United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
	)	
and	)	**Docket No. 13-495**
	)	**Issued: December 24, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Wichita, KS, Employer	)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 2, 2013 appellant, through her attorney, filed a timely appeal of the November 23, 2012 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed since the most recent merit decision dated May 10, 2012 and the filing of this appeal on January 2, 2013, the Board lacks jurisdiction to review the merits of the claim pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This is the second appeal in the present case. In a September 9, 2002 decision, the Board affirmed OWCP decisions dated January 10 and November 13, 2000.[2] The Board found that OWCP met its burden of proof to terminate appellant's compensation benefits for the accepted conditions of mycobacterium cheloni with abscess formation of the left breast. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.[3]

On January 13, 2007 appellant claimed a recurrence of disability, alleging a November 1, 1999 recurrence of a left breast infection causing complex regional pain syndrome.

In a May 14, 2007 decision, OWCP denied her recurrence claim. Appellant requested an oral hearing and in May 21, 2008 and May 1, 2009 decisions, a hearing representative set aside decisions dated May 14, 2007 and September 11, 2008 and remanded the case for further medical development. In the course of developing the claim, OWCP referred appellant to a second opinion physician and also to an impartial medical examiner. It found a conflict between appellant's physician, Dr. Joel Hochman, a Board-certified psychiatrist, and an OWCP referral physician, Dr. Maria Armstrong-Murphy, regarding whether she had complex regional pain syndrome causally related to her work injury. OWCP referred appellant to Dr. Daniel A. Brzusek, a Board-certified physiatrist, to resolve the conflict.

Appellant submitted a December 8, 2009 report from Dr. Paul D. Raymond, a Board-certified family practitioner, who treated her for chronic pain associated with regional pain syndrome. He noted that he did not handle complex chronic pain management cases.

In a July 22, 2010 decision, OWCP denied appellant's claim to expand her accepted conditions to include complex regional pain syndrome and denied her recurrence of disability commencing on November 1, 1999. It found that the referee physician's report established that these conditions were not causally related to her work injury. Appellant requested an oral hearing which was held on December 7, 2010.[4] In a March 17, 2011 decision, the hearing representative set aside the July 22, 2010 decision and remanded the case for further medical development. The hearing representative instructed OWCP to obtain a supplemental report and diagnostic evaluation from the referee physician, Dr. Brzusek. It subsequently referred appellant to the referee physician for a supplemental report. In a November 17, 2011 report, Dr. Brzusek

[2] On September 25, 1991 appellant, a biological technician filed a claim for cold abscess formations on her left breast as a result of her work duties that involved cleaning test animal cages. She became aware of her condition on August 5, 1991. Appellant worked intermittently from August 6 to 27, 1991 and stopped completely on August 29, 1991. OWCP accepted her claim for microbacterium chelonic and cold abscess formation of the left breast. She was paid compensation. Appellant relocated to Alaska in 1996.

[3] Docket No. 01-653 (issued September 9, 2002).

[4] Appellant submitted a December 3, 2010 report from Dr. Forest Tennant, a Board-certified internist, who took over appellant's care after the death of Dr. Hochman. He diagnosed intractable pain secondary to neuropathies of the left breast, chest wall, shoulder and arm, central abnormal neuroplasticity and opioid dependence for therapeutic purposes. Dr. Tennant agreed that appellant fit the definition of complex regional pain syndrome, due to severe breast, shoulder and chest wall damage, and noted she was in intractable pain and required opioid therapy.

opined that the testing and evaluation was insufficient to establish that she had complex regional pain syndrome.

Appellant submitted a December 8, 2009 report from Dr. Hochman who noted that, due to the complexity of her case and her opioid use to contain pain, no physician in Alaska would care for her and she had to travel to Texas for treatment. He advised that she was being treated for complex regional pain syndrome and opioid dependency which was due to her accepted medical condition. Reports from Dr. Tennant, dated October 15, 2010 to March 19, 2012, noted treating her for intractable pain, reflex sympathetic dystrophy and chest wall neuropathy due to a breast infection.

In a May 10, 2012 decision, OWCP denied appellant's consequential injury claim and denied her recurrence of disability claim commencing on November 1, 1999.[5]

On August 29, 2012 appellant requested reconsideration of the May 10, 2012 decision. She asserted that OWCP failed to obtain answers to questions from the referee physician and contended that the referee physician's reports were deficient. Appellant indicated that the referee physician did not address her disability in his supplemental report. She asserted that Dr. Tennant's June 21, 2012 report supported her diagnoses of complex regional pain syndrome. Appellant indicated that a second opinion physician placed permanent work restrictions on her because of her physical condition and her opioid use. She asserted that there was no real conflict between Dr. Hochman and the second opinion physician as both agreed that she required restrictions due to her accepted work injuries. In an undated note, appellant reiterated that she was unable to find a physician to treat her pain and had to find a physician out of state. She requested reimbursement for her travel to Texas for treatment by Dr. Hochman. Appellant submitted a December 8, 2009 report from Dr. Hochman, a December 8, 2009 report from Dr. Raymond and a September 9, 2011 prescription note from a physician's assistant, all previously of record.

