United States Department of Labor
Employees' Compensation Appeals Board

D.W., Appellant	)	
and	)	**Docket No. 16-1044**
	)	**Issued: October 20, 2016**
DEPARTMENT OF AGRICULTURE, INSPECTION OPERATIONS PROGRAM, Minneapolis, MN, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 22, 2016 appellant filed a timely appeal of a January 12, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated April 17, 2015, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

ISSUE

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

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 29, 2006 appellant, then a 45-year-old inspector, filed an occupational disease claim (Form CA-2) alleging that he experienced dry mouth, coughing, headaches, upset stomach, chest pain, chest tightness, as well as nose and throat irritation due to a sharp smell in the air while working. He indicated that the smell was unusual and it impacted his health.

In a report dated April 19, 2006, Dr. Tracy T. Phillips, an osteopath, indicated that appellant reported exposure to ozone gases at work. Appellant listed his symptoms as headaches, chest tightness, shortness of breath, and thickened saliva. Dr. Phillips reported that appellant's chest x-ray was normal and referred him to a pulmonologist.

Appellant's supervisor completed a March 14, 2006 statement and noted that appellant reported symptoms from exposure to high ozone levels at the employing establishment. He advised that the employing establishment previously had a problem with an automated chlorine system which resulted in a strong chlorine smell and eye burning for some employees. Both ozone and chlorine were used to reduce the pathogens present in the slaughter environment.

OWCP accepted his claim on May 25, 2006 for exposure to unspecified gas, fume, or vapor with a toxic effect and unspecified asthma with acute exacerbation. It authorized compensation benefits from March 15 through April 4, 2006.

Appellant was transferred to another employing establishment facility on July 9, 2006 and reported additional symptoms. OWCP authorized compensation benefits from October 2 through November 25, 2006.

In a report dated April 4, 2006, Dr. Ali Al-Nashif, a Board-certified sleep specialist, diagnosed reactive airway dysfunction syndrome and occupational asthma due to exposures to ozone gas at the employing establishment. He noted that appellant wore a mask to work which improved his symptoms. On September 7, 2006 Dr. Al-Nashif further diagnosed allergic rhinitis, mild obstructive pulmonary function test, and possible obstructive sleep apnea. In a note dated December 1, 2006, he diagnosed occupational asthma and noted that appellant's symptoms worsened after exposure to the workplace. Dr. Al-Nashif opined that appellant needed to work in an area without chemical exposure.

Appellant requested a transfer to a lower grade position of program support assistant at the employing establishment on March 5, 2007 which was granted effective that date. By decision dated June 11, 2007, OWCP found that the position of program support assistant fairly and reasonably represented appellant's wage-earning capacity and reduced his compensation based on his wage-earning capacity in this position.

Dr. Al-Nashif completed a report on January 23, 2012 and diagnosed bronchial asthma, obstructive sleep apnea, allergic rhinitis, and hypertension.

On September 10, 2013 appellant filed a claim for a schedule award (Form CA-7). In a letter dated September 18, 2013, OWCP requested that appellant provide additional medical

evidence addressing his permanent impairment in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment.*[2]

OWCP referred appellant's medical records and his request for a schedule award to the OWCP medical adviser on November 4, 2013. In a report dated November 10, 2013, an OWCP medical adviser requested pulmonary function studies to determine if appellant had any permanent impairment as a result of his accepted condition of asthma.

Dr. Al-Nashif completed a note following his April 12, 2013 examination of appellant in which he diagnosed occupational asthma. He reported that appellant's symptoms occurred at work after chemical exposure and that appellant's symptoms worsened in the workplace. Dr. Al-Nashif opined that appellant's workplace exposure caused a permanent condition and permanent restrictions from exposure to chemicals.

OWCP referred appellant for a second opinion examination with Dr. Robert Walter, a Board-certified pulmonologist, on June 6, 2014. Dr. Walter examined appellant on July 8, 2014 and noted his history of chemical exposure in the performance of duty. He found that appellant's nose was normal and that his mouth and throat exhibited prominent turbinate with somewhat boggy, blue mucosa. Dr. Walter found that appellant used normal effort in his pulmonary examination with no stridor, respiratory distress, wheezes, rales, or tenderness. He diagnosed occupational asthma and noted that appellant had exhibited bronchial hyperresponsiveness while working at the employing establishment since 2006. Dr. Walter opined that appellant's condition was permanent and had reached maximum medical improvement (MMI). He reported that appellant had continued symptoms of runny nose, nasal congestion, facial pressure, and wheezing or dyspnea. Dr. Walter reported that appellant used his short acting beta agnostic (SABA) inhaler twice a day and about one canister a month. Appellant explained that he awakened most nights with wheezing and was able to climb only one flight of stairs without resting. Dr. Walter noted that asthma severity was rated on a multidimensional scale, including physiology, clinical, and functional assessment. He found that appellant's asthma was not well-controlled and his impairment rating would be class 3, 28 percent, based on clinical perimeters. Dr. Walter reported that appellant's spirometry was normal, but that his prior monitoring suggested significant airflow variability. He provided appellant's pulmonary function testing. This demonstrated a forced expectory volume within 1 second (FEV_1) and forced vital capacity (FVC) ratio of 104 percent predicted which was normal, spirometry within normal limits, lung volumes within normal limits, and normal diffusing capacity.

OWCP's medical adviser reviewed the medical record as well as Dr. Walter's report on September 30, 2014 and determined that appellant had reached MMI. He reported that the record before OWCP did not support that appellant had been treated for pulmonary mediated symptoms since 2006. OWCP's medical adviser applied the A.M.A., *Guides*[3] to the pulmonary function test results and found no ratable impairment of either lung. He concluded that appellant's pulmonary conditions had resolved.

