

On appeal, appellant contends that his disability is due to his employment and that he is entitled to wage-loss compensation as his disability is employment related.

FACTUAL HISTORY

This case has previously been before the Board. In an October 6, 2011 decision, the Board affirmed a June 18, 2010 OWCP decision denying appellant's claim for wage-loss compensation for the period March 19 through October 22, 2007 causally related to an April 5, 2004 employment injury.² The Board found that he failed to submit sufficient medical evidence to establish that he was totally disabled for the period March 19 through October 22, 2007 due to his accepted employment injuries. Appellant also failed to submit medical evidence explaining why he was unable to perform his light-duty position during this period or a material change in his accepted condition. The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.³

Appellant filed claims for wage-loss compensation commencing May 30, 2012.⁴

By letter dated August 13, 2012, OWCP informed appellant that the evidence was insufficient to establish his claim for wage-loss compensation. Appellant was advised as to the medical and factual evidence required to support his claim.

By decision dated September 27, 2012, OWCP denied appellant's claim for a recurrence of disability on and after May 23, 2012.

On October 9, 2012 appellant requested an oral hearing before an OWCP hearing representative and a telephonic hearing was held on February 11, 2013. He testified that he stopped work on May 16, 2012 and has not returned.

By decision dated April 26, 2013, an OWCP hearing representative found the evidence insufficient to establish that appellant's total disability on and after May 23, 2012 was causally related to his accepted April 5, 2004 employment injuries. She found that the evidence implicated new factors as he attributed his disability to disputes with his supervisor following a May 2012 meeting. The hearing representative found the evidence insufficient to establish either a spontaneous change in his condition or a natural worsening of his condition.

² Docket No. 11-278 (issued October 6, 2011).

³ On April 5, 2004 appellant, then a 38-year-old building equipment mechanic, sustained a traumatic injury when she slipped on a wet ladder and fell onto a folding chair. OWCP accepted the claim for neck sprain, lumbar sprain and rib sprain, which was expanded to include a consequential injury of anxiety disorder with mixed anxiety and depressed mood. It assigned claim file number xxxxxx098. OWCP subsequently accepted an unspecified anxiety state and major depression with recurrent episode, severe with mention of psychotic behavior. Appellant returned to a light-duty job on April 12, 2004 due restrictions from his physician. On June 5, 2007 he filed an occupational disease claim alleging that on April 20, 2006 he first realized that his stress and anxiety were due to conflicts with his supervisor over work restrictions. This was assigned claim file number xxxxxx005. By letter dated April 24, 2008, OWCP informed that claim file numbers xxxxxx005 and xxxxxx098 were doubled, with the latter number designated the master file number.

⁴ Appellant was fired by the employing establishment on or about August 17, 2012.

Following the April 26, 2013 decision, OWCP accepted appellant's claim to include the conditions of cervical and lumbar spine spondylosis.

On August 22, 2013 appellant requested reconsideration on the denial of his wage loss on and after May 16, 2012. He submitted an arbitration decision dated August 1, 2013. Jim K. Duncan, an arbitrator, concluded that the employing establishment had just cause to discipline appellant, but not for his removal. The decision instructed the employing establishment that appellant's removal be reduced to a suspension. Mr. Duncan instructed that appellant's return to work was conditional and based on appellant providing acceptable medical documentation regarding the resolution of his medical issues. He found that the record supported that appellant had "some type of medical condition which obviously" impacted the ability to perform his work.

In an August 28, 2013 letter, Dr. Phillip A. Tracy, a treating Board-certified family medicine physician, stated that appellant continued to be totally disabled from working due to his depression and anxiety.

In reports dated August 7 and September 16, 2013, Dr James M. Sims, a treating psychiatrist, recommended that appellant be transferred to a different supervisor due to the conflict between him and his current supervisor. In the September 16, 2013 report, he opined that appellant was unable to return to work due to his anxiety and major depression, recurrent episode, severe with psychotic behavior. Dr. Sims stated that appellant's past conflicts with his supervisor "continues to cause him stress" and he worries about possible future contact with this supervisor.

In an October 25, 2013 statement, appellant argued that it did not matter whether his disability was due to his interaction with his supervisor or was a spontaneous recurrence as his disability was employment related.

By decision dated December 20, 2013, OWCP denied reconsideration.⁵

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ 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.⁷ To be entitled to a merit review of an OWCP decision denying or

⁵ The Board notes that, following the December 20, 2013 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. 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).

⁶ 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.

⁷ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁸ 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.⁹

ANALYSIS

On August 22, 2013 appellant requested reconsideration. The underlying issue is whether he sustained a recurrence of disability due to his accepted neck sprain, lumbar sprain and rib sprain and a consequential injury of anxiety disorder with mixed anxiety and depressed mood. In support of his request, appellant submitted factual and medical evidence including his statements, treatment notes from Drs. Sims and Tracy and an August 1, 2013 arbitration decision regarding his August 17, 2012 removal from employment.

The Board finds that the August 1, 2013 arbitration decision is relevant to the issue of whether appellant's disability was causally related to his accepted conditions as it discussed administrative error. Mr. Duncan found that appellant had an accepted medical condition which impacted his ability to perform his work. He stated that appellant's return to work was conditioned on appellant providing acceptable medical documentation regarding the resolution of his medical issues. These findings by Mr. Duncan raise the issue of whether appellant's recurrence of disability was due to an accepted employment condition and was not due to a new injury or new factor of employment as found by OWCP. As the claim for a recurrence of disability was denied on the grounds that the disability was due to a new employment factor and not to appellant's accepted conditions, the August 1, 2013 arbitration decision constitutes pertinent new evidence relevant to the basis for OWCP's December 13, 2013 denial of his claim for a recurrence of disability.

Accordingly, the Board finds that the August 1, 2013 arbitration decision constitutes pertinent new and relevant evidence not previously considered by OWCP.¹⁰ Appellant has met one of the requirements of 20 C.F.R. §§ 10.606(b)(3) and therefore he is entitled to a review of the merits of his claim. The case will be remanded to OWCP for any necessary further development, to be followed by a merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128.

⁸ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

¹⁰ *Id.* at § 10.606(b)(3).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 20, 2013 is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: October 9, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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