

ISSUE

The issue is whether OWCP properly denied reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 13, 2010 appellant, then a 63-year-old carpenter, filed a traumatic injury claim (Form CA-1) claiming that, on May 12, 2010, he sustained a lumbar strain when his ankle gave way as he loaded a ladder into a truck. He stopped work on May 12, 2010.

In a June 16, 2010 letter, OWCP advised appellant of the evidence needed to establish his claim, including a report from his attending physician explaining how and why the May 12, 2010 workplace incident caused the claimed back injury. It afforded him 30 days to submit such evidence.

Appellant submitted medical reports from Dr. Sam V. Sydney, an attending Board-certified orthopedic surgeon. On May 17, 2010 Dr. Sydney noted that appellant was scheduled for surgical exploration of the right Achilles tendon. He related appellant's account of lumbar spasms at work while "bending and loading tools on a ladder." Dr. Sydney diagnosed a possible acute exacerbation of degenerative lumbar disc disease.³ He released appellant to light duty as of July 6, 2010. In July 1, 2010 reports, Dr. Sydney noted that appellant was recovering from surgery on his Achilles tendon. He diagnosed lumbar arthralgia.

By decision dated July 30, 2010, OWCP denied appellant's claim finding that fact of injury was not established. It found that appellant and Dr. Sydney described divergent mechanisms of injury, and that it was unclear if the claimed back injury was due to a nonoccupational ankle condition.

In an August 11, 2010 letter, appellant requested a review of the written record. He explained that on May 12, 2010 he stepped in a small depression while loading a ladder into a pickup truck, causing him to lose his balance and strain his back. Appellant asserted that preexisting tendinitis of the Achilles tendon did not affect his stability. He submitted an August 12, 2010 note from Dr. Sydney stating that he treated appellant on May 17, 2010 for an occupational back injury.

By decision dated and finalized November 18, 2010, an OWCP hearing representative affirmed the July 30, 2010 decision, as modified. The hearing representative found that, while appellant had established that the May 12, 2010 incident occurred at the time, place and in the manner alleged, he did not submit sufficient medical evidence to establish a causal relationship between that incident and the claimed back condition.

In three December 17, 2010 letters, appellant requested a review of the written record, reconsideration and an appeal before the Board. He submitted the three letters by telefacsimile

³ Appellant submitted an August 29, 2008 lumbar magnetic resonance imaging (MRI) scan report noting a possible subtle disc protrusion at L4-5, an L5-S1 anterolisthesis, spondylitic changes from T12-S1 and mild scoliosis.

to OWCP but addressed the cover sheet to “Department of Labor, Appeals Board.”⁴ In a March 26, 2011 letter, appellant requested reconsideration before OWCP. He submitted additional evidence.

In a December 9, 2010 report, Dr. Sydney noted treating appellant for Achilles tendinitis of the right ankle that resolved prior to the May 12, 2010 incident. He related appellant’s account of twisting his back on May 12, 2010 while loading a ladder onto a truck. Appellant presented on May 17, 2010 with low back pain.

Appellant also submitted an unsigned first page of a report from Dr. Sydney dated December 17, 2010. In an April 19, 2011 letter, OWCP asked appellant to explain whether Dr. Sydney’s December 17, 2010 report consisted of more than the one page then of record. It advised him to submit the complete report. Appellant did not respond to OWCP’s request prior to July 27, 2011.

By decision dated May 24, 2011, OWCP denied reconsideration on the grounds that the evidence submitted was irrelevant to the critical issue of causal relationship. It found that the medical evidence submitted on reconsideration did not “include a discussion, with medical rationale, on whether the diagnosed back conditions were caused or aggravated by the May 12, 2010 work injury.”

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show 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.⁶ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁷

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁸ They need only submit relevant, pertinent evidence not previously considered by OWCP.⁹ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether

⁴ On March 10, 2011 OWCP noted that appellant had called asking about the status of his hearing request. It also noted that it would contact him as he simultaneously exercised several appeal rights.

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁸ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁹ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁰

ANALYSIS

OWCP issued a July 30, 2010 decision denying appellant's traumatic injury claim on the grounds that fact of injury was not established. It issued a November 18, 2010 decision modifying its prior determination, finding that he had established a May 12, 2010 workplace incident as factual but not that it caused the claimed back injury. Appellant requested reconsideration on March 10, 2011 and submitted additional evidence. By July 27, 2011 decision, OWCP denied reconsideration as the evidence submitted was cumulative and repetitious.

In support of his March 10, 2011 request for reconsideration, appellant submitted a December 9, 2010 report from Dr. Sydney, an attending Board-certified orthopedic surgeon, reiterating elements of his May 17, 2010 report and appellant's account of the May 12, 2010 workplace incident. Cumulative and repetitive evidence is insufficient to warrant reopening a claim for further merit review.¹¹

Appellant also submitted an unsigned fragment of a December 17, 2010 report from Dr. Sydney. He did not respond to OWCP's April 19, 2011 request to submit the complete report. The Board finds that the unsigned report fragment does not constitute medical evidence.¹² As the critical issue at the time of the last merit decision was the medical issue of causal relationship, the report fragment is also irrelevant to the claim and insufficient to warrant a review on its merits.¹³

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 evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that he consulted a new physician as Dr. Sydney could not provide the reports necessary to establish his claim. The Board notes, however, that it only has jurisdiction over whether OWCP properly denied a merit review of the claim. As explained, appellant did not submit any evidence or argument in support of his reconsideration request that warrants reopening of his claim for a merit review under 20 C.F.R. § 10.606(b)(2).

¹⁰ *Annette Louise*, 54 ECAB 783 (2003).

¹¹ *A.R.*, Docket No. 11-1358 (issued January 3, 2012). See *L.H.*, 59 ECAB 253 (2007).

¹² *Merton J. Sills*, 39 ECAB 572 (1988).

¹³ *A.R.*, *supra* note 11.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 24, 2011 is affirmed.

Issued: March 14, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board