



## **FACTUAL HISTORY**

This case has previously been before the Board. By decision dated June 22, 2004, the Board affirmed an August 21, 2003 OWCP decision that reduced appellant's wage-loss compensation to zero on the grounds that he failed, without good cause, to continue to participate in vocational rehabilitation efforts.<sup>3</sup> The history and findings of fact from the prior decision and order are hereby incorporated by reference.<sup>4</sup>

By decision dated May 10, 2007, OWCP reduced appellant's compensation benefits effective April 15, 2007 on the grounds that the selected position of host/greeter was medically and vocationally suitable for appellant and fairly and reasonably represents his wage-earning capacity. Appellant disagreed with the decision and requested a hearing before an OWCP hearing representative, which was held on October 29, 2007. By decision dated January 22, 2008, an OWCP hearing representative reversed the May 10, 2007 decision. The hearing representative found that OWCP did not meet its burden of proof to reduce appellant's compensation based on an ability to earn wages as a host/greeter as the position was not medically suitable to appellant's assigned work restrictions.

Appellant was offered a position as a supply technician, which OWCP found to be vocationally and medically suitable.<sup>5</sup> By decision dated January 5, 2011, OWCP terminated his compensation benefits effective February 13, 2011 on the grounds that he refused suitable light-duty employment and, under 5 U.S.C. § 8106(c), was not entitled to compensation. Appellant disagreed with the decision and requested an oral hearing, which was held telephonically on April 21, 2011. By decision dated July 29, 2011, an OWCP hearing representative affirmed the January 5, 2011 OWCP decision. The hearing representative found that the light-duty position was consistent with the physical restrictions set forth by appellant's attending physician, Dr. David Lannik, a Board-certified orthopedic surgeon. The hearing representative disregarded appellant's argument regarding the suitability of the position under section 8115, in which factors of vocational suitability and job availability are considered with regard to wage-earning capacity determination, as the termination of compensation was made under section 8106(c), which pertains to consideration of physical suitability, and the employing establishment indicated instruction/training would be provided on the use of computers and computer programs.

On May 25, 2012 appellant requested reconsideration of the July 29, 2011 decision. In a May 25, 2012 10-page statement, he presented several arguments: he argued that the termination decision should have been based on section 8115 as opposed to section 8106(c). Appellant contended that the offered supply clerk position, GS-2005-04, was not vocationally or medically

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<sup>3</sup> Docket No. 04-281 (issued June 22, 2004), *petition for recon. denied* (issued September 27, 2004).

<sup>4</sup> On January 3, 1983 appellant filed an occupational disease claim alleging that his right wrist condition was causally related to his federal employment. OWCP accepted his claim for de Quervain's syndrome and chronic tenosynovitis of the right wrist and paid appropriate compensation benefits.

<sup>5</sup> The employing establishment initially offered the supply clerk position at the GS-6 level, but later withdrew the offer as appellant did not have reinstatement rights to that grade level. Appellant was subsequently offered the supply clerk position at the GS-4 level as he had reinstatement rights to that level.

suitable and that the unsuitability of the job offer was previously pointed out to OWCP. He argued that OWCP terminated his benefits without the proper procedural due process notice or protections issued under section 8106. Appellant alleged that OWCP did not follow proper procedure to determine that the job offer was suitable and the January 5, 2011 decision “failed to properly terminate my compensation benefits under section 8106 of FECA, as I understand it.” He contended that the position was not vocationally or medically suitable based on his physical disability, physical limitations and work history and cited various Board cases which he felt applied in his case. Appellant noted that, prior to the July 29, 2011 decision affirming the denial of benefits, the employing establishment had clarified in a June 30, 2011 letter that the supply clerk position would include “instruction” provided by trained personnel to show [appellant] how to use this software.” He contended that this letter established that he had not received all the information about the accommodations for the position. Appellant further asserted that the job offer was never presented to him as light duty prior to the April 21, 2011 hearing. Lastly, he argued that it did not appear that his physician, Dr. Lannik, was consulted by OWCP for his opinion. In support of his reconsideration request, appellant cited various legal cases and resubmitted evidence previously of record. New evidence submitted included: several letters from appellant, some with attachments previously of record; copies of OWCP’s July 29, 2011 hearing representative decision; OWCP’s October 20 and December 27, 2011 responses to appellant’s request to change physician; a January 25, 2012 letter from the Office of Personnel Management; and a November 28, 2011 medical evaluation of appellant’s right wrist from Dr. Steven Blasdel, a Board-certified orthopedic surgeon, concurred with the permanent work restrictions outlined by Dr. Lannik.

