

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.R., Appellant**

**and**

**DEPARTMENT OF THE ARMY, PINE BLUFF  
ARSENAL, Pine Bluff, AR, Employer**

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**Docket No. 12-1463  
Issued: January 7, 2013**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 27, 2012 appellant filed a timely appeal from a February 21, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). The Board also has jurisdiction over an April 27, 2012 nonmerit OWCP decision denying appellant's reconsideration request. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly reduced appellant's compensation effective July 3, 2011 based on his capacity to earn wages in the constructed position of shipping and receiving supervisor effective August 28, 2011; and (2) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been on appeal to the Board. In the first appeal,<sup>2</sup> the Board affirmed OWCP's denial of his hearing request and the suspension of benefits on the grounds that he failed to attend a scheduled medical examination.<sup>3</sup> The Board, however, found that OWCP had abused its discretion in denying his request for reconsideration regarding his failure to attend the scheduled medical examination as he raised new contentions not previously considered by OWCP. In the second appeal, the Board affirmed the March 2, 2001 decision which denied appellant's request for modification of the suspension of his compensation benefits effective September 13, 1998 on the grounds that he failed to attend a scheduled medical examination.<sup>4</sup> The Board, in the third appeal, set aside a June 19, 2003 decision<sup>5</sup> as the decision contained no findings of fact regarding his request for retroactive compensation and remanded the case for further action on his request.<sup>6</sup> On July 19, 2006 the Board in the fourth appeal affirmed an OWCP hearing representative's January 19, 2006 decision.<sup>7</sup> The hearing representative affirmed the suspension of appellant's benefits for the period September 3, 1998 to July 10, 2002 on the grounds that he failed to attend a scheduled medical examination. He found appellant's arguments that the suspension of his benefits would not have occurred had he been given a merit review at the time to be without merit and, thus, found appellant was not entitled to retroactive compensation for this period in question. On December 29, 2006 the Board granted the Director's petition for reconsideration and modified the prior decision to reflect that appellant was entitled to the resumption of his compensation on May 22, 2002 as this was the date that appellant indicated his willingness to attend the scheduled examination. The Board also denied appellant's petition for reconsideration as he had not shown any error of law

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<sup>2</sup> Docket No. 99-1694 (issued January 22, 2001). OWCP accepted that appellant, then a 29-year-old protective and safety equipment repairer, sustained a tear of the medial meniscus of the right knee, lumbar sprain, intervertebral disc disorder with myelopathy of the lumbar region and adhesive capsulitis of the left shoulder on March 3, 1986 when he tripped and fell while removing railroad iron in the performance of duty. Appellant stopped work on March 20, 1986. The employing establishment terminated his employment on October 14, 1986.

<sup>3</sup> In the June 23, 1998 letter referring appellant to Dr. Joe Schooler, who specialized in physical rehabilitation and orthopedic surgery, for an impartial examination, OWCP informed appellant of the consequences of his refusal to submit to the examination under 5 U.S.C. § 8123(d). Appellant did not attend the initial appointment or the rescheduled appointment. OWCP advised him by a July 9, 1998 letter of the consequences of his refusal to submit and provided him 15 days to provide reasons for his failure to attend the initial scheduled appointment. By decision dated September 1, 1998, it suspended compensation for refusing to submit to an examination with Dr. Schooler. OWCP denied appellant's request for modification of the September 1, 1998 decision on February 2, 1999.

<sup>4</sup> Docket No. 01-1366 (issued May 2, 2002). In a letter dated May 22, 2002, appellant indicated his willingness to attend the scheduled examination with Dr. Schooler. Subsequent to the Board's decision, OWCP scheduled appellant for an examination on July 10, 2002, which appellant attended. In a letter dated August 28, 2002, appellant's representative requested benefits to resume including past compensation benefits. By letter dated January 9, 2003, OWCP placed appellant on the periodic rolls for temporary total disability effective December 29, 2002.

<sup>5</sup> In this decision, OWCP attached the findings from the March 2, 2001 decision, without addressing appellant's request for retroactive compensation benefits.

<sup>6</sup> Docket No. 04-1157 (issued August 23, 2004).

