

FACTUAL HISTORY

On January 17, 2008 appellant, then a 49-year-old mail handler, filed a traumatic injury claim alleging that on November 18, 2007 he injured his right shoulder after pushing and pulling an upright to scales and machines.

In narrative statements dated November 21 and 25, 2007 and March 3, 2008, appellant related that he resigned from the employing establishment due to physical and mental stress. He described the development of his claimed injury and noted his prior carpal tunnel injury. Appellant reported the claimed injury to his supervisor who failed to report the injury to a safety manager. He explained that the only available date for him to seek medical treatment from Dr. Michael D. Overbeck, an attending Board-certified internist, was on December 18, 2007. After his examination, Dr. Overbeck referred appellant to Dr. David L. Glaser, a Board-certified orthopedic surgeon, who could not see him until January 2, 2008 due to the holiday season.

Appellant submitted medical records dated January 2 to February 29, 2008 which addressed his right shoulder, cervical and lumbar conditions and causal relationship. In a February 29, 2008 report, Dr. Overbeck advised that appellant sustained a right rotator cuff injury that was caused or aggravated by the November 2007 incident.

In an undated letter, Barbara A. McCottrell, a supervisor of distribution operations, controverted the claim. She noted that appellant did not work more than 62 hours before his resignation. Ms. McCottrell described his work duties and contended that he was never instructed to pull an upright to a scale and machines. Appellant never reported an injury to management or a supervisor while working at the employing establishment. There were no witnesses to the alleged incident.

During conferences held on April 22 and 23, 2008, Curt Wanamaker and Tyrone Bolden, supervisors, respectively, advised OWCP that appellant was instructed to push and not pull equipment. He was also instructed to immediately report an injury to his supervisor. Both Mr. Wanamaker and Mr. Bolden stated that appellant did not mention that he was injured or report an injury.

By decision dated April 24, 2008, OWCP denied appellant's claim, finding that the evidence was insufficient to establish that the November 18, 2007 incident occurred as alleged. It found several discrepancies in the evidence that cast serious doubt on his claim and he submitted insufficient factual and medical evidence to establish that the incident occurred as alleged.

On April 28, 2008 appellant requested a telephone hearing before an OWCP hearing representative and submitted medical evidence. In reports dated February 29 and September 8, 2008 and January 19, 2009, Dr. Overbeck reiterated his opinion that appellant sustained a right rotator cuff injury due to the November 2007 incident.

In a March 23, 2009 decision, an OWCP hearing representative affirmed the April 24, 2008 decision, finding that the factual evidence was insufficient to establish that the November 18, 2007 incident occurred at the time, place and in the manner alleged.

In a March 16, 2010 letter, appellant, through his attorney, requested reconsideration and submitted medical evidence. Counsel contended that Dr. Overbeck's reports established that appellant sustained a right rotator cuff shoulder injury, cervical strain and possible herniated discs on November 18, 2007 due to his work at the employing establishment. He also contended that appellant had provided notice of his injury to Mr. Wanamaker and a Ms. Robinson. Counsel argued that appellant reported his injury within the time limitations provided by FECA. He further argued that OWCP erred in finding that the alleged injury did not occur as there were no witnesses and as appellant continued to work three to four days after his injury occurred. Counsel contended that OWCP erred in making a negative inference or conclusion from appellant's explanation that he resigned from the employing establishment due to harassment and discrimination based on his ethnicity, national origin and religion for which he filed a claim with the Equal Employment Opportunity Commission. He noted that a decision from the Social Security Administration, which awarded appellant disability benefits effective November 10, 2008, referenced his November 18, 2007 injury at the employing establishment.

In a March 11, 2010 report, Dr. Overbeck again advised that appellant's right shoulder injury was related to his November 2007 injury.

In a June 17, 2010 decision, OWCP denied modification of the March 23, 2009 decision. It found that appellant failed to submit any evidence to establish that he provided immediate notice of injury to his supervisors. He continued to work after his injury and did not seek medical treatment until January 2, 2008. OWCP found that these inconsistencies continued to be sufficient to cast serious doubt as to whether the claimed injury occurred at the time, place and in the manner alleged.