By decision dated July 9, 2012, OWCP denied appellant’s request for reconsideration on the grounds that appellant offered no evidence of error nor advanced a point of law and there was no new and relevant evidence submitted.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128 of FECA,<sup>6</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>7</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>8</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 of the merits.

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>9</sup> and the submission of evidence or

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<sup>6</sup> 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).

<sup>7</sup> 20 C.F.R. § 10.606(b)(1)-(2).

<sup>8</sup> *Id.* at § 10.607(a).

<sup>9</sup> *See A.L.*, Docket No. 08-1730 (issued March 16, 2009). *See also Eugene F. Butler*, 36 ECAB 393, 398 (1984).

argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>10</sup>

### ANALYSIS

Appellant disagreed with OWCP's July 29, 2011 decision which affirmed the termination of benefits in his claim on the grounds that he refused suitable light-duty work as a supply technician under 5 U.S.C. § 8106(c). As the Board does not have jurisdiction to review the merits of the case, the sole issue is whether appellant's request for reconsideration met any of the conditions of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for further review of the merits.

Appellant did not identify a specific point of law or show that OWCP erroneously applied or interpreted it. He also did not advance a new and relevant legal argument. In his May 25, 2012 request for reconsideration, appellant reiterated arguments previously made before OWCP. He argued that the position was not physically or vocationally appropriate under 5 U.S.C. § 8115, but this is the same argument he made before OWCP's hearing representative which was addressed in the July 29, 2011 decision. Appellant further argued that OWCP failed to properly terminate his compensation benefits under 5 U.S.C. § 8106 as the position was not vocationally or medically suitable based on his physical disability, physical limitations and work history. However, he did not show that 5 U.S.C. § 8106 was erroneously applied or interpreted in his situation. While appellant may have learned about further accommodations and that the position was considered light duty during the hearing on April 21, 2010, this would not change the fact that the offered position was medically and vocationally suitable to appellant. Thus he has not shown that OWCP erroneously applied or interpreted a specific point of law and he has not advanced a relevant legal argument not previously considered by OWCP.

A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence not previously considered by OWCP, but appellant submitted no such evidence with his reconsideration request. The majority of the evidence appellant submitted with his reconsideration request was duplicative of evidence previously submitted. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>11</sup> The new evidence appellant submitted, including the November 28, 2011 report from Dr. Blasdell, fails to address the particular issue involved, that is whether OWCP properly terminated appellant's benefits on July 29, 2011 based upon refusal of suitable work, and, thus, does not constitute a basis for reopening a case.<sup>12</sup> As appellant did not meet any of the necessary requirements he is not entitled to further merit review.<sup>13</sup>

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<sup>10</sup> *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>11</sup> See *A.L.*, Docket No. 08-1730 (issued March 16, 2009). See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

<sup>12</sup> *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>13</sup> See *L.H.*, 59 ECAB 253 (2007).

The Board 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.

On appeal, appellant requests that the Board review the merits of his case. The Board noted above that it only has jurisdiction over OWCP's July 9, 2012 nonmerit decision which denied his request for reconsideration and therefore is precluded from conducting a merit review.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's application for reconsideration without merit review of the claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 9, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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