

ISSUE

The issue is whether OWCP properly denied appellant's request for further review of the merits of his case under 5 U.S.C. § 8128.

FACTUAL HISTORY

On August 12, 2009 appellant, then a 57-year-old lead transportation security officer, injured his right shoulder while lifting baggage. OWCP accepted the claim for right shoulder impingement, right bicipital tendinitis and right rotator cuff tendinitis and paid appropriate benefits. On September 10, 2009 Dr. Anthony Cappellino, a Board-certified orthopedic surgeon, released appellant to limited-duty capacity work, with a 10-pound weight restriction and no overhead lifting. Appellant stopped work on November 17, 2009 and used sick and annual leave until January 12, 2010.

On April 28, 2010 appellant filed a compensation claim for wage loss from January 12 to April 24, 2010. In a January 21, 2010 report, Dr. Cappellino noted the history of injury and appellant's progress since his initial evaluation on September 10, 2009. He listed examination findings and opined that appellant had moderate to marked disability and could return to work in a light-duty capacity with a 10-pound weight restriction and no overhead lifting, pushing or pulling. Dr. Cappellino also recommended surgery.

In a May 12, 2010 letter, OWCP requested further information from appellant regarding the claimed wage loss. It informed appellant that his wage-loss claim may be indicative of a recurrence and provided the definitions for a recurrence of disability, new injury and occupational disease. Appellant was also informed that if he stopped work for any other reason, this should be explained in writing. He was also requested to submit medical evidence establishing his disability for work during the period claimed.

In a May 17, 2010 statement, appellant noted that he was not claiming a recurrence, that there was no recovery or partial recovery and there was no intervening incident. He also denied that the light-duty assignment had changed. Appellant stated that he stopped work because of his August 12, 2009 injury. He submitted Dr. Cappellino's May 21, 2010 work capacity evaluation. Dr. Cappellino stated that appellant could not perform his usual job and could not work eight hours due to pain and discomfort. He indicated that appellant could only work the 4:00 p.m. shift and that the restrictions of no lifting, no pushing, no pulling and no over-the-shoulder lifting were indefinite and maximum medical improvement had been reached. Appellant was allowed to drive to and from work for no more than 20 minutes each way.

In a July 12, 2010 report, Dr. Sanford R. Wert, a Board-certified orthopedic surgeon and second opinion physician, reviewed appellant's history of injury and set forth examination findings. He diagnosed right shoulder impingement syndrome, right biceps tear and preexisting degenerative disease of the right shoulder. While appellant had residuals of his accepted conditions, he was capable of working in a light-duty capacity with restrictions. Permanent restrictions were noted as lifting, carrying, pushing and pulling to 20 pounds or less and no overhead reaching and repetitive movements with the right upper extremity. Dr. Wert indicated

that, since appellant had elected not to undergo surgery, maximum medical improvement had been reached.

On July 30, 2010 the employing establishment offered appellant a position as an “exit lane monitor,” a position that was rotated every 30 minutes. The position included no greater than 10 pounds restriction on lifting, pushing and pulling and provided for no reaching over the shoulder and repetitive movements, right. In an August 3, 2010 letter, OWCP advised appellant that the position offered on July 30, 2010 was suitable to his accepted medical limitations and afforded him 30 days to accept the position or provide a valid reason for not accepting it.

In an August 6, 2010 decision, OWCP denied appellant’s claim for wage-loss compensation for the period January 12 to April 24, 2010. It found that the medical evidence did not establish that he was totally disabled during the claimed period due to the work injury.

In August 10 and September 7, 2010 letters, OWCP notified appellant that he had not provided an acceptable reason for refusing to accept the offered position, that no further reasons would be considered and that failure to accept the position or arrange for a report within 15 days would result in a termination of his compensation benefits. In a September 17, 2010 letter, appellant stated that he could not accept the modified job assignment because of his work-related disability. September 28 and November 17, 2009 reports from Dr. Cappellino were submitted.

By decision dated October 13, 2010, OWCP terminated appellant’s entitlement to monetary compensation effective that date on the grounds that he refused to accept suitable work.

