

On appeal, counsel asserts that OWCP did not review the documents submitted on reconsideration, but only materials forwarded by the employing establishment and Department of Veterans' Affairs records irrelevant to the claim. He contends that the employing establishment forbade employees from using narcotics and benzodiazepines during work hours, an argument OWCP previously ignored. Counsel also contends that appellant did not refuse suitable work and that the employing establishment denied reasonable accommodations in March 2007. He asserts that OWCP erred by requiring appellant to work while he was taking prescription narcotics.

FACTUAL HISTORY

OWCP accepted that on April 3, 2006 appellant, then a 55-year-old security screening agent, sustained a lumbosacral strain when he lifted heavy luggage. He stopped work on the date of injury. Appellant received wage-loss compensation.

In a March 8, 2007 report, Dr. G.P. Massand, an attending Board-certified orthopedic surgeon, found appellant able to perform sedentary work for six to eight hours a day. Appellant returned to work in a modified light-duty position on March 19, 2007. He stopped work again on April 1, 2007 and received wage-loss compensation.²

Dr. Narendra Shah, an attending Board-certified anesthesiologist, submitted reports commencing April 25, 2008. She diagnosed chronic lumbar pain, lumbar disc disease, lumbar disc protrusions and degenerative disc disease and prescribed medication. Dr. Shah found appellant able to perform light duty for six hours a day, with limited lifting, standing and sitting.

On October 28, 2008 the employing establishment offered appellant a full-time job as a modified security screener, with lifting limited to 20 pounds, standing for 20 to 30 minutes and sitting for four hours. Appellant submitted reports from Dr. Shah dated January 16 to April 24, 2009 reiterating her prior diagnoses.

In a May 15, 2009 letter, OWCP advised appellant that the offered modified screener position was found suitable work and that he must either accept the offer or provide valid reasons for refusal within 30 days or his compensation could be terminated.

On June 18, 2009 OWCP advised him that it would not consider any additional reasons for refusal and he must accept the position within 15 days. In response, appellant provided additional reports from Dr. Shah dated from May 22 to July 17, 2009, reiterating the diagnoses and renewing prescriptions. He did not accept the position or return to work.

By decision dated August 5, 2009, OWCP terminated appellant's monetary compensation effective August 29, 2009 under section 8106(c) of FECA on the grounds that he refused an offer of suitable work.

² On July 17, 2007 OWCP obtained a second opinion from Dr. Donald J. Thompson, who found appellant able to perform full-time limited duty.

In a September 2, 2009 letter, appellant requested an oral hearing. At the hearing on December 29, 2009, he asserted that he wanted to accept the October 28, 2008 job offer but the employing establishment would not allow him to take narcotic medications during work hours. Appellant provided a copy of the October 28, 2008 job offer to the employing establishment, which he accepted on October 31, 2008. On the offer, he wrote questions regarding training, medication use and his desire to find alternate employment, stating that he could not return to work until these matters were resolved. Appellant stated in a January 12, 2010 letter that he wished to return to work but could not do so as he took narcotic medication and his employing establishment's policies restricted narcotic use in the workplace.

Appellant also submitted correspondence dated December 7, 2008 to January 21, 2010 to the employing establishment asking for information about uniforms, security badges, training and workplace policies. He also provided copies of letters to OWCP asking for various copies of documents.

Appellant also submitted reports from Dr. Shah dated August 5, 2008 to February 3, 2010. Dr. Shah repeated prior diagnoses and renewed prescriptions. In a January 22, 2010 memorandum, the employing establishment noted speaking to Dr. Shah about appellant's need to use narcotics during work hours. Dr. Shah advised that appellant could take Tylenol or Advil during the workday, then take narcotic medication at night if needed.

By decision dated March 22, 2010, an OWCP hearing representative affirmed the August 5, 2009 decision. However, the hearing representative also remanded the case for additional development regarding whether appellant was able to perform the modified security screener position as of August 5, 2009.

On remand, of the case, OWCP sent Dr. Shah an April 14, 2010 letter asking that he review the October 28, 2008 job offer and address whether appellant was able to perform the position as of August 2009. In a June 3, 2010 letter, the employing establishment advised appellant that while it prohibited employees from using narcotics while on duty, Dr. Shah advised an occupational health nurse that appellant could use Advil or Tylenol while at work.

Appellant submitted copies of letters dated April to June 2010 to OWCP, Dr. Shah and the employing establishment regarding his use of prescription narcotics. He also provided reports from Dr. Shah dated from February 26 to July 2, 2010 reiterating his diagnoses and renewing prescriptions. Appellant also submitted notes from a social worker and a state vocational counselor.

On June 24, 2010 appellant accepted a full-time position as a modified security screener.

By decision dated July 21, 2010, OWCP affirmed the August 5, 2009 decision. It found that the medical evidence of record did not establish the modified screener position offered to him on October 28, 2008 was outside his medical restrictions.