<sup>7</sup> Docket No. 06-713 (issued July 19, 2006).

or fact with regard to his request for retroactive pay for the period in question.<sup>8</sup> In the fifth appeal on April 21, 2009, the Board affirmed a May 23, 2008 OWCP decision denying his application for reconsideration as it was untimely filed and failed to establish clear evidence of error. The facts as set forth in the Board's decision and order are incorporated by reference.

In an October 15, 2009 report, Dr. Robert E. Holladay, IV, a second opinion Board-certified orthopedic surgeon, conducted a physical examination and reviewed medical reports and the statement of accepted facts. Diagnoses included postoperative left shoulder surgery, low back pain and postoperative right knee surgery, arthroscopy and partial meniscectomy. Dr. Holladay opined that appellant continued to have residuals due to his accepted shoulder and right knee employment injuries but that the lumbar condition had resolved. He concluded that appellant was capable of working a sedentary position. In an attached work capacity form, Dr. Holladay indicated that appellant was capable of working four hours per day initially, which would increase to eight hours per day within six months. Restrictions for four hours of work included no pushing, pulling or lifting more than 10 pounds; up to one hour of walking and standing; no squatting, kneeling, climbing, operating a motor vehicle at work and no reaching above the left shoulder.

On November 10, 2009 Dr. Harold E. Chakales, a treating Board-certified orthopedic surgeon, reviewed Dr. Holladay's report and responded to the questions posed by OWCP. He disagreed with Dr. Holladay's opinion that appellant's lumbar contusion had resolved with no residuals and his recommendations for further treatment. In a November 10, 2009 work capacity evaluation form, Dr. Chakales indicated that appellant was permanently totally disabled from working.

On January 26, 2010 OWCP referred appellant to Dr. Apurva R. Dalal, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Chakales, appellant's treating physician, and Dr. Holladay, an OWCP referral physician, on the issue of appellant's work capability. In a February 22, 2010 report, Dr. Dalal, based upon a review of the medical records, statement of accepted facts and physical examination, diagnosed lumbosacral strain with radiculopathy, status post left shoulder surgery with residual motion loss and status post right knee surgery with residuals. A physical examination revealed evidence of malingering and exaggeration during the left shoulder examination. Range of motion for left shoulder included 100 degrees forward flexion, 100 degrees abduction, 60 degrees internal and external rotation and 50 degrees extension. Physical findings for the right knee revealed moderate effusion, no evidence of instability and 120 degrees flexions. An examination of the lumbosacral spine showed positive right side straight leg raising, a normal motor and sensory examination and signs of exaggeration. Dr. Dalal reviewed x-ray interpretations which revealed degenerative changes in the lumbar spine, right knee and left shoulder. In concluding, Dr. Dalal stated that he concurred with Dr. Chakales' opinion that appellant was totally disabled from performing any type of meaningful employment.

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<sup>8</sup> The original period in question was September 3, 1998 to July 10, 2002. In view of the Board's granting the Director's petition for reconsideration the period in question has been modified to September 3, 1998 to May 22, 2002. The record contains evidence that appellant was paid wage-loss compensation for the period May 22 to July 9, 2002 on October 12, 2006.

On April 21, 2010 OWCP requested that Dr. Dalal review additional medical evidence and provide a supplemental report. Dr. Dalal did not respond to OWCP's request.

Hearing no response from Dr. Dalal, on September 29, 2010, OWCP referred appellant to a second impartial medical examination with Dr. Bret R. Sokoloff, a Board-certified orthopedic surgeon, to resolve the outstanding conflict in the medical evidence.

