

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

_____)
J.J., Appellant)

and)

DEPARTMENT OF THE AIR FORCE, ROBINS)
AIR FORCE BASE, Warner Robins, GA,)
Employer)
_____)

Docket No. 21-0262
Issued: December 8, 2021

Appearances:

*Paul H. Felser, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 16, 2020 appellant, through counsel, filed a timely appeal from July 29 and September 9, 2020 nonmerit decisions of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated August 20, 2019, to the filing of 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 to review 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's May 22 and August 4, 2020 requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 28, 1997 appellant, then a 31-year-old sheet metal mechanic, filed a traumatic injury claim (Form CA-1) alleging that on July 22, 1997 he sustained neck pain as a result of using a hammer to install rivets while in the performance of duty. OWCP initially accepted that he sustained displacement of the cervical intervertebral disc at the C5-C6 level, intervertebral disc disorder of the cervical region with myelopathy, and neck sprain, and later expanded acceptance of the claim to include a single episode of major depressive disorder and adjustment disorder as consequential injuries to his accepted cervical spine injuries. Appellant stopped work on September 24, 1998 and did not return. OWCP paid him wage-loss compensation on the periodic rolls beginning September 13, 1998. On November 18, 2009 appellant underwent an OWCP-authorized fusion of the cervical spine with allograft and plating.

In a report dated January 19, 2014, Dr. Thomas H. Sachy, a Board-certified psychiatrist serving as an impartial medical examiner, opined that appellant could not return to his prior position as a sheet metal mechanic, and that he probably could not return to any other position. Dr. Sachy noted that, if appellant agreed to vocational rehabilitation, it could be cautiously attempted, but that his prognosis for returning to any kind of meaningful work was poor.

In a report dated November 8, 2017, Dr. Samuel I. Samuel, a Board-certified psychiatrist and OWCP's second opinion examiner, opined that with regard to appellant's accepted psychiatric conditions, he did not have residuals and could return to his date-of-injury position.

In a report dated March 5, 2018, Dr. Harry J. Lenaburg, Jr., a physician Board-certified in physical medicine and rehabilitation serving as OWCP's second opinion examiner opined, with regard to appellant's cervical conditions, that appellant still had residuals and was unable to perform the physical requirements of his date-of-injury position. He recommended sedentary work with restrictions for four hours per day. Dr. Lenaburg diagnosed postlaminectomy syndrome and opined that appellant could participate in vocational rehabilitation.

On May 3, 2018 OWCP further expanded the acceptance of appellant's claim to include postlaminectomy syndrome.

On May 22, 2018 OWCP referred appellant's case for vocational rehabilitation services. A rehabilitation counselor noted in a letter to appellant dated June 13, 2018 that attempts to reach appellant by telephone had been unsuccessful. The counselor provided a telephone number, meeting times, and meeting places and requested that appellant respond.

By decision dated August 9, 2018, OWCP terminated appellant's entitlement to medical benefits effective August 10, 2018 for the conditions of major depression, adjustment disorder, displacement intervertebral disc with myelopathy (cervical region), intervertebral disc disorder with myelopathy (cervical region) and neck sprain. It found that based on the reports of Dr. Samuel and Dr. Lenaburg he no longer had residuals of these accepted conditions. OWCP

noted that appellant's case would remain open for treatment of cervical postlaminectomy syndrome.³

On November 13, 2018 OWCP again referred appellant's case for vocational rehabilitation services. A rehabilitation counselor noted in a letter to appellant dated April 1, 2019 that attempts to reach him by telephone had been unsuccessful. The counselor provided a telephone number and requested that appellant respond. The rehabilitation counselor provided another notice on April 19, 2019 and again provided a telephone number, requesting that appellant respond.

In a letter dated July 1, 2019, OWCP notified appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation without good cause. It noted that Dr. Lenaburg had indicated that appellant had the ability to obtain employment working four hours per day with a lifting restriction at the sedentary level. OWCP afforded appellant 30 days to contact OWCP and his rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort designed to return him to gainful employment. It informed him that, if he believed that he had a good reason for not participating in the rehabilitation effort, he should respond within 30 days, with reasons for noncompliance, and submit evidence in support of his position. OWCP noted that, if he did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

In a letter dated July 30, 2019, appellant explained to OWCP that he was unable to participate in vocational rehabilitation services as he had been extremely depressed and that his mental and emotional state was unstable.

