

FACTUAL HISTORY

On April 23, 2009 appellant, then a 52-year-old health system specialist, filed a traumatic injury claim alleging that on April 17, 2009 she sustained an aggravation of asthma after being exposed to paint fumes in the performance of duty. She stopped work on April 17, 2009. OWCP accepted the claim for an aggravation of preexisting extrinsic asthma and paid appellant compensation for total disability beginning June 7, 2009.

By decision dated August 2, 2011, OWCP terminated appellant's compensation and authorization for medical benefits effective that date after finding that she had no further employment-related disability or need for medical treatment.² It noted that a conflict of medical opinion arose between Dr. Vinod Anand, an attending Board-certified otolaryngologist, and Dr. Beverly Fulcher, a Board-certified otolaryngologist and OWCP referral physician, regarding whether her vocal cord dysfunction resulted from her April 17, 2009 work injury. OWCP found that the opinion of Dr. John M. Schweinfurth, a Board-certified otolaryngologist and impartial medical examiner, established that her current condition of vocal spastic dysphonia was not causally related to her paint fume exposure. It further found that the opinion of Dr. Charles Bryan, a Board-certified internist specializing in pulmonology and an OWCP referral physician, established that appellant's temporary aggravation of asthma had resolved. OWCP determined that the opinion of Dr. Jeffrey K. LeDuff, an attending Board-certified internist, was insufficiently rationalized to create a conflict with Dr. Bryan regarding whether she continued to have an employment-related aggravation of extrinsic asthma.

On August 12, 2011 appellant requested a telephone hearing before an OWCP hearing representative. In a decision dated February 2, 2012, OWCP's hearing representative affirmed the August 2, 2011 termination decision.

On December 28, 2012 appellant, through her attorney, requested reconsideration. In support of the request, she submitted an October 22, 2012 report from Dr. LeDuff, who indicated that appellant experienced problems after chemical exposure in April 2009. Dr. LeDuff noted that she had a history of asthma and had "tried to return to work, but this was aggravated once again by her environment at work at that time." He concluded that appellant's "trouble started once again when she was exposed to chemicals at the [employing establishment] causing her spastic dysphonia."

By decision dated January 9, 2013, OWCP denied appellant's request for reconsideration after finding that the medical evidence submitted was substantially similar to evidence already of record and thus insufficient to warrant reopening the case for further merit review.

On January 23, 2013 appellant, through her attorney, again requested reconsideration. She submitted speech therapy notes from 2009 to 2012, treatment notes from 2005, and progress reports dated 2005 to 2009. In a progress report dated October 28, 2011, Dr. D. Winn Walcott, a Board-certified allergist, discussed appellant's complaints of a stuffy nose, sneezing, sore throat and hoarseness. He diagnosed intrinsic asthma with an acute exacerbation and acute bronchitis.

² OWCP initially issued a termination decision on February 25, 2011; however, it vacated this decision after finding that it had not provided appellant with due process.

On December 1, 2011 Dr. Walcott noted that appellant had continued hoarseness that began after “a significant chemical exposure.” He diagnosed intrinsic asthma and allergic rhinitis. In an October 4, 2012 progress report, Dr. Walcott diagnosed acute bronchitis, intrinsic asthma with an acute exacerbation and allergic rhinitis.

Appellant also submitted a medical report dated November 26, 2012 from Dr. Kimberly N. Vinson, a Board-certified otolaryngologist, who related that she initially treated appellant in August 2009 for vocal cord and respiratory problems after exposure to paint fumes in April 2009 and that at their last session they discussed “the possibility of anxiety contributing to her symptoms....” Dr. Vinson again treated appellant in March 2012 for an irritable larynx and muscle tension dysphonia and provided speech and physical therapy. She stated, “[Appellant] does not have SD [spasmodic dysphonia] based on my two examinations. SD is a neurologic, focal dystonia of the larynx characterized by sound specific breaks.”

