United States Department of Labor
Employees' Compensation Appeals Board

B.C., Appellant	)	
and	)	**Docket No. 13-128**
	)	**Issued: June 13, 2013**
DEPARTMENT OF THE NAVY, AIR SYSTEMS COMMAND, Patuxent River, MD, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 22, 2012 appellant filed a timely appeal from a May 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) and the June 6 and July 23, 2012 nonmerit decisions. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.[2]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a spinal subluxation due to his February 12, 2000 work injury; and (2) whether OWCP

[1] 5 U.S.C. §§ 8101-8193.

[2] On November 8, 2012 appellant also sought to appeal a July 19, 2011 merit decision of OWCP but this attempt to appeal was not filed within the requisite 180 days of that decision and therefore that OWCP decision is not currently within the Board's jurisdiction. *See* 20 C.F.R. §§ 501.2(c), 501.3.

properly denied appellant's requests for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

OWCP accepted that on February 12, 2000 appellant, then a 46-year-old systems accountant, sustained an aggravation of cervical stenosis with myelopathy when he fell, striking his back and the back of his head. He was attending a mandatory wellness activity while on temporary duty. Appellant stopped work on March 6, 2000 and was placed on the periodic disability rolls.

Appellant was seen in the emergency room on February 15, 2000 by Dr. Donovan Kendrick, a Board-certified neurosurgeon, who noted that appellant sustained a "significant stinger" involving his cervical spine and indicated that magnetic resonance imaging (MRI) scan testing showed profound spondylosis at multiple cervical spine levels with perhaps some evidence of signal abnormality.

Appellant underwent x-ray testing of his cervical spine on February 12, 2000. The findings showed that his vertebral bodies were in normal alignment and that there was moderate degenerative disc disease and spondylosis at C5-6 and C6-7. No fracture or subluxation was observed, the prevertebral soft tissues were normal and the neural foramina were patent. The impression portion of the findings indicated, "Degenerative change at C5-6 and C6-7. No acute fracture seen."

The findings of a February 12, 2000 MRI scan of appellant's cervical spine, showed degenerative disc disease and spondylosis throughout most of the cervical spine, from C3-4 through C6-7. There was disc space loss at all levels with associated endplate spurring both anteriorly and posteriorly. An associated broad-based posterior disc bulge was observed at C3-4, but there were no other disc bulges or protrusions. The impression portion of the findings stated:

> "There is underlying degenerative disc disease and spondylosis which creates spinal canal stenosis from C3-4 through C6-7 along with moderate to severe bilateral neural foraminal stenosis at these same levels. Small focal regions of signal abnormality within the adjacent spinal cord at these levels suggest some underlying myomalacia or spinal cord edema. No focal disc herniation identified."

In a March 6, 2000 report, Dr. Thomas B. Ducker, an attending Board-certified neurosurgeon, noted that MRI scan testing of appellant's cervical spine showed early degenerative changes between C3-4 and C6-7 with one level which was worse and "associated with diffuse congenital stenosis." On March 6, 2000 Dr. Michael Saloman, an attending Board-certified neurosurgeon, stated that the MRI scan testing obtained on February 12, 2000 did not show evidence of cervical disc herniation.

On March 29, 2000 Dr. Ducker performed cervical laminar decompression surgery at C3 through C7, cervical microplate reconstruction laminoplasty and local autograft for laminoplasty. The surgery was authorized by OWCP. Dr. Ducker listed preoperative diagnoses

of traumatic and congenital cervical spinous stenosis, cord compression and myelopathy. Cervical x-rays obtained by Dr. Ducker on March 31, 2000 showed wide laminotomy and supporting posterior metallic bands from C3 through C7. Dr. Ducker noted that overall alignment was appropriate at that time.

Appellant received treatment for his cervical problems from Dr. Daniel W. Alexander, an attending chiropractor. In numerous notes dated beginning in April 2000, Dr. Alexander detailed the findings of treatment sessions, including range of motion finding for the cervical spine.

In a June 19, 2000 report, Dr. David D. Weisher, an attending Board-certified neurologist, indicated that appellant reported an electrical sensation which radiated down the lateral and anterior aspects of his chest. He indicated that appellant's history and examination were consistent with post-traumatic Brown-Sequard Syndrome manifested by a right cervical cord lesion. On November 20, 2000 Dr. Weisher released appellant to work four to six hours per day with no pulling, pushing lifting more than 10 pounds and no forward flexion of her neck.

In January 2001, OWCP accepted that appellant sustained Brown-Sequard Syndrome and myelomalacia of his cervical spine due to his February 12, 2000 work injury.

The findings of March 23, 2001 x-rays of appellant's cervical spine showed that he was status post laminectomy from C3 through C7. There was no subluxation identified. On April 3, 2001 Dr. Ducker reviewed the findings of a recent computerized tomography (CT) scan of appellant's cervical spine and indicated that there was no new pathology present.

In a September 20, 2001 report, Dr. Alexander indicated that appellant had been seen in his office for severe neck pain with radiculopathy and expressed his concern that appellant would undergo further injury if he had to use his head in a flexion-type motion. The record contains numerous reports of Dr. Alexander's chiropractic sessions with appellant.

Appellant subsequently claimed that he sustained a spinal subluxation due to his February 12, 2000 work injury. He submitted several reports by attending chiropractors, but they did not provide an opinion that he sustained a spinal subluxation due to the February 12, 2000 injury as demonstrated by x-rays to exist. OWCP denied appellant's claim in merit decisions dated August 5 and December 6, 2011.

