

ISSUE

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

FACTUAL HISTORY

On January 28, 2005 appellant, then a 56-year-old transportation security screener, filed a traumatic injury claim alleging that on December 29, 2004 she sustained hypertension from being exposed to high altitudes during a period of travel duty. By decision dated May 20, 2005, OWCP accepted her claim for sinusitis and hypertension from the effects of high altitude exposure during a period of travel duty to Colorado from December 10, 2004 to February 6, 2005. It noted that appellant's conditions were expected to resolve upon returning to sea level on or about February 7, 2005.

Appellant lost time from work beginning December 24, 2004 and returned to work in Colorado on January 8, 2005 with no restrictions until February 2, 2005. On February 6, 2005 she returned home to Michigan and stopped working from February 7 to April 13, 2005. Appellant returned to work on April 14, 2005 under a reduced schedule. On November 27, 2007 she was terminated from her employment due to her inability to perform the essential functions of her job on a full-time basis.

Appellant filed a claim for compensation (Form CA-7) for intermittent periods of wage-loss compensation beginning February 7, 2005. She submitted a number of medical records from her treating physicians in support of her claim.

By decision dated October 18, 2005, OWCP denied appellant's claim finding that the evidence failed to establish that she sustained a recurrence of disability beginning February 7, 2005 and continuing due to her accepted work injury.

On November 14, 2005 appellant requested an oral hearing before the Branch of Hearings and Review. In support of her claim, she submitted a number of medical records documenting her treatment for hypertension from December 31, 2004 to March 16, 2007.

At the March 20, 2007 hearing, appellant's attorney argued that OWCP did not have sufficient medical information to establish that appellant's hypertension had resolved when she returned to sea level on February 6, 2005. Appellant testified that her initial exposure to high altitudes continued to cause her problems with hypertension and its peripheral effects, as documented by her medical reports

By decision dated July 26, 2007, the hearing representative vacated OWCP's October 18, 2005 decision and remanded the case with instructions for OWCP to further develop the medical evidence. It noted that appellant's medical reports contained physicians' opinions that she had a material worsening of her condition that could be related to her high altitude induced hypertension. On remand, the hearing representative instructed OWCP to refer appellant, along with a statement of accepted facts and the case record, to an appropriate specialist for a rationalized medical opinion on whether she continued to suffer from hypertension as a result of

her high altitude exposure, whether she required further treatment for her conditions and whether she could return to work in any capacity.

OWCP referred appellant, the case record and a statement of accepted facts to Dr. Charles Syrjamaki, Board-certified in internal medicine, for a second opinion examination. In the statement of accepted facts, it noted that her claim was accepted for sinusitis and hypertension (resolved upon returning to sea level) and that she returned home to Michigan on February 2, 2005.

In an October 3, 2007 medical report, Dr. Syrjamaki provided a summary of appellant's medical history and diagnosed mild hypertension, osteopenia, fibromyalgia and thyroidectomy. He opined that her mild hypertension condition was not related to high altitude exposure and that her hypertension could be associated with her medication, Premarin. Dr. Syrjamaki stated that there were no residuals from the high altitude exposure warranting the need for her disability and medical treatment and that she was capable of working full-time without restrictions.

OWCP found a conflict of medical opinion based on the report of Dr. Syrjamaki and appellant's treating physicians. On December 10, 2007 it referred appellant, a statement of accepted facts, the case file, a medical conflict statement and a series of questions to Dr. Jeffry Knibbe, Board-certified in internal medicine, for an impartial referee medical examination to resolve the conflict between Dr. Syrjamaki and appellant's treating physicians. Upon review of medical records and physical examination, Dr. Knibbe opined that there was no objective finding to support that her high blood pressure condition would be expected to remain after she returned to a lower altitude. He opined that appellant did not require any on-going medical treatment and was capable of working full-time without restrictions. On January 4, 2008 Dr. Knibbe performed an ambulatory blood pressure monitor report and opined that there was no residual hypertension as a direct result to the high altitude exposure.

By decision dated January 22, 2008, OWCP denied appellant's claim for recurrence of disability beginning February 7, 2005 finding that the medical evidence did not establish that she continued to suffer from hypertension as a result of exposure to high altitude on December 29, 2004. It further noted that the evidence from appellant's physicians lacked objective medical findings to support their conclusions.

By letter dated January 15, 2009, appellant requested reconsideration of OWCP's January 22, 2008 decision. She argued that neither Dr. Syrjamaki nor Dr. Knibbe were provided with complete copies of the case file and therefore were incapable of offering an informed medical opinion on the issue of whether her continued hypertension condition was related to her high altitude exposure during the period December 10, 2004 to February 6, 2005. Appellant further argued that OWCP improperly drafted the statement of accepted facts, which stated that her sinusitis and hypertension had resolved when she returned to sea level rather than stating that it was "expected" to resolve, as noted in OWCP's May 20, 2005 acceptance letter. She noted other issues with the statement of accepted facts and provided arguments for why the medical reports of Dr. Syrjamaki and Dr. Knibbe's were insufficient. Appellant stated that the report of Dr. Syrjamaki was speculative and that she believed that Dr. Knibbe and Dr. Syrjamaki were not provided with all of her medical records and thus, could not make an informed decision. She further stated that OWCP should not have treated her claim as a recurrence because she was paid

continuation of pay through February 11, 2005. In support of her claim, appellant submitted a number of medical documents.