In an October 20, 2010 report, Dr. Sokoloff diagnosed moderate right knee arthritis, lumbar spine mild arthritis and degenerative disc disease and left shoulder moderate arthritis and rotator cuff disease. A physical examination of the left shoulder revealed no tenderness in the acromioclavicular joint, no atrophy swelling, no laceration/abrasion or malalignment. Physical findings for the right knee included no swelling, increased warmth, no deformity, ligamentous instability, no varus laxity, negative anterior drawer sign and patellar subluxation. Dr. Sokoloff reported that an examination of the thoracic lumbar spine revealed no tenderness, no swelling, no muscle atrophy and normal alignment. He related that his findings on examination were inconsistent with the objective tests, that appellant appeared to give poor effort, resisted passive examination and that the motor examination was inconsistent with appellant's gait and mobility as seen during the visit. A review of the records showed a normal physical examination proximal to the initial injury and that as early as 1986 appellant's treating physician found appellant capable of performing light-duty work. Dr. Sokoloff related that a review of the medical records suggested symptom-magnification or malingering based on the few anatomic or objective findings. He opined that appellant's subjective complaints were the only thing preventing him from working. Dr. Sokoloff reported that appellant's left shoulder range of motion was self-limited. He noted limited range of motion in thoracic lumbar spine both knees. In concluding, Dr. Sokoloff found no objective findings supporting a work-related pathology and attributed poor physical efforts on examination to malingering or symptom-magnification. In an attached work capacity evaluation form, he provided permanent work restrictions for working eight hours per day. The restrictions included up to four hours of walking and standing, up to two hours of twisting and bending/stooping; up to four hours of lifting up to 30 pounds, up to one hour of squatting and climbing and up to two hours of kneeling.

On December 1, 2010 OWCP referred appellant for vocational rehabilitation services.

On March 15, 2011 the vocational rehabilitation specialist identified the position of receptionist with a weekly salary of \$320.96 and shipping and receiving supervisor with a weekly salary of \$507.20 as within appellant's work restrictions and reasonably available in sufficient numbers in appellant's commuting area. The physical requirements listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) for shipping and receiving supervisor with DOT No. 222.137-030 included light strength; frequent reaching, handling and finger; light strength; no climbing, balancing, crouching, or crawling; and occasional stooping and kneeling.

In a July 14, 2011 status report, the vocational rehabilitation specialist noted that vocational rehabilitation services were unsuccessful. The rehabilitation specialist indicated that the following positions were suitable for appellant: receptionist with a weekly salary of \$320.98 and shipping and receiving supervisor with a weekly salary of \$507.20. Both positions were

within appellant's physical, educational and vocational abilities. These positions were also reasonably available in his commuting area.

On July 19, 2011 OWCP proposed to reduce appellant's compensation for wage loss, noting that the medical and factual evidence established that he was no longer totally disabled but had the capacity to earn wages as a shipping and receiving supervisor with a weekly salary of \$507.20.

In an August 3, 2011 letter, appellant disagreed with the proposal to reduce his wages in the constructed position of a shipping and receiving supervisor.

By decision dated August 22, 2011, OWCP adjusted appellant's compensation benefits effective August 28, 2011 based upon its determination that the position of a shipping and receiving supervisor represented his wage-earning capacity. It noted that his weekly pay rate when injured was \$274.52 and that the current pay rate for job and step when injured was \$536.20. OWCP found appellant was capable of earning \$507.20 per week, that the adjusted wage-earning capacity per week was \$260.79, that the percentage of new wage-earning capacity was 95 percent, that the loss in wage-earning capacity amount per week was \$13.73, leaving appellant with a compensation rate of \$10.30. It calculated that this resulted in a new compensation rate every four weeks of \$80.00 beginning on August 28, 2011.

On August 26, 2011 appellant requested an oral hearing before an OWCP hearing representative and a telephonic hearing was held on December 2, 2011. At the hearing and in an August 3, 2011 letter, he contended that OWCP erred in referring him for a second impartial evaluation and should have accepted Dr. Dalal's opinion that he was unable to work. Appellant argued that the report of Dr. Sokoloff should not have been used by OWCP in finding that he was capable of working.

By decision dated February 21, 2012, OWCP's hearing representative affirmed the August 22, 2011 decision reducing appellant's wage-loss compensation.

In a letter dated March 21, 2012, appellant requested reconsideration. He argued that Dr. Dalal's opinion was sufficient to resolve the conflict in the medical opinion evidence and that OWCP erred in referring him for a second impartial medical examination with Dr. Sokoloff. Appellant also argued that the constructed position was unsuitable. In support of his request, he submitted copy of a November 29, 2011 Certificate of Attendance from a Coping With Chronic Pain Group, a page from Dr. Holladay's October 15, 2009 report and an October 20, 2010 x-ray service request form.