In a decision dated November 23, 2012, OWCP denied appellant's reconsideration request without reviewing the merits as she neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

Under section 8128(a) of FECA,[6] OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in

[5] In a May 11, 2012 decision, OWCP denied future authorization for narcotic therapy for complex regional pain syndrome. On July 20, 2012 appellant requested reconsideration from the May 11, 2012 decision. Appellant submitted a June 21, 2012 report from Dr. Tennant who opined that she had an opioid dependency due to prolonged treatment for her work-related conditions. Dr. Tennant noted that he was not prescribing opioids strictly because of complex regional pain syndrome but due to her intractable pain due to countless neuropathies. He disagreed with stopping opioid therapy and advised that suddenly stopping the treatment could result in death.

In a decision dated July 24, 2012, OWCP vacated the May 11, 2012 decision.

[6] 5 U.S.C. § 8128(a).

section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(1) Shows that [OWCP] erroneously applied or interpreted a specific point of law; or
>
> "(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]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.[8]

ANALYSIS

OWCP's May 10, 2012 merit decision denied appellant's claim for a consequential injury of complex regional pain syndrome and denied her recurrence of disability commencing on November 1, 1999. It denied her reconsideration request, without a merit review and she appealed this decision to the Board.

The issue presented is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her reconsideration request, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument.

In disagreeing with OWCP's decision, appellant asserted that OWCP did not obtain the answers to questions from the referee physician as instructed by the hearing representative and the referee physician's reports were deficient and the deficiencies were not cured in supplemental reports. Appellant further indicated that the referee physician did not address her disability in his supplemental report. She asserted that the June 21, 2012 report from Dr. Tennant supported her diagnosis of complex regional pain syndrome. Appellant further asserted that there was no real conflict between Dr. Hochman and the second opinion physician as both agreed that she required work restrictions due to her accepted industrial injuries. In an undated note, she advised that she was unable to find a local physician to treat her pain and sought treatment out of state. These arguments do not establish that OWCP erroneously applied or interpreted a specific point of law nor advance a new and relevant legal position. The underlying issue in this case is whether appellant's diagnosed condition of complex regional pain syndrome is causally related to the September 25, 1991 incident and whether she had a

[7] 20 C.F.R. § 10.606(b)(2).

[8] *Id*. at § 10.608(b).

recurrence of disability after November 1, 1999. The record indicates that the medical conflict involved whether appellant's complex regional pain syndrome related to the work injury and Dr. Brzusek adequately addressed this. These are medical issues which must be addressed by relevant medical evidence.[9]

Appellant submitted a December 8, 2009 report from Dr. Hochman, a December 8, 2009 report from Dr. Raymond and a September 9, 2011 prescription note from a physician's assistant.[10] However, these reports are duplicative of evidence previously submitted and were considered by OWCP in its decision dated July 22, 2010, October 11, 2011 and May 10, 2012 and found insufficient. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[11]

Appellant also asserted that Dr. Tennant's June 21, 2012 report supported her claim. This report was prepared with regard to whether OWCP should continue opioid therapy. The report supported continued opioid treatment and indicated that appellant had complex regional pain syndrome. However, Dr. Tennant did not specifically address whether complex regional pain syndrome was employment related and he also did not address whether appellant had recurrence of disability beginning November 1, 1999 causally related to her accepted conditions. Because he did not address the underlying points at issue, his report is not relevant. Furthermore, this report is essentially duplicative of his December 3, 2010 report with regard to his discussion of complex regional pain syndrome.

Therefore, the medical evidence submitted in support of the reconsideration request is insufficient to require OWCP to reopen the claim for a merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. 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.

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

[10] Evidence from a physician's assistant is of no probative medical value as the Board has held that physician's assistants and physical therapist are not competent to render a medical opinion under FECA. *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under the FECA); 5 U.S.C. § 8101(2) (this subsection defines a ''physician'' as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

[11] *See Daniel Deparini,* 44 ECAB 657 (1993); *Eugene F. Butler,* 36 ECAB 393, 398 (1984); *Bruce E. Martin,* 35 ECAB 1090, 1093-94 (1984).

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 24, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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