In an August 16, 2010 letter, appellant requested an oral hearing, held on February 24, 2011. He asserted that he did not refuse suitable work, but declined a position that Dr. Shah had not approved. At the hearing, appellant reiterated that he refused the October 28,

2008 job offer based on his prescription narcotics. He also asserted that he did not have adequate training to perform the offered position.

Following the hearing, appellant provided a July 19, 2010 report from Dr. Shah, who explained that appellant's narcotic medication could cause drowsiness and impair physical and mental abilities. He did not have a description of the position offered to appellant on October 28, 2008 and could not determine whether appellant was able to perform the job as of August 2009. Dr. Shah opined that appellant could perform the modified position he accepted on June 24, 2010.

By decision dated and finalized July 12, 2011, a hearing representative affirmed the July 21, 2010 decision, finding that OWCP properly terminated appellant's wage-loss compensation as of August 29, 2008 on the grounds that he refused suitable work.

Dr. Shah submitted periodic reports from August 5, 2011 through December 21, 2012, finding appellant's condition unchanged. Appellant continued to work in the modified screener position through February 2012, working six hours a day and claiming compensation for the remaining two hours. He filed a recurrence of total disability claim and claimed compensation commencing November 29, 2012.

In a December 27, 2012 letter, OWCP advised appellant of the additional evidence needed to establish his claim for disability as of November 29, 2012. It requested a statement from his attending physician supporting that he was unable to perform the modified screener position for the claimed period. It afforded appellant 30 days to submit such evidence.

In a January 14, 2013 letter, counsel asserted that appellant had requested reconsideration of the July 12, 2011 decision on an unspecified date. Appellant contended that, on November 28, 2012, the employing establishment withdrew his six-hour a day schedule and required him to work eight hours a day. He stopped work as of November 28, 2012, contending that Dr. Shah restricted him from working more than six hours a day. Appellant submitted a January 18, 2013 report from Dr. Shah restricting appellant to working no more than six hours a day, with limitations on sitting, standing, walking and lifting.

By decision dated February 4, 2013, OWCP denied appellant's claim for compensation for the period November 29, 2012 to January 26, 2013. It found that Dr. Shah's reports stated that he was able to work during that period.

Accompanying an April 9, 2013 letter, counsel submitted a copy of a July 1, 2012 request for reconsideration of OWCP's July 12, 2011 decision, with a postal certified return receipt confirming that OWCP received the request on July 9, 2012. He contended that the modified screener position offered on October 28, 2008 was not suitable work as it was full time, whereas Dr. Shah had limited appellant to working six hours a day. Counsel also asserted that an employing establishment management directive would have prevented appellant from taking prescribed narcotic medications, creating a legal prohibition against accepting the job.

Counsel submitted reports from Dr. Shah dated February 15 to July 8, 2013, finding appellant able to perform restricted-duty work for six hours a day through April 12, 2013. Dr. Shah commented that appellant stopped work on November 29, 2011 as the employing

establishment required him to work full time. He noted on June 10, 2013 that appellant was totally disabled for work due to a recent myocardial infarction.

By decision dated August 6, 2013, OWCP affirmed its July 12, 2011 decision, finding that the additional evidence and argument submitted did not establish that the modified screener position offered on October 28, 2008 was not within appellant's medical restrictions.

In a December 19, 2013 letter, counsel requested reconsideration. He repeated his argument that appellant was legally prohibited from accepting the October 28, 2008 job offer because his narcotic medications were restricted by an employing establishment management directive against using narcotics while on duty. Counsel reiterated that the offered position was full time, in violation of the six-hour work limitation given by Dr. Shah. He submitted reports from Dr. Shah dated August 5, 2013 to February 10, 2014. Dr. Shah repeated the diagnoses of lumbar disc disease and lumbar disc protrusion with radiculopathy. He renewed prior work restrictions limiting appellant to working six hours a day light duty.

The record also contains a November 11, 2013 peer review report from employing establishment physician Dr. David Sack, Board-certified in occupational medicine. He provided a history of injury and treatment and reviewed medical records. Dr. Sack noted that appellant took prescribed narcotics. He stated that his records review was insufficient to determine whether appellant was able to work while taking the prescribed medications. It was not possible to determine whether appellant had developed a tolerance such that he could perform his assigned tasks without impairment. Dr. Sack recommended additional medical development on the issue. He commented that some reports indicated that appellant genuinely wished to return to work, while others "suggest a number of caveats that do not have much basis in objective findings."

Appellant also provided a June 21, 2013 benefits statement from the Department of Veterans' Affairs. He filed additional claims for wage-loss compensation.