By decision dated August 20, 2019, OWCP reduced appellant's compensation to zero, effective November 10, 2019, pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, for his failure to cooperate with vocational rehabilitation without good cause. It found that as he provided no medical documentation to substantiate his professed inability to participate in vocational rehabilitation, he had not shown good cause for his noncompliance.

On September 20, 2019 appellant requested reconsideration of OWCP's August 20, 2019 decision. In an attached statement, he contended that his mental and emotional instability was exacerbated by recent events and that it represented a relapse of recurrent depression.

By decision dated November 21, 2019, OWCP denied appellant's request for reconsideration.

By letter dated December 16, 2019, appellant, through counsel, noted that OWCP had reduced appellant's compensation to zero based on his inability to fully cooperate with vocational rehabilitation, but that Dr. Lenaburg had reported that appellant was only capable of four hours of work per day. Counsel requested that appellant's wage-earning capacity be modified to reflect the restrictions of Dr. Lenaburg.

On May 22, 2020 appellant, through counsel, requested reconsideration of OWCP's August 20, 2019 decision. Counsel again noted that OWCP had reduced appellant's compensation

³ OWCP continued to pay appellant wage-loss compensation on the periodic rolls through August 17, 2019 and on the supplemental rolls from August 18 through 20, 2019.

to zero based on his inability to fully cooperate with vocational rehabilitation, but that Dr. Lenaburg had reported that appellant was only capable of four hours of work per day. Counsel requested that appellant's wage-earning capacity be modified to reflect the restrictions of Dr. Lenaburg. Counsel explained that appellant's inability to fully cooperate with vocational rehabilitation was due to his substantial disabling emotional condition and a degenerative brain condition. He contended that Dr. Samuel had not fully reviewed the medical record in offering his opinion as to appellant's work capability. Counsel further contended that Dr. Samuel's opinion was a year old at the time of referral for vocational rehabilitation services and that current medical evidence must be used to establish that any positions identified for appellant were suitable. He argued that the statement of accepted facts (SOAF) provided to Dr. Samuel was deficient.

By decision dated July 29, 2020, OWCP denied appellant's request for reconsideration.

On August 4, 2020 appellant, through counsel, again requested reconsideration of OWCP's August 20, 2019 decision.

By decision dated September 9, 2020, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the

⁴ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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 *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

The Board finds that OWCP properly denied appellant's May 22 and August 4, 2020 requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant filed timely requests for reconsideration of an August 20, 2019 OWCP decision reducing his compensation to zero, for his failure to cooperate with vocational rehabilitation without good cause.

With regard to appellant's May 22, 2020 reconsideration request, counsel argued that appellant's wage-earning capacity should be modified to reflect the work restrictions provided by Dr. Lenaburg. He further alleged that appellant's inability to fully cooperate with vocational rehabilitation was due to his substantial disabling emotional condition and a degenerative brain condition. Counsel also contended that Dr. Samuel had not fully reviewed the medical record in offering his opinion regarding appellant's work capacity; that Dr. Samuel's opinion was a year old at the time of referral for vocational rehabilitation services and that current medical evidence must be used to establish that any positions identified for appellant were suitable; and that the SOAF provided to Dr. Samuel was deficient. The underlying issue in this case is whether or not appellant, without good cause, had failed to cooperate with vocational rehabilitation under 5 U.S.C. § 8113(b). As counsel's arguments do not address the underlying issue of whether appellant was medically unable to participate in vocational rehabilitation, they are insufficient to warrant merit review.⁹ With regard to appellant's August 4, 2020 reconsideration request, counsel did not proffer an argument. Accordingly, appellant has not established a basis for further merit review under the first and second above-noted requirements of 20 C.F.R. § 10.606(b)(3) in his May 22, and August 4, 2020 requests for reconsideration.

Appellant did not submit any medical evidence in connection with his May 22 and August 4, 2020 reconsideration requests. Therefore, the Board finds that he also failed to satisfy the third requirement under 20 C.F.R. § 10.606(b)(3).

As appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) with respect to his May 22 and August 4, 2020 reconsideration requests, pursuant to 20 C.F.R. § 10.608, the Board finds that OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's May 22 and August 4, 2020 requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁸ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *See K.C.*, Docket No. 14-1798 (issued July 2, 2015).

ORDER

IT IS HEREBY ORDERED THAT the September 9 and July 29, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 8, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board