On August 2, 2011 OWCP received appellant’s request for reconsideration from the August 6 and October 13, 2010 decisions. In a nine-page statement, appellant argued that the medical evidence supported that he was disabled from performing the duties for transportation security officer and unable to accept the temporary limited assignment offer. He provided reasons for why the position of “exit lane monitor” was unsuitable to his medical condition and indicated that the Office of Personnel Management approved his application for disability retirement on October 27, 2010. Appellant contended that OWCP made it twice as difficult for him to prepare his petition for reconsideration as it split his claim into two separate decisions (August 6 and October 13, 2010).

Appellant resubmitted copies of Dr. Cappellino’s medical reports from September 21, 2009 through January 21, 2010, which were previously of record. None of the medical reports found that appellant was unable to perform his light-duty assignment. Also submitted were internet articles regarding the quality of the work environment and the rate of injuries at the employing establishment.

By decision dated August 22, 2011, OWCP denied appellant’s reconsideration request of its August 6, 2010 decision on the grounds the medical evidence submitted was repetitious of evidence already on file.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ 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.⁵ 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.⁶

When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether 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.⁷

ANALYSIS

In its August 22, 2011 decision, OWCP found that further merit review of its August 6, 2010 decision was not warranted.⁸ The August 6, 2010 decision denied appellant's claim for compensation for wage loss from January 12 through April 24, 2010 on the basis that the medical evidence did not establish that he was totally disabled.

Appellant's request for reconsideration did not establish that OWCP erroneously applied or interpreted a specific point of law. While appellant contends that the medical evidence of record supports that he is totally disabled from performing his preinjury position, his argument is irrelevant to the issue of whether he was totally disabled from performing the duties of his limited-duty assignment from January 12 through April 24, 2010. Additionally, he did not advance a relevant legal argument not previously considered by OWCP. Although appellant asserted that his OPM disability retirement application was approved, this is not relevant to a determination under FECA and does not warrant reopening the claim for a merit review.⁹ Consequently, 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).

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

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.608(b).

⁷ *Annette Louise*, 54 ECAB 783 (2003).

⁸ OWCP has not yet issued a final decision on appellant's reconsideration request of its October 13, 2010 decision. Thus, the Board has no jurisdiction over matters pertaining to the reconsideration request with respect to the suitable work decision. *See supra* note 2. Upon return of the case record, OWCP should issue an appropriate decision with regard to the reconsideration request, received August 2, 2011, of the October 13, 2010 decision.

⁹ *See Daniel Deparini*, 44 ECAB 657, 659-60 (1993).

In support of his reconsideration request, appellant resubmitted copies of Dr. Cappellino's medical reports dated September 21, 2009 through January 21, 2010. The reports were previously of record and reviewed by OWCP and determined to be insufficient to establish that he was disabled from performing his limited-duty assignment during the period in question. The Board finds that submission of these reports did not require reopening appellant's case for merit review because they had been previously reviewed by OWCP. The reports repeat evidence already of record. They are duplicative and do not constitute relevant or pertinent new evidence.¹⁰ Appellant also submitted copies of internet articles regarding the employing establishment. This evidence, while new, is not relevant to the underlying medical issue. The Board has held that such articles lack evidentiary value as they are of general application and not determinative regarding whether specific conditions are causally related to the particular employment factors in a claim.¹¹ Therefore, appellant has not established a basis for reopening his case.

The Board finds that OWCP properly determined that appellant was not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his request for reconsideration.

On appeal, appellant contends that OWCP failed to adequately consider documents which found him to be totally disabled from his preinjury position and a July 7, 2010 letter from the employing establishment indicating that it could not accommodate him in his current position. The Board notes that this evidence is not relevant to the underlying issue of whether appellant was totally disabled during the period January 12 through April 24, 2010. As previously noted, the Board does not have jurisdiction over the merits of the October 13, 2010 termination decision.¹² For the reasons articulated above, the evidence submitted on reconsideration is insufficient to constitute a basis for reopening the case for a merit review for the issue at hand.

CONCLUSION

The Board finds that OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

¹⁰ See *D.K.*, 59 ECAB 141 (2007).

¹¹ See *K.R.*, Docket No. 11-34 (issued August 2, 2011).

¹² See *supra* footnote 2 and 3.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 22, 2011 is affirmed.

Issued: July 10, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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