

ISSUE

The issue whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 18, 2008 appellant, then a 33-year-old wildlife specialist, filed a traumatic injury claim alleging that he injured his lower back on September 27, 2007 while setting an explosive charge to remove a dam.

In support of his claim, appellant submitted an undated attending physician's report from Dr. John T. Burch, a treating Board-certified orthopedic surgeon, who diagnosed probable left herniated nucleus pulposus and checked "yes" as being employment related. Dr. Burch related that appellant's work duties entailed heavy lifting, stooping and bending.

In a letter dated May 14, 2008, OWCP informed appellant that the evidence of record was insufficient to support his claim. It advised him as to the medical and factual evidence necessary to support his claim.

In response, appellant submitted an undated attending physician's report (Form CA-20) from Dr. John G. Erskine, a treating chiropractor, who diagnosed lumbar disc syndrome and checked "yes" to the question of whether appellant's work caused or aggravated the diagnosed condition.

By decision dated June 20, 2008, OWCP denied appellant's claim on the grounds that he failed to establish that he sustained an injury. The medical evidence was found insufficient to establish causal relation.

Subsequently, OWCP received a February 28, 2008 magnetic resonance imaging (MRI) scan which diagnosed a right central disc extrusion at L5-S1 with impingement and displacement on the right S1 nerve root. It also received a June 12, 2008 report from Dr. Erskine diagnosing lumbar disc syndrome due to setting a charge in a hole for blasting.

On July 22, 2008³ appellant requested an oral hearing before an OWCP hearing representative.

In a March 5, 2008 report, Dr. Burch diagnosed a grade 3 L5-S1 herniation. In a July 22, 2008 Form CA-20, he diagnosed left herniated nucleus pulposus. Dr. Burch checked "yes" that the condition was employment related with a supporting notation that appellant's work duties entailed heavy lifting, stooping and bending.

By decision dated August 26, 2008, OWCP denied his request for an oral hearing as appellant failed to file his request within 30 days of the June 20, 2008 decision.

³ This was based on the date of the postmark on the attached envelope.

On June 15, 2009 appellant requested reconsideration. He contended that he had unjustly been denied benefits as he had submitted the necessary medical evidence.

By merit decision dated June 30, 2009, OWCP found the evidence supported the September 27, 2007 incident at work but found the medical evidence was insufficient to establish that he sustained a back condition causally related to the accepted incident.

On June 17, 2010 appellant requested reconsideration. He contended that the medical evidence was clear that he sustained an injury due to his work duties. Appellant stated that Dr. Burch correctly noted that his injury was due to his work duties of heavy lifting, stooping and bending, which occurred on the day his disc ruptured while setting explosives to blast a beaver dam.

By decision dated June 28, 2010, OWCP denied appellant's request for reconsideration of the merits. It found he did not submit new evidence or legal argument sufficient to warrant a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that 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.⁵ 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.⁶ 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.⁷

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁸ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

⁴ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁵ 20 C.F.R. § 10.606(b)(2). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁶ 20 C.F.R. § 10.607(a). See *Robert G. Burns*, 57 ECAB 657 (2006); *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

⁷ 20 C.F.R. § 10.608(b). See *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

⁸ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

⁹ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

ANALYSIS

In a decision of June 20, 2008, OWCP initially denied appellant's claim on grounds that he failed to establish fact of injury. Appellant requested reconsideration. In a June 30, 2009 merit decision, OWCP denied the claim. It found that the September 27, 2007 incident occurred at work but there was insufficient medical evidence establishing that the diagnosed back condition was causally related to the September 27, 2007 employment incident. Appellant requested reconsideration of the June 30, 2009 decision on June 17, 2010.

As noted, the Board does not have jurisdiction over the June 30, 2009 merit decision. The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), to require OWCP to reopen his case for a review of the merits. In his June 17, 2010 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify any point of law or submit evidence to show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He contended only that he had previously submitted medical evidence sufficient to establish that his back condition was causally related to the September 27, 2007 employment incident. Appellant submitted no new medical evidence in support of his request. The underlying issue in this case was whether appellant's disc herniation was causally related to the September 27, 2007 employment incident while setting an explosive charge to remove a dam. That is a medical issue which must be addressed by probative medical opinion evidence.¹⁰ A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant's contentions regarding the evidence of record does not require further merit review.

The Board 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 constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

¹⁰ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 28, 2010 is affirmed.

Issued: September 19, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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