By decision dated February 27, 2014, OWCP denied appellant's request for reconsideration on the grounds that he failed to present new, relevant evidence or legal argument. It found that counsel's argument was repetitive of his prior assertions. OWCP found that Dr. Shah's reports were irrelevant or immaterial as they did not address whether appellant was able to perform the offered position as of August 2009. It also found that Dr. Sack's opinion was cumulative of medical evidence previously of record and did not provide a definite opinion. OWCP further found that appellant's claims for compensation and the benefits statement from the Department of Veterans' Affairs were irrelevant to the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ section 10.606(b)(2) of Title 20 of the Code of Federal 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

³ 5 U.S.C. § 8128(a).

pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) provides that when an application for review of the merits of a claim 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

In support of a request for reconsideration, a claimant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.⁶ He or she need only submit relevant, pertinent evidence not previously considered by OWCP.⁷ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁸

ANALYSIS

OWCP accepted that appellant sustained a lumbosacral strain on April 3, 2006. Appellant returned to light duty in March 2007, but stopped work on April 1, 2007. On October 28, 2008 the employing establishment offered him a modified-duty position. By letters dated May 15 and June 18, 2009, OWCP advised appellant that the offered position was found to be suitable work. It advised appellant of the penalties under FECA for refusing the position without good cause. As appellant did not accept the position or provide good cause for his refusal, OWCP issued its August 5, 2009 decision terminating his monetary compensation effective August 29, 2009.

OWCP affirmed the termination by merit decisions dated March 22 and July 21, 2010 and July 12, 2011. It found that the periodic reports provided by Dr. Shah, an attending Board-certified anesthesiologist, did not establish that the modified position offered appellant on October 28, 2008 was not suitable work.

Counsel requested reconsideration on July 1, 2012, contending that the October 28, 2008 job offer was not suitable work as it was full time, in violation of Dr. Shah's six-hour work limit. He also asserted that appellant was legally prohibited from accepting the position as an employing establishment management directive barred the use of narcotics medications during the workday. Counsel submitted reports from Dr. Shah, who reiterated prior diagnoses, prescriptions and work restrictions. OWCP denied reconsideration by merit decision issued August 6, 2013, finding that the additional evidence and argument failed to establish that the October 28, 2008 job offer was not suitable work.

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

⁷ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

Counsel again requested reconsideration on December 19, 2013. He repeated the arguments presented in his July 1, 2012 request for reconsideration regarding the administrative prohibition against narcotics use and Dr. Shah's six-hour work restriction. Counsel provided treatment notes from Dr. Shah dated from August 5, 2013 to February 10, 2014, repeating prior diagnoses, work restrictions and prescription information. The record also contains a November 11, 2013 report from Dr. Sack, an employing establishment physician, a benefits statement from the Department of Veterans' Affairs and appellant's claim forms for wage-loss compensation. OWCP denied reconsideration by decision dated February 27, 2014, finding that counsel's arguments and Dr. Shah's and Dr. Sack's reports were repetitive and cumulative and the remainder of the evidence was irrelevant to the claim.

The Board finds that OWCP properly denied counsel's December 19, 2013 request for reconsideration. Counsel's arguments were the same as those set forth in his July 1, 2012 request for reconsideration. Dr. Shah's reports were cumulative, reiterating prior diagnoses, restrictions and medication information. Dr. Sack's opinion was also cumulative in that it was highly similar to other employing establishment statements previously considered on merit review, including the June 3, 2010 memorandum noting that Dr. Shah would permit appellant not to take prescribed narcotics during the workday. Evidence which is duplicative or cumulative or repetitive in nature is insufficient to warrant reopening a claim for merit review.⁹ Appellant's claim forms for wage-loss compensation and the Department of Veterans' Affairs benefits statement are not relevant to the suitable work issue and therefore do not comprise a basis for reopening the case.¹⁰

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any in this case. He 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. OWCP's February 27, 2014 decision denying reconsideration was proper under the law and facts of the case.

On appeal, counsel asserts that OWCP did not review the documents submitted on reconsideration. The Board notes that OWCP's February 27, 2014 decision discussed the documents submitted to the record on reconsideration. There is no evidence of record that OWCP failed to consider the documents counsel submitted. Counsel also repeated his argument that the employing establishment restricted employees from using prescribed narcotics during work hours. He contends that OWCP previously ignored this contention. The Board notes that OWCP fully considered the prescription drug argument pursuant to the July 1, 2012 request for reconsideration. Counsel also contends that appellant did not refuse suitable work, and that the employing establishment denied reasonable accommodations in March 2007. This argument pertains to the merits of the case, which are not before the Board on the present appeal. Counsel also asserts that OWCP violated due process by requiring appellant to work while he was taking

⁹ *Denis M. Dupor*, 51 ECAB 482 (2000).

¹⁰ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

prescription narcotics. This argument also pertains to the merits of the case, which are not before the Board on the present appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 27, 2014 is affirmed.

Issued: November 20, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board