[2] A.M.A., *Guides*, 6th ed. (2009).

[3] A.M.A., *Guides* 90, Table 5-5, Criteria for Rating Permanent Impairment due to Asthma.

By decision dated September 30, 2014, OWCP denied appellant's claim for a schedule award as the evidence of record was insufficient to establish a ratable impairment to a scheduled member.

On October 30, 2014 appellant requested a review of the written record from OWCP's Branch of Hearings and Review. He argued that OWCP's medical adviser had improperly applied Table 5-4 Pulmonary Dysfunction,[4] rather than Table 5-5 of the A.M.A., *Guides*, which addresses impairments due to asthma. Appellant argued that he required medication to treat his condition and that he had frequent attacks as documented by Drs. Al-Nashif and Walter. In support of this request, he submitted notes dated June 19, 2007, November 2, 2010, and April 15, 2013 from Dr. Mohammad Zakiullah, a general practitioner, diagnosing bronchial asthma. These documents had not previously been in the record. Appellant also resubmitted Dr. Al-Nashif's January 23, 2012 note and a note dated April 12, 2013.

In a decision dated April 17, 2015, OWCP's hearing representative performed a review of the written record and affirmed OWCP's September 30, 2014 decision denying appellant's claim for a schedule award. She found that the weight of the medical evidence failed to establish a ratable pulmonary impairment for schedule award purposes.

Appellant requested reconsideration on June 1, 2015. He asserted that he had a class 3 impairment for 28 percent permanent impairment due to occupational asthma and that he required further medical treatment. Appellant resubmitted Dr. Walter's July 8, 2014 report. He also submitted additional medical records addressing his left ankle injury in 2014.

By decision dated August 24, 2015, OWCP declined to reopen appellant's claim for consideration of the merits finding that the evidence he submitted was repetitious or irrelevant.

Appellant again requested reconsideration on October 16, 2015. He provided his interpretation of Dr. Walter's second opinion report. Appellant resubmitted a July 8, 2014 and a new note dated May 29, 2015 from Dr. Walter. Dr. Walter reviewed OWCP's decision with appellant on May 29, 2015 and contended that normal spirometry did not exclude the diagnosis of asthma, contrary to OWCP's opinion. He also opined that OWCP used only a single dimension of the A.M.A., *Guides* rating scale to determine appellant's disability.

Dr. Walter also completed an October 13, 2015 report. He noted that asthma was characterized by an episodic increase in airflow obstruction, which could be fully normalized between exacerbations. Dr. Walter found that measuring asthma required multi-dimensional tools and that reliance on a single metric such as FEV_1 did not appropriately capture disease severity. He noted that the current A.M.A., *Guides* recognized that spirometry/FEV_1 was variable and depended on adequacy of therapy. Dr. Walter contended that FEV_1 could be entirely normal after a dose of short-activing beta agonist. He reported that the A.M.A., *Guides* provide for both bronchial hyper-responsiveness and FEV_1 in quantifying disease severity. Dr. Walter opined that a disability determination using solely FEV_1 would not comport with these standards. He noted that appellant had documented bronchial hyper-responsiveness evidenced by his serial pulmonary function tests and peak flow measures. Dr. Walter noted that

[4] A.M.A., *Guides* 88, Table 5-4.

the degree of appellant's bronchial hyper-responsiveness had not been quantified. He noted, "It is notable that he, at our last encounter, was on daily inhaled steroids as well as leukotriene inhibitors and was still using daily inhaled bronchodilators. This would suggest, using the A.M.A., *Guides*, at least a mild/moderate (*i.e.*, class 2 or 3) disability.

By decision dated January 12, 2016, OWCP declined to reopen appellant's claim for consideration of the merits. It found that Dr. Walter's notes were cumulative.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.[5] Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.[6] Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.[7] Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.[8]

It is well established that the requirement for reopening a claim for further merit review before OWCP does not require a claimant to submit all evidence necessary to discharge his burden of proof. Rather, the requirement for reopening a case specifies only that the evidence be relevant, pertinent, and not previously considered by OWCP. The presentation of such new evidence creates the necessity for review of the full case record in order to properly determine whether the newly submitted evidence warrants modification of an earlier decision.[9]

ANALYSIS

The Board finds that OWCP improperly declined to reopen appellant's claim for consideration of the merits.

[5] 5 U.S.C. §§ 8101-8193, 8128(a).

[6] 20 C.F.R. § 10.606(b)(3).

[7] *Id.* at § 10.608.

[8] *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

[9] *F.D. (S.D.)*, 58 ECAB 413 (2007).

In support of his October 16, 2015 reconsideration request, appellant submitted new reports dated May 29 and October 13, 2015 from OWCP's second opinion physician, Dr. Walter. In these reports, Dr. Walter provided further rationale in support of his opinion which disagreed with the application of the A.M.A., *Guides* by OWCP's medical adviser and he again specifically noted that appellant's permanent impairment based on asthma should not be evaluated solely on his FEV_1 and spirometry results and that the hearing representative had inaccurately characterized his opinion. He also further opined that appellant had class 2 or class 3 impairment under the A.M.A., *Guides*.[10] The Board finds that this report constitutes relevant and pertinent new evidence not previously considered by OWCP. Appellant's request for reconsideration met one of the standards for obtaining merit review of his case.[11] Accordingly, he is entitled to a merit review. The Board will, therefore, set aside OWCP's January 12, 2016 decision and remand the case for a *de novo* decision on appellant's claim for an additional schedule award.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for further review of the merits of his schedule award claim as he submitted relevant and pertinent new evidence not previously considered by OWCP.

[10] A.M.A., *Guides* 90, Table 5-5.

[11] *L.Y.*, Docket No. 15-1344 (issued March 10, 2016).

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 20, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board