By letter dated June 11, 2011, appellant's attorney requested reconsideration. He cited federal court cases in support of his contention that OWCP failed to defer to Dr. Overbeck's rationalized and uncontradicted medical opinion that appellant sustained a work-related injury. Counsel reiterated his contention that appellant immediately reported his injury to his supervisor and contended that the employing establishment had a strong financial incentive to deny receiving notice of his injury.

In a July 21, 2011 decision, OWCP denied modification of the June 17, 2010 decision, finding that the evidence was insufficient to establish that the November 18, 2007 incident occurred at the time, place and in the manner alleged.

By letter dated June 14, 2012, appellant, through his attorney, requested reconsideration. Counsel reiterated that appellant immediately reported his injury to his supervisors. The supervisor's statement indicating that she had no knowledge of the injury was not relevant as she was not the supervisor to whom appellant had reported the injury. Appellant testified that he reported his injury to other supervisors.³ Counsel contended that OWCP erroneously substituted its subjective judgment into the factual analysis when it questioned why the supervisors would not report appellant's injury as required under FECA. He noted that appellant clearly explained

³ During the August 15, 2008 telephone hearing, appellant stated that he immediately reported his right shoulder injury to Mr. Bolden on November 18, 2007. On the following date, he informed Ms. Robinson, a floor manager, about his injury.

that he was harassed by supervisors based on his national origin, Egyptian, name and accent which presented a good motive for the supervisors' conspiracy to refuse to report his work-related injury. Based on their discriminatory animus, they did not want him to receive benefits. Counsel requested a new hearing at a minimum and the reopening of appellant's claim to ascertain whether his injury resulted from a hostile work environment and the possible motives of the supervisors to conceal his injury. He contended that the un rebutted medical evidence from Dr. Overbeck established that appellant sustained a work-related injury.

In a July 26, 2012 decision, OWCP denied appellant's request for reconsideration. It found that he did not raise any substantive legal questions or submit new and relevant evidence warranting further merit review of his claim.

LEGAL PRECEDENT

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

ANALYSIS

On January 17, 2008 appellant filed a claim for a traumatic injury, which OWCP denied by decisions dated April 24, 2008, March 23, 2009, June 17, 2010 and July 21, 2011. OWCP found that he did not sustain a right shoulder injury on November 18, 2007 while in the performance of duty, as alleged. On June 14, 2012 appellant disagreed with OWCP's July 21, 2011 decision and requested reconsideration.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered. In a June 14, 2012 request for reconsideration, counsel alleged that appellant immediately reported his injury to his supervisors and not to the supervisor who stated that she had no knowledge of the injury. He further alleged that OWCP erroneously substituted its subjective judgment into the factual analysis as it questioned why the supervisors would not report appellant's injury as required under FECA despite appellant's clear explanation that he was harassed and discriminated against by his supervisors based on his national origin, name and accent. Counsel stated that such behavior served as a good motive for the supervisors'

⁴ 5 U.S.C. §§ 8101-8193. Section 8128 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. 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

conspiracy to refuse to report his work-related injury and prevent him from receiving compensation benefits. He contended that Dr. Overbeck's medical reports were sufficient to establish that appellant sustained a work-related injury. These arguments are not new and are repetitious of evidence already of record and considered by OWCP and, therefore, cumulative in nature. Arguments which repeat or duplicate arguments already in the case record do not constitute a basis for reopening a case for a merit review.⁷ Further, the Board finds that appellant's argument regarding the weight of Dr. Overbeck's reports is not premature as the underlying issue in this case is factual in nature, whether the claimed events contributed to the claimed injury occurred as alleged.⁸

The Board finds that OWCP properly determined that appellant was not entitled to further review of the merits of his claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied his June 14, 2012 request for reconsideration.⁹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

⁷ See *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Betty A. Butler*, 56 ECAB 545 (2005).

⁸ See *Bonnie A. Contreras*, 57 ECAB 364 (2006) (where a claimant did not establish an employment incident alleged to have caused an injury, it was not necessary to consider any medical evidence).

⁹ *Robert E. Cullison*, 55 ECAB 570 (2004); *M.E.*, 58 ECAB 694 (2007) (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).

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board