In an April 27, 2012 decision, OWCP denied appellant's request for reconsideration on the grounds that he did not show that OWCP erroneously applied or interpreted a point of law, did not advance a point of law not previously considered and did not submit pertinent new and relevant evidence.<sup>9</sup> The cover sheet of the decision provided him with his appeal options including informing him that he had 180 days to appeal the decision to the Board.

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<sup>9</sup> The Board notes that, following the April 27, 2012 nonmerit decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision.

## LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>10</sup> An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>11</sup>

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee, if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>12</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT) or otherwise available in the open market, that fit the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>13</sup> and codified by regulations at 20 C.F.R. § 10.403<sup>14</sup> should be applied. Subsection(d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.<sup>15</sup>

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments

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*See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>10</sup> *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>11</sup> 20 C.F.R. §§ 10.402, 10.403.

<sup>12</sup> 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>13</sup> 5 ECAB 376 (1953).

<sup>14</sup> 20 C.F.R. § 10.403.

<sup>15</sup> *Id.* at § 10.403(d).

resulting from postinjury or subsequently acquired conditions.<sup>16</sup> Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, the job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>17</sup>

Section 8123(a) of FECA<sup>18</sup> provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>19</sup> When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>20</sup>

### ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim and, by letter dated January 9, 2003, placed him on the periodic rolls for temporary total disability.

OWCP properly found a conflict of the medical evidence regarding appellant's disability for work. Appellant was referred to an impartial medical examiner, Dr. Dalal, a Board-certified orthopedic surgeon, who found on February 22, 2010 that appellant was disabled from performing any type of meaningful employment. Dr. Dalal also found evidence of malingering and exaggeration during appellant's physical examination. On April 21, 2010 OWCP properly requested that he supplement his previous report based upon review of additional evidence and with an opinion about appellant's ability to return based on his findings of malingering and exaggeration. Dr. Dalal did not respond.

Because the first impartial medical examiner, Dr. Dalal, did not respond to OWCP's request for a supplemental report, the Board finds that OWCP properly referred appellant to another impartial specialist to resolve the conflict between Dr. Chakales and Dr. Holladay.<sup>21</sup> On October 20, 2010 Dr. Solokoff, a Board-certified orthopedic surgeon, conducted a thorough physical examination of appellant and made a review of his medical history. He reported that the physical examination revealed poor effort and inconsistencies. Dr. Sokoloff concluded that there was symptom-magnification or malingering on the part of appellant based on the few anatomic or objective findings found in his examination and review of the medical records. He also noted

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<sup>16</sup> *James Henderson, Jr.*, 51 ECAB 268 (2000).

<sup>17</sup> *Id.*

<sup>18</sup> 5 U.S.C. §§ 8101-8193.

<sup>19</sup> 5 U.S.C. § 8123(a); *see J.J.*, Docket No. 09-27 (issued February 10, 2009); *Geraldine Foster*, 54 ECAB 435 (2003).

<sup>20</sup> *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

<sup>21</sup> *See Guiseppe Aversa*, 55 ECAB 164 (2003).

appellant's passive resistance on examination, inconsistent motor examination based on his observation of appellant's gait and mobility during the visit, findings inconsistent with objective testing and poor effort on the part of appellant. The Board finds that the opinion of Dr. Sokoloff is entitled to the special weight of the medical evidence because it is well rationalized and based on a thorough physical examination and review of the medical history.

On July 14, 2011 the vocational rehabilitation counselor stated that she had identified two jobs that appellant would be capable of performing and which were available in the area. One of them was as a shipping and receiving supervisor, DOT No. 222.137-030, with an average weekly salary of \$320.98 per week. This position was identified as sedentary and was reasonably available in appellant's commuting area on a full-time basis.