By decision dated April 17, 2009, OWCP affirmed the January 22, 2008 decision. It noted that OWCP provides all second opinion and referee physicians with complete copies of the entire case file. OWCP stated that appellant did not submit evaluation records from the Mayo Clinic until January 23, 2009, well after her examination with Dr. Knibbe and thus, OWCP would have no knowledge of their existence when submitting the case record. It also stated that both Dr. Knibbe and Dr. Syrjamaki were qualified physicians and answered the questions regarding whether her continued hypertension condition was related to her work-related exposure to high altitudes during the period of December 10, 2004 to February 6, 2005. OWCP acknowledged that the statement of accepted facts should have stated that appellant's condition was "expected to" resolve rather than resolved upon returning to sea level. However, it stated that the purpose of the examinations by both Dr. Syrjamaki and Dr. Knibbe was in fact to determine whether her condition had resolved. Thus, omission of the phrase "expected to" did not alter the physicians' ability to respond to the questions at hand. OWCP addressed appellant's many arguments and evaluated the additional medical evidence submitted. It concluded that the evidence supported that the job requirement of working in high altitude states during the period of December 10, 2004 to February 6, 2005 contributed to her hypertension condition. However, there was no evidence to support that, after returning to lower elevations in Michigan, her continued elevated blood pressure was related to the accepted employment incident.

By letter dated April 10, 2010, appellant requested reconsideration of the April 17, 2009 OWCP decision repeating many of her previous arguments. She reiterated that the statement of accepted facts incorrectly informed Dr. Knibbe and Dr. Syrjamaki that her condition had resolved upon returning to sea level rather than "expected" to resolve. Appellant stated that the claim was incorrectly being dealt with as a recurrence claim because her condition never resolved when it should have been a continuation of pay claim. Because of this, Dr. Knibbe and Dr. Syrjamaki used the inaccurate information from the statement of accepted facts to determine that her condition had resolved and that her continued hypertension was not due to the employment incident. Appellant also argued that the physicians did not have the full case file as evidenced by Dr. Knibbe's statement that blood pressure readings prior to her predeployment were not provided to him to review. She submitted additional medical documentation in support of her claim.

By decision dated September 16, 2010, OWCP affirmed the April 17, 2009 decision. It found that the medical evidence submitted failed to provide a well-rationalized opinion to support that, after returning to sea level, appellant's continued elevated blood pressure was related to the accepted factors of employment. OWCP further addressed appellant's other arguments and noted that it had already acknowledged that the statement of accepted facts should have noted her condition was "expected" to resolve rather than resolve, but that Dr. Syrjamaki and Dr. Knibbe provided a proper evaluation regarding whether her condition had resolved as part of their examination. It further stated that her file was reviewed and both physicians were properly provided copies of her entire case file per OWCP policy.

By letter dated September 10, 2011, appellant requested reconsideration of OWCP's September 16, 2010 decision. She repeated previous arguments and stated that OWCP provided

both physicians with inaccurate and false information that her condition had resolved when it had not. Appellant further repeated her argument that OWCP did not provide Dr. Knibbe with the full case record as evidenced by his statement, making his report unsubstantiated. She stated that the additional medical evidence she previously provided from the Mayo Clinic and her physicians' reports supported her claim as they provide detailed rational medical opinions based on her medical history. No other documents were submitted with her claim.

By decision dated December 6, 2011, OWCP denied appellant's request for reconsideration finding that she neither raised substantive legal questions nor included new and relevant evidence. It noted that her arguments were not validated by facts or examples with supporting documentation in her favor. Without evidence to support the information presented, there was no basis for reconsideration. OWCP also stated that appellant's previous argument that Dr. Knibbe was not provided with the full case record was addressed and that he was provided with a complete case record at the time of her examination.³

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that the 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 regulations provide 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

ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The only OWCP decision before the Board on appeal is the December 6, 2011 decision, denying appellant's application for review. Because more than 180 days elapsed between the date of OWCP's most recent merit decision on September 16, 2010 and the filing of her appeal on May 29, 2012, the Board lacks jurisdiction to review the merits of her claim.⁶

³ OWCP noted that it informed appellant by letter that, it should bring with her all available records at the time of her examination and thus, she was afforded the opportunity to provide additional medical reports at the time of her examination with Dr. Knibbe, including testing and treatment records.

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

⁶ 20 C.F.R. § 501.3(e) requires that an application for review by the Board be filed within 180 days of the date of OWCP's final decision being appealed.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In her February 1, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She did not advance a new and relevant legal argument. Appellant repeated arguments previously made which were addressed and evaluated in OWCP's January 22, 2008, April 17, 2009 and September 16, 2010 merit decisions. She contended that her continued hypertension was employment related, the medical evidence she previously submitted supported her claim, Dr. Syrjamaki and Dr. Knibbe were not provided with the full case record, the statement of accepted facts was inaccurate and that her hypertension condition never resolved. These arguments were already considered and addressed by OWCP. The Board notes that the medical evidence that appellant referenced in support of her claim was also already addressed and evaluated by OWCP. The underlying issue in this case was whether she continued to suffer from hypertension as a result of the December 29, 2004 employment incident resulting in a disability from February 7, 2005 onward. This is a medical issue which must be addressed by relevant medical evidence.⁷ A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. In this case, appellant failed to submit any new and relevant evidence with her September 10, 2011 appeal addressing whether her continued hypertension was a result of the December 29, 2004 employment incident.

The Board accordingly 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 submit relevant and pertinent 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).

⁷ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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