OWCP received duplicate copies of Dr. Dawson’s November 15, 2016 report and the September 27, 2016 FCE.

On November 29, 2017 appellant, through counsel, again requested reconsideration. He noted that a witness confirmed that appellant lifted a heavy piece of equipment at work, causing injury to his shoulders. Counsel explained that the employing establishment chose the date of injury as May 9, 2016, but that appellant was injured a few days earlier.

Counsel noted that OWCP did not acknowledge appellant’s request to change the date of injury, despite receipt of the witness statement, which was consistent with the opinion of Dr. Dawson.

By decision dated February 26, 2018, OWCP denied appellant’s request for reconsideration without reviewing the merits of his claim.

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: (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.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 a review on the merits.⁸

⁴ 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).

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); *see also C.C.*, Docket No. 18-0316 (issued March 14, 2019).

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).

Following the February 3, 2017 OWCP decision, counsel submitted a letter dated June 21, 2017, requesting that OWCP correct the date of injury to May 5, 2016, and consolidate the current claim with his prior left shoulder claim. He argued that the June 21, 2017 witness statement from L.B. confirmed that appellant was at work on May 5, 2016, when he pushed/pulled a lift from under a vehicle. On November 29, 2017 counsel repeated his arguments regarding the date of the injury and argued that the witness statement was consistent with Dr. Dawson's opinion. In its November 1, 2016 and February 3, 2017 decisions, OWCP accepted that the alleged incident occurred, but denied the claim because the evidence submitted was insufficient to establish causal relationship. Thus, the underlying issue in this case is whether appellant submitted medical evidence sufficient to establish causal relationship between the diagnosed medical conditions and the accepted employment incident. Causal relationship is a medical issue which must be addressed on reconsideration by relevant medical evidence not previously considered.⁹ Counsel's arguments regarding the date of injury therefore did not establish that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, the Board finds that appellant is not entitled to further 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).

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board further finds that appellant has not submitted such evidence in this case.¹⁰ In support of his reconsideration request, appellant submitted duplicate copies of Dr. Dawson's November 15, 2016 report and the September 27, 2016 FCE previously of record. The resubmission of these reports does not require the reopening of appellant's claim for review of the merits because OWCP had already considered them and determined that they were insufficient to establish appellant's traumatic injury claim. 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

The Board also finds that the June 21, 2017 witness statement from L.B. is insufficient to require reopening appellant's claim. The submission of this factual evidence does not require reopening of appellant's claim because this evidence is not relevant to the underlying issue which is whether appellant submitted medical evidence sufficient to establish causal relationship between a diagnosed medical condition and the accepted employment incident. The Board has held that the submission of evidence or argument which does not address the particular issue involved does

⁹ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

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 See *H.H.*, Docket No. 18-1660 (issued March 14, 2019).

not constitute a basis for reopening a case.¹² Consequently, the Board finds that appellant is not entitled to further review of the merits of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

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.

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: May 15, 2019
Washington, DC

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

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

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

¹² See *supra* note 9.