In an undated report received on February 28, 2012, Dr. Alexander noted that he had seen appellant in conjunction with Dr. Ducker. He stated:

> "In April 2000 [appellant] was noted to have subluxations at C2, T2-T3, increased neuromusculoskeletal disorders and a loss in cervical spinal range of motion due to past surgical effects. The findings were noted from [appellant's] symptoms, palpation and x-ray findings, which were reviewed with Dr. Ducker on April 25, 2000. To the best of my knowledge during that call we talked about the x-rays, surgery and no need for a neck brace."

In a May 11, 2012 decision, OWCP denied appellant's claim for a work-related spinal subluxation, noting that the submitted evidence did not clearly establish that a subluxation had been demonstrated by x-rays to exist. Dr. Alexander's report was deemed to be vague with respect to the x-rays he reviewed.

In a May 21, 2012 letter, appellant requested reconsideration. He argued that the Board's decision in *Christopher Smith*, Docket No. 95-2631 (issued February 18, 1998), was consistent with the facts in his case and asserted that he sustained a compensable spinal subluxation.

In a June 6, 2012 decision, OWCP denied appellant's request for merit review of his claim, noting that his argument did not have a reasonable color of validity.

On June 11, 2012 appellant requested reconsideration. He submitted a June 11, 2012 report from Dr. Thomas Sievert, an attending chiropractor, who provided the diagnoses of cervical disc degeneration, cervicobrachial syndrome and spasms. Dr. Sievert noted that appellant was totally disabled from work.

In a July 23, 2012 decision, OWCP denied appellant's request for further merit review of his claim, finding that the evidence was not relevant.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence.[4]

Under section 8101(2) of FECA, chiropractors are only considered physicians, and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-ray to exist.[5] OWCP's regulations at 20 C.F.R. § 10.5(bb) have defined subluxation as an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.[6]

[3] *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

[4] *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

[5] 5 U.S.C. § 8101(2). *See Jack B. Wood*, 40 ECAB 95, 109 (1988).

[6] 20 C.F.R. § 10.5(bb); *see also Bruce Chameroy*, 42 ECAB 121, 126 (1990).

ANALYSIS -- ISSUE 1

The Board finds that appellant has not submitted sufficient evidence to establish that he sustained a spinal subluxation as a result of his February 12, 2000 work injury. Appellant submitted reports from attending chiropractors, including those of Dr. Alexander. The Board notes that the reports of the chiropractors constitute medical evidence if they diagnosed a subluxation due to the February 12, 2000 injury as demonstrated by x-rays to exist.

In a February 23, 2012 report, Dr. Alexander stated that appellant had spinal subluxations, but he did not clearly identify the x-rays relied upon. It should be noted that cervical spine x-ray testing from February 12, 2000 did not appear to show a spinal subluxation. The findings showed that appellant's vertebral bodies were in normal alignment and that there was moderate degenerative disc disease and spondylosis at C5-6 and C6-7. No fracture or subluxation was observed, the parevertebral soft tissues were normal and the neural foramina were patent. The impression portion of the findings indicated, "Degenerative change at C5-6 and C6-7. No acute fracture seen." Moreover, Dr. Alexander made his diagnosis some 12 years after the injury accepted in this case.[7]

For these reasons, appellant has not submitted sufficient evidence to establish that he sustained a spinal subluxation as a result of his February 12, 2000 work injury. He may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[8] 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.[9] To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[10] 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.[11] The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record[12] and the submission of evidence or argument which does not address the particular issue involved does not

[7] *See Linda L. Mendenhall*, 41 ECAB 532 (1990).

[8] 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[9] 20 C.F.R. § 10.606(b)(2).

[10] *Id.* at § 10.607(a).

[11] *Id.* at § 10.608(b).

[12] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

constitute a basis for reopening a case.[13] While a 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.[14]

ANALYSIS -- ISSUE 2

OWCP issued its last merit decision on May 11, 2012. Appellant requested reconsideration of this decision in May and June 2012. In decisions dated June 6 and July 23, 2012, OWCP denied his requests for merit review.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2) which would require OWCP to reopen the case for review of the merits of the claim. In his applications for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He 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 connection with his May 2012 reconsideration request, appellant argued that the Board's decision in *Christopher Smith*, Docket No. 95-2631 (issued February 18, 1998), was consistent with the facts in his claim. In that case, however, the chiropractor forwarded x-rays he obtained within two weeks of the accepted injury. As noted, Dr. Alexander did not clearly identify the x-rays on which he relied. Appellant did not provide adequate support for this argument and it does not have a reasonable color of validity.

A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit such medical evidence in this case. In connection with his June 2012 reconsideration request, appellant submitted a June 11, 2012 report in which Dr. Sievert, an attending chiropractor, provided the diagnoses of cervical disc degeneration, cervicobrachial syndrome and spasms. Although this report is new, it is not relevant to the main issue of whether appellant established that he sustained a spinal subluxation on February 12, 2000. Dr. Sievert did not provide an opinion on this matter. Therefore, the report is not relevant medical evidence.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). He 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 appellant met his burden of proof to establish that he sustained a spinal subluxation due to his February 12, 2000 work injury. The Board further finds that

[13] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[14] *John F. Critz*, 44 ECAB 788, 794 (1993).

OWCP properly denied his requests for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 23, June 6 and May 11, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 13, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board