

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

_____)	
T.M., Appellant)	
)	
and)	Docket No. 19-0535
)	Issued: July 25, 2019
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Long Beach, CA, Employer)	
_____)	

Appearances:
Sally F. LaMacchia, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 10, 2019 appellant, through counsel, filed a timely appeal from an October 23, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated October 26, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

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.

ISSUE

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

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 10, 1988 appellant, then a 49-year-old staff nurse, filed a traumatic injury claim (Form CA-1) alleging that on May 8, 1988 she suffered low back pain while turning a patient in bed. She stopped work and with the exception of one day in October 1989, she has not worked since that time. OWCP initially accepted the claim for low back strain. On June 30, 1989 it terminated appellant's wage-loss compensation and medical benefits as she was no longer disabled due to the accepted low back strain.

Following a March 26, 1990 reconsideration request, OWCP referred appellant to Dr. David Geddes, a Board-certified psychiatrist, for a second opinion evaluation. Based on Dr. Geddes' July 20, 1990 report, on August 23, 1990 it accepted psychiatric factors affecting appellant's physical condition, with dysthymia. Appellant was placed on the periodic compensation rolls effective August 26, 1990.

OWCP continued to develop the claim and, based on a July 3, 2008 second opinion evaluation performed by Dr. E. Richard Dorsey, a Board-certified psychiatrist, on April 3, 2009 it reduced appellant's compensation based on her ability to earn wages as a medical assistant. Appellant requested reconsideration and, by decisions dated July 15, 2009 and September 2, 2010, OWCP denied modification of its April 3, 2009 decision. She filed an appeal with the Board and, by decision dated October 7, 2011, the Board reversed these decisions, finding that OWCP had not established that appellant's wage-earning capacity was represented by the constructed position of medical assistant.³

On April 26, 2013 OWCP referred appellant to Dr. Steven M. Ma, a Board-certified orthopedic surgeon, and Dr. Ana M. Andia, a Board-certified psychiatrist for second opinion evaluations.

In a May 15, 2013 report, Dr. Ma determined that appellant had no objective residuals from her 1988 employment injury, and that her physical limitations were due to multiple nonwork-related conditions. He opined that appellant could be gainfully employed at her usual employment duties.

² Docket No. 92-1678 (issued June 17, 1993), Docket No. 11-0078 (issued October 7, 2011) and Docket No. 16-1033 (issued June 22, 2017).

³ Docket No. 11-0078, *id.*

In a May 23, 2013 report, Dr. Andia indicated that, while appellant's initial onset of depression appeared to be due to the low back injury, her current depressive symptoms had not been aggravated by her low back pain, but were caused by multiple stressors that she had encountered since her back injury. She listed a number of stressors and opined that appellant had a dysthymic disorder, which was currently caused by multiple nonwork-related aggravating stressors, and that she also had nonadaptive personality traits. Dr. Andia advised that appellant was not likely to improve, and could not return to work as a nurse due to her age and that her personality disorders were a result of nature and nurture and not related to employment factors.

By decision dated October 8, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits, effective October 20, 2013. It determined that the weight of the medical evidence, represented by the opinions of Dr. Ma and Dr. Andia, established that she no longer had residuals or disability due to her accepted employment-related conditions. By decision dated September 10, 2014, a hearing representative with OWCP's Branch of Hearings and Review affirmed the October 8, 2013 decision.⁴

Following an October 1, 2014 reconsideration request, by decision dated February 13, 2015, OWCP denied modification of its prior decision. Appellant, through counsel, again requested reconsideration on November 26, 2015. By decision dated February 24, 2016, OWCP again denied modification.

Appellant appealed to the Board on April 20, 2016. By decision dated June 22, 2017, the Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective October 20, 2013 and that appellant had not established continuing residuals or disability on or after that date.⁵

Subsequent to the Board's June 22, 2017 decision, on July 28, 2017 appellant, through counsel, requested reconsideration. She asserted that a conflict in medical opinion had been created between appellant's attending psychiatrist and second opinion psychiatrist Dr. Andia, and maintained that appellant should be referred for an independent medical evaluation.

By decision dated October 26, 2017, OWCP denied modification of the Board's June 22, 2017 decision.

On July 30, 2018 appellant, through counsel, again requested reconsideration. She asserted that OWCP committed reversible error when it terminated benefits in 2013 based on a 2009 medical opinion that was appropriated by Dr. Andia in 2013.

By decision dated October 23, 2018, OWCP denied appellant's request for reconsideration, finding that the arguments raised were cumulative and repetitive and she did not submit new and relevant evidence.

⁴ Appellant had timely requested a hearing on October 31, 2013. A hearing was held on July 10, 2014.

⁵ Docket No. 16-1033, *supra* note 2.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.⁶ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁷ 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.⁸

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.⁹ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS

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).

Counsel's assertions on reconsideration regarding the reliability of Dr. Andia's opinion are duplicative of arguments made in the past, to both OWCP and the Board. 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 Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.607.

⁸ *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). Chapter 2.1602.4b

⁹ 20 C.F.R. § 10.606(b)(3); *see J.B.*, Docket No. 18-1531 (issued April 11, 2019).

¹⁰ *Id.* at § 10.608.

¹¹ *J.B.*, *supra* note 9.

Furthermore, appellant submitted no new evidence in support of her request for reconsideration.¹² Thus, she is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).¹³

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 her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹² *Id.*

¹³ *H.H.*, Docket No. 18-1660 (issued March 14, 2019).