

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 27, 2011 appellant, then a 48-year-old nursing assistant, filed a traumatic injury claim alleging that on May 20, 2011 he injured his lower back while restraining a patient who was aggressive and out of control. No evidence was submitted with the claim.

In a June 1, 2011 letter, OWCP advised appellant of the deficiencies in his claim and requested that additional factual and medical evidence be submitted within 30 days. This included a report from a qualified physician which contained a well-rationalized opinion as to how the reported work incident caused or aggravated a medical condition. Appellant was advised that nurse practitioners and physician assistants were not considered qualified physicians under FECA unless the report was countersigned by a physician.

In response to the development letter, OWCP received May 20, 2011 emergency room notes from Patricia Stanford, a nurse practitioner, Tracey M. McHugh, a nurse, and Richard Butz, a physicians' assistant, diagnosing back pain.

In May 25, 2011 medical notes and memorandum cosigned by Dr. Warren M. Wallis, a clinical psychologist, Mr. Butz stated that appellant presented to the clinic for hyperglycemia. He noted that appellant was seen in the emergency room for the May 20, 2011 work injury and that when appellant was seen by occupational health this morning, appellant had an elevated glucose level and was requested to return to primary care clinic. It was also noted that appellant was under stress due to a recent robbery and his son being mugged. Mr. Butz assessed low back pain and provided a note excusing appellant from work until May 27, 2011. He also noted that appellant's history was consistent with post-traumatic stress disorder, diabetes and obesity. No opinion on causal relationship was provided.

By decision dated July 13, 2011, OWCP denied the claim on the grounds the medical evidence did not establish that the work event caused an injury.

On September 27, 2011 appellant requested reconsideration. He submitted a September 12, 2011 statement in which he described the event of May 20, 2011 and the medical care he received. In support of his claim, appellant submitted a witness statement from Edward Maloney, associate chief nurse, attesting to the events of May 20, 2011; a September 14, 2011 note from Mr. Butz³; and a duplicative copy of the May 20, 2011 emergency room notes from Ms. McHugh and Ms. Stanford.

By decision dated December 29, 2011, OWCP denied appellant's reconsideration request on the grounds that his request was insufficient to warrant a review of its prior decision. It further noted that a limited review of the prior decision was not in error.

³ Illegible handwriting appears underneath Mr. Butz's signature.

On appeal, appellant contends that he had submitted medical evidence by a qualified physician. Specifically, he stated that the May 25, 2011 note was cosigned by Dr. Wallis, a clinical psychologist, and the September 14, 2011 note was cosigned by Dr. Douglas Durrett.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by 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.⁴ Section 10.608(b) of OWCP's regulations provides that when an application for reconsideration 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.⁵ The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁶

ANALYSIS

On September 27, 2011 appellant requested reconsideration of OWCP's July 13, 2011 decision which denied his claim on the grounds that the medical evidence was insufficient to establish causal relationship. His request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a relevant legal argument not previously considered by OWCP. He is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Appellant also did not submit relevant and pertinent new evidence not previously considered by OWCP. In support of his claim, he submitted a witness statement from Mr. Maloney attesting to the events of May 20, 2011. It was accepted that the incident occurred as alleged; thus, this evidence is not relevant to the underlying issue of whether the medical component of fact of injury was established. Appellant also submitted a new note dated September 14, 2011 from Mr. Butz and a duplicative copy of the May 20, 2011 emergency room notes signed by nurses. Notes from nurses and physician assistants are of no probative value as nurses and physician assistants are not considered to be physicians within the meaning of FECA; thus, this evidence is not sufficient to warrant merit review.⁷ Furthermore, the May 20, 2011 emergency room notes have been previously reviewed by OWCP. As the May 20, 2011 emergency room notes repeat evidence already in the case record, they are duplicative and do not

⁴ 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141 (2007).

⁵ *Id.* at § 10.608(b); *K.H.*, 59 ECAB 495 (2008).

⁶ *See Daniel Deparini*, 44 ECAB 657 (1993).

⁷ *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

constitute relevant and pertinent new evidence. Therefore, appellant has not established a basis for reopening his case.⁸

The evidence submitted by appellant on reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law; advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered by OWCP. As appellant did not meet any of the necessary regulatory requirements, the Board finds that he is not entitled to further merit review.⁹

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant asserts that the medical evidence, in particular the May 25, 2011 note and the September 14, 2011 note, were signed by qualified physicians. Regarding the September 14, 2011 note, the writing below Mr. Butz's signature is illegible. The Board has held that a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2) and reports lacking proper identification do not constitute probative medical evidence.¹⁰ As the writing below Mr. Butz's signature is illegible, this note is not relevant to the underlying medical issue as the note lacks proper identification. The May 25, 2011 note from Mr. Butz was cosigned by Dr. Wallis, a clinical psychologist, but this report was previously considered by OWCP and, thus, is not a basis for reopening the claim.¹¹ The Board only has jurisdiction over whether OWCP properly denied merit review of the claim. Appellant did not submit any evidence or argument in support of his reconsideration request that warrants a reopening of his claim for merit review under 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁸ See *D.K.*, 59 ECAB 141 (2007).

⁹ *M.E.*, 58 ECAB 694 (2007) (when an application for reconsideration 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).

¹⁰ *C.B.*, Docket No. 09-2027 (issued May 12, 2010).

¹¹ See *supra* note 6.

ORDER

IT IS HEREBY ORDERED THAT the December 29, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 27, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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