In a report dated December 6, 2012, Dr. Walcott related that appellant experienced an exacerbation of asthma and a loss of voice when exposed to irritants. He opined that when she was exposed to occupational irritants she had a “significant upper and lower airway problems including her voice loss. It is my opinion that her occupational exposure[s] are causing both upper and lower airway symptoms.” In a progress note dated December 10, 2012, Dr. Walcott discussed appellant’s continued hoarseness and current symptoms of a cough and wheeze. In a progress report dated December 14, 2012, Dr. Todd N. Adkins, a Board-certified allergist, evaluated her for sinus and nasal congestion.

In a decision dated April 26, 2013, OWCP denied appellant’s request for reconsideration after finding that she had not submitted evidence or raised an argument sufficient to warrant reopening her case for further merit review under section 8128.

On appeal appellant’s attorney argues that OWCP failed to consider the reports of Dr. Walcott and Dr. Vinson in denying her reconsideration request.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ 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.⁴ 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.⁵ When a claimant fails to meet one of the above standards, OWCP

³ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.”

⁴ 20 C.F.R. § 10.606(b)(3).

⁵ *Id.* at § 10.607(a).

will deny the application for reconsideration without reopening the case for review on the merits.⁶

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.⁷ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁸ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁹

ANALYSIS

OWCP accepted that appellant sustained an aggravation of preexisting extrinsic asthma due to an April 17, 2009 employment injury. It terminated her compensation and authorization for medical benefits effective August 2, 2011 after finding that she had no further employment-related condition or disability. In decisions dated January 9 and April 26, 2013, OWCP denied appellant's requests for reconsideration.

As noted above, the Board does not have jurisdiction over the January 9 and April 26, 2013 OWCP decisions. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In her December 28, 2012 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She 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.

A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any pertinent new and relevant medical evidence in this case. She submitted a report dated October 22, 2012 from Dr. LeDuff, who discussed appellant's history of chemical exposure in April 2009. Dr. LeDuff noted that appellant had sustained another aggravation of her condition when she tried to resume work. He diagnosed spastic dysphonia due to chemical exposure at work. Dr. LeDuff's opinion, however, is substantially similar to his prior report dated September 16, 2010 which was previously considered by OWCP. Consequently, it is cumulative in nature and thus insufficient to warrant reopening the case for merit review.¹⁰

With her January 23, 2013 request for reconsideration, appellant submitted speech therapy notes dated 2009 to 2012 and medical evidence dated 2005 to 2009. As this evidence

⁶ *Id.* at § 10.608(b).

⁷ *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

⁸ *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

⁹ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

¹⁰ *F.R.*, 58 ECAB 607 (2007); *Patricia Aiken*, 57 ECAB 441 (2006).

does not address the threshold issue of whether she had any further condition or disability after August 2, 2011, it does not constitute pertinent new and relevant medical evidence.¹¹

Appellant further submitted progress reports dated October 28 and December 1, 2011 and October 4, December 10 and 14, 2012 from Dr. Walcott and Dr. Adkins. These reports do not address the relevant issue of whether appellant requires any additional medical treatment or has any further disability due to her April 17, 2009 employment injury. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.¹²

In a report dated November 26, 2012, Dr. Vinson described her treatment of appellant in August 2009 for respiratory and vocal cord problems after she was exposed to paint fumes in April 2009. She indicated that anxiety may be exacerbating appellant's symptoms. In March 2012 Dr. Vinson treated appellant for muscle tension dysphonia and an irritable larynx. She found no evidence of SD. As Dr. Vinson did not address the threshold issue of whether appellant had continuing disability or the need for medical treatment due to the accepted condition of an aggravation of extrinsic asthma, her opinion does not constitute pertinent new and relevant medical evidence.

On December 6, 2012 Dr. Walcott opined that appellant experienced an exacerbation of asthma and voice loss when exposed to irritants. He advised that she experienced problems with her upper and lower airways due to occupational exposure. Again, however, the relevant issue is whether appellant has any further medical condition or disability as a result of her April 17, 2009 employment injury. Dr. Walcott did not address the relevant issue; consequently, his opinion is insufficient to warrant reopening the case for further merit review under section 8128.¹³

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

CONCLUSION

The Board finds that OWCP, in its January 9 and April 26, 2013 decisions, properly denied appellant's requests to reopen her claim for further merit review under section 8128.

¹¹ *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

¹² *Id.*

¹³ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 26 and January 9, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 21, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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