The evidence establishes that appellant was capable of performing the duties required for the selected position of shipping and receiving supervisor. As noted, Dr. Sokoloff advised that appellant was capable of doing work sedentary and indicated that appellant could perform up to four hours of walking and standing. The vocational rehabilitation counselor determined that appellant was able to perform the position of shipping and receiving supervisor. She provided a job description which was comprised of sedentary requirements related to the receiving and answering requests for information and determined that the position fell within appellant's medical restrictions. The counselor noted that the position was available on a full-time basis within his commuting area and that the wage of the position was \$320.98 per week.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of shipping and receiving supervisor represented his wage-earning capacity.<sup>22</sup> The evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties and that the position was reasonably available within the general labor market of his commuting area. The wage information as set forth by the vocational counselor indicated that the wages for the position of shipping and receiving supervisor was \$320.98 per week. Applying the *Shadrick*<sup>23</sup> principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of \$320.98 per week and a percentage of loss of wage-earning capacity is determined. OWCP determined that appellant had a 95 percent loss of wage-earning capacity and his compensation was reduced to a net compensation of \$80.00 every four weeks. The Board finds that OWCP met its burden of proof to reduce his compensation in this case.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

On appeal appellant contends that OWCP erred in relying on the opinion of Dr. Sokoloff as he performed an incomplete examination. Contrary to appellant's contention, Dr. Sokoloff performed a complete examination and provided physical findings from his examination as well as his opinion on reviewing the medical record OWCP provided him.

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<sup>22</sup> See *N.J.*, 59 ECAB 171 (2007); *James M. Frasher*, 53 ECAB 794 (2002).

<sup>23</sup> See *supra* note 14.

## LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>24</sup> 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.<sup>25</sup> 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 of the date of that decision.<sup>26</sup> 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.<sup>27</sup>

## ANALYSIS -- ISSUE 2

OWCP issued an August 22, 2011 decision finding that the selected position of shipping and receiving supervisor properly represented his wage-earning capacity, which was affirmed by an OWCP hearing representative on February 21, 2012. Appellant requested reconsideration on March 21, 2012, asserting that Dr. Dalal had resolved the conflict in the medical opinion evidence, that OWCP erred in referring him for a second impartial medical examination with Dr. Sokoloff and that the constructed position was unsuitable. He submitted a certificate of attendance from an attending pain group, a page from Dr. Holladay's October 15, 2009 report and an October 20, 2010 x-ray request form. In an April 27, 2012 decision, OWCP denied reconsideration as the evidence submitted was insufficient to warrant merit review.

In his March 21, 2012 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument not previously considered. His argument was that OWCP erred in referring him for a second impartial evaluation with Dr. Sokoloff when Dr. Dalal, the original impartial medical specialist, had resolved the conflict in the medical opinion evidence. Appellant also asserted that the selected position was not suitable work. However, the Board finds that his arguments were repetitive of the arguments made before OWCP's hearing representative and OWCP. In addition, the certificate for attendance from a pain group and the October 20, 2010 x-ray request are not relevant to the issue of appellant's work capability and are insufficient to require reopening the record for a merit review.<sup>28</sup> Dr. Holladay's report was previously considered by OWCP. Evidence or argument which is duplicative or cumulative in

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<sup>24</sup> 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.

<sup>25</sup> 20 C.F.R. § 10.606(b)(2). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>26</sup> 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).

<sup>27</sup> 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).

<sup>28</sup> *D.I.*, 59 ECAB 158 (2007); *Betty A. Butler*, 56 ECAB 545 (2005).

nature is insufficient to warrant reopening a claim for merit review.<sup>29</sup> The duplicative nature of the evidence and argument does not require reopening the record for further merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Appellant contended that he was not provided any appeal rights with the April 27, 2012 decision. However, a review of the record shows that OWCP provided him with what his appeal options were on the cover sheet of the decision. Appellant was given the necessary information regarding his appeal options with the April 27, 2012 decision.

**CONCLUSION**

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of shipping and receiving supervisor. The Board further finds that it properly denied his request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 27 and February 21, 2012 are affirmed.

Issued: January 7, 2013  
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

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<sup>29</sup> *Candace A. Karkoff*, 56 ECAB 622 (2005); *Denis M. Dupor*, 51 ECAB 482 (2000).