

ISSUE

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

On appeal appellant contended that OWCP erred in relying on the opinion of the impartial medical examiner in terminating his benefits.

FACTUAL HISTORY

This case has previously been before the Board. In the prior appeal, the Board affirmed a July 3, 2008 OWCP hearing representative's decision finding an overpayment of compensation and denying waiver of the recovery of the overpayment.³ The Board reversed OWCP's April 10, 2008 decision which denied reconsideration of a February 2, 2007 decision terminating monetary benefits pursuant to 5 U.S.C. § 8106(c). The Board noted that on June 9, 2004 OWCP referred appellant to Dr. Mary Reif, a Board-certified neurologist, to resolve the conflict in the medical opinion evidence between Dr. David Hagie, a treating osteopath, and Dr. Stephen C. Zinsmeister, a second opinion Board-certified psychiatrist and neurologist, on the issues of whether appellant was capable of performing sedentary work for eight hours per day and whether his current condition was employment related and totally disabling. On July 8, 2004 Dr. Reif concluded that appellant was capable of working an eight-hour day with restrictions. The Board found that OWCP improperly relied upon the July 8, 2004 opinion of Dr. Reif, as it was not current. The facts and the circumstances of the Board's prior decision is incorporated by reference.

On September 29, 1994 appellant, then a 48-year-old seasonal motor vehicle operator, filed a traumatic injury claim alleging that on that date he strained his lower back and skinned his left jaw while in the performance of duty. OWCP accepted the claim for left jaw contusion and low back strain, which was subsequently expanded to include postconcussion syndrome, aggravation of preexisting migraines and suboccipital neuralgia. Appellant stopped work on September 29, 1994 and was placed on the periodic rolls for temporary total disability by letter dated March 19, 2002.

On remand, OWCP on March 18, 2010, referred appellant to Dr. Richard B. Rosenbaum, a Board-certified neurologist and internist, to resolve the conflict in the medical opinion. In an April 27, 2010 report, Dr. Rosenbaum, based upon a review of the medical evidence, statement of accepted facts, list of questions and physical examination, diagnosed facial contusion, low back strain, postconcussion syndrome and probable cervical strain due to the September 29, 1994 employment injury, preexisting migraine headaches, lumbar degenerative disc disease with progressive spondylolisthesis at L4-5; dizziness, cognitive concerns and mild peripheral sensory neuropathy. He concluded that the conditions of left jaw contusion, postconcussive syndrome, lower back strain and suboccipital neuralgia had resolved. Dr. Rosenbaum opined that appellant's preexisting headaches had been permanently aggravated by the 1994 employment injury based on the increase in headaches since the injury.

³ Docket No. 08-2265 (issued September 28, 2009).

OWCP issued a November 15, 2010 notice proposing to terminate appellant's compensation benefits based on the opinion of the impartial medical examiner, Dr. Rosenbaum, who concluded that appellant's accepted conditions had all resolved except for permanent aggravation of headaches. OWCP informed appellant that medical treatment remained open for the accepted condition of permanent aggravation of headaches.

By decision dated December 16, 2010, OWCP finalized the termination of appellant's compensation effective that day. It relied upon the opinion of Dr. Rosenbaum in concluding that appellant no longer had any residuals or disability due to his accepted condition. Appellant was informed that medical treatment remained available for his headaches.

Following the December 16, 2010 decision, OWCP received progress reports from Dr. Hagie. On November 30, 2010 Dr. Hagie diagnosed post-concussion syndrome, spondylolisthesis, migraine and cervical, sacrum and pelvis somatic dysfunction. He provided physical findings and a treatment plan.

Dr. Hagie, in progress notes dated November 2, 2010, January 4, February 22 and April 21, 2011 provided a medical history, physical findings and treatment plan. Diagnoses included migraine, headache and cranium, cervical and sacrum somatic dysfunction.

OWCP received correspondence dated August 5, 2011 from a Medicare Secondary Payer Recovery Contractor regarding Medicare and appellant's workers' compensation insurance.

In a December 10, 2011 letter, appellant requested reconsideration. He argued that the medical evidence established that he continued to have residuals from the accepted conditions of left jaw contusion, postconcussive syndrome, lower back strain and suboccipital neuralgia. Appellant also argued that the medical evidence established that his spondylolisthesis was due to his accepted September 29, 1994 employment injury. He argued that Dr. Rosenbaum's opinion was not based on all the medical evidence.

By decision dated December 16, 2011, OWCP denied reconsideration. It found the medical evidence and appellant's arguments insufficient 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

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)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

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

ANALYSIS

OWCP terminated appellant's entitlement to medical benefits effective December 16, 2010 after finding that the weight of the medical evidence established that he had no further residuals or disability due to his accepted left jaw contusion, low back strain, postconcussion syndrome and suboccipital neuralgia, but found he was entitled to continuing medical benefits for his accepted condition of aggravation of preexisting migraine headaches. On December 10, 2011 appellant requested reconsideration of the termination of his compensation benefits.

As was noted above, the Board does not have jurisdiction over OWCP's December 16, 2010 termination decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2) to require OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant did not advance a new and relevant legal argument not previously considered by OWCP. Before OWCP and on appeal to the Board, he argued that OWCP should not have relied on Dr. Rosenbaum's opinion as it was not based on all the relevant medical evidence and he was not an appropriate specialist. The underlying issue in this case was whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective December 16, 2010 on the grounds that he did not have residuals of the accepted conditions of left jaw contusion, low back strain, postconcussion syndrome and suboccipital neuralgia after that date. That is a medical issue which must be addressed by relevant medical evidence.⁸

The statement from appellant and the Medicare correspondence are irrelevant to the underlying medical issue of whether appellant continued to have residuals from the accepted conditions of left jaw contusion, low back strain, postconcussion syndrome and suboccipital neuralgia and are insufficient to reopen appellant's case for a merit review.⁹

The progress notes for the period November 30, 2010 through April 21, 2011 from Dr. Hagie discussing a treatment plan and providing diagnoses do not require reopening appellant's case for merit review because they are not relevant to the underlying issue of the present case. Dr. Hagie provided no opinion on the issue of whether appellant had residuals of his accepted left jaw contusion, low back strain, postconcussion syndrome and suboccipital neuralgia after December 16, 2010. The submission of evidence that does not address the

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

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

⁸ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁹ See *Ronald A. Eldridge*, 53 ECAB 218 (2001).

particular issue involved does not constitute a basis for reopening a case.¹⁰ In addition, Dr. Hagie's reports were duplicative of reports previously submitted and reviewed by OWCP. The Board has held that evidence which is duplicative or repetitive of evidence existing in the record is not sufficient to warrant further merit review.¹¹ Thus, these reports do not constitute relevant and pertinent new medical evidence and are insufficient to require OWCP to reopen appellant's case for further review of the merits.

As appellant did not satisfy any of the criteria of 20 C.F.R. § 10.606(b)(3), OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2011 is affirmed.

Issued: December 6, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁰ *R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

¹¹ *L.T.*, Docket No. 09-1798 (issued August 5, 2010); *L.H.*, 59 ECAB 253 (2007); *Jennifer A. Guillary*, 57 ECAB 485 (2005).