

FACTUAL HISTORY

On December 2, 2013 appellant, then a 47-year-old forklift operator, filed an occupational disease claim (Form CA-2) alleging that he first became aware of his back injury and his detached retina and realized that they were caused by driving through potholes at work, on April 11, 2012. He worked from 6:30 a.m. to 5:00 p.m., Monday through Thursday. Melvin Fagan, a supervisor, stated that he was not aware of the conditions described by appellant. He stated that appellant did very little forklift work.

Diagnostic test reports dated April 15, 2003 to October 21, 2010 addressed appellant's cervical and thoracic spine conditions.

Medical reports dated April 8 and 15 and August 20, 2003 addressed appellant's right and left eye conditions and left eye surgery.

In an April 11, 2012 magnetic resonance imaging (MRI) scan report, Dr. D. Scott Campanini, a radiologist, found mild dextroscoliosis in the mid-to-lower thoracic spine and minimal degenerative disease.

In reports dated May 3, July 25 and December 4, 2013, Dr. J. David Bradford, a Board-certified surgeon, advised that appellant had scleritis, ocular hypotony and pain of the left eye. Appellant also had total retinal detachment of the left eye for which he was status post *pars plana* vitrectomy, membrane peel and seleral buckle. Dr. Bradford stated that the retina was still attached.

An April 8, 2013 Equal Employment Opportunity negotiated settlement agreement between appellant and the employing establishment cancelled the employing establishment's April 1, 2013 letter proposing to suspend him for two workdays for failure to follow instructions and March 21, 2013 letter notifying him of the nonextension of his time-limited appointment as a forklift operator. The employing establishment also agreed not to mention or annotate the canceled letters on his official records or files maintained by management. Appellant agreed to voluntarily resign without coercion or duress effective April 8, 2013.

In an October 28, 2013 letter, the Office of Personnel Management (OPM) stated that it had reviewed appellant's medical records and determined that he was disabled for his forklift operator position due to thoracic spine degenerative disc disease and total retinal detachment of the left eye.

By letter dated December 3, 2013, Ann Harmon, an injury compensation program administrator, controverted appellant's claim, contending that he resigned from his job in lieu of further administrative action by his employing establishment and applied for disability retirement on April 8, 2013.³ Appellant had worked for the employing establishment since 2008 and during this time he never reported an injury or filed an injury claim related to his thoracic spine or left eye. Ms. Harmon noted OPM's letter approving his disability retirement due to his thoracic

³ A notification of personnel action form (SF 50-B) dated April 11, 2013 indicated that appellant resigned from the employing establishment effective April 8, 2013 due to medical reasons.

spine and left eye conditions. She reviewed a report of medical history completed by appellant during a preplacement examination for employment on April 11, 2008. Appellant reported no history of eye disorder or trouble or loss of vision in either eye. He answered no to the question whether he had or had been advised to have any operations or surgery. Ms. Harmon stated that, at the time he filed his CA-2 form, appellant had a history of a recurrent left retinal detachment several years prior to his employment. Appellant had three surgical procedures in 2003, one in Shreveport, Louisiana and two in Dallas, Texas. He had denied any prior medical problems with his eyes and surgeries of any type during his preplacement examination. Ms. Harmon contended that the medical evidence submitted by appellant failed to establish that he sustained left eye and thoracic spine injuries while working at the employing establishment from 2008 to 2013.

By letter dated December 11, 2013, OWCP advised appellant that the evidence submitted was insufficient to establish his claim. It gave him 30 days to submit a factual statement describing the employment factors that contributed to his injury and a medical report from a physician explaining how his employment activities caused, contributed to or aggravated his condition. OWCP also requested that the employing establishment submit factual evidence regarding appellant's claim and medical evidence, if he had been treated at its medical facility.

On December 17, 2013 appellant contended that his physician placed him on total disability in 2012 because he was worn down by his work. He stated that it was too aggressive and he was not prepared to work that hard. Appellant related that he had not worked since March 2013 because metal fragments got into his left eye causing a loss of vision in the eye. He further related that his claim was also for a back injury. Appellant contended that he was exposed to airborne metal and chemicals while driving a forklift on roads with bad potholes. He stated that his exposures were found during testing by the Occupational Safety and Health Administration (OSHA). Appellant claimed that he worked 10 hours a day, 6 to 7 days a week. He drove a forklift, tow motor and Humvees. Appellant usually drove a forklift approximately 10 hours a day due to a heavy workload. He stated that his last day at work was March 25, 2013 as ordered by his physician. Appellant drove as needed as he only had one eye and a severely damaged spinal cord. He had numbness in his entire left leg and sharp pains and tingling that radiated down his entire spinal cord and both arms. Appellant also had difficulty walking. His physician prescribed a permanent disability parking sticker on October 8, 2012 so that he could park closer to his work building to avoid painful long walks to the building. Appellant contended that his exposures to metal and chemicals caused infections and the removal of a piece of fine metal from his eye by "Dr. Fenton of [T]exarkana [Texas]"⁴ Which both led to darkness and loss of sight in his left eye. He realized his injuries were severely aggravated by his federal employment in October 2012. Appellant's left eyesight had decreased severely and he had difficulty walking due to a severely damaged spine, which made it difficult to perform his job. He contended that his employment-related loss of left eyesight and severely damaged spine resulted in his permanent disability. Appellant further contended that he did not have a spinal cord or left eye condition when he started work at the employing establishment.

⁴ The Board notes that Dr. Fenton's full name and professional qualifications are not contained in the case record.

In a May 23, 2003 computerized tomography (CT) scan report, Dr. Steven W. Holman, a Board-certified radiologist, found no signs of a fracture. He found mild reversal of the normal lordotic curves of the cervical spine that were probably due to muscle spasm or positioning.

In an April 11, 2012 CT scan report, Dr. Rudy M. Braza, a Board-certified radiologist, found intrinsic narrowing of the cervical spinal canal with multilevel degenerative changes. He also found a small focus of hyperintense signal within the spinal cord at C4-5 on the right suggestive of myelomacia. In an April 11, 2012 MRI scan report, Dr. Braza found degenerative disease and levoscoliosis of the lumbar spine.

By decision dated January 31, 2014, OWCP denied appellant's occupational disease claim. It found that the evidence was insufficient to establish that the conditions were caused by work factors

In a February 18, 2014 letter, appellant requested reconsideration. He contended that Jerry Blocker, his former supervisor, failed to respond to his request for documents showing the dates he complained about bad potholes and the dates Mr. Blocker submitted orders to maintenance to have them repaired. Appellant stated that this information was also needed so that his physician could submit a proper medical summary to the Department of Labor. He contended that he never received the requested documents, which was a denial of due process and caused his 30-day response limitation to expire and the denial of his claim. Appellant further contended that medical evidence clearly showed that his medical condition was not severe or disabling during his 2008 employing establishment examination. He asserted that OPM's October 28, 2013 letter granted him disability due to his thoracic degenerative disc disease and he was fully aware that his injuries were directly related to his work at the employing establishment. Appellant alleged that an OWCP claims examiner denied his claim because he was African American. He further alleged that the claims examiner was biased against him in his decision because he had knowledge about the existence of documents that he could have obtained prior to ruling against him.

In a January 23, 2014 report Dr. John H. Dodson, a radiologist at Forest Park Medical Clinic, Little Rock, AR advised that appellant had an acute cervical and lumbar sprain and chronic cervical and lumbar pain secondary to herniated nucleus pulposus. He further advised that appellant was permanently and totally disabled and could never return to work.

A document from Arkansas Spine and Pain listed instructions to follow before the performance of a February 25, 2014 procedure.

A description of appellant's forklift operator position required him to operate, among other things, an electric, gasoline or diesel powered forklift truck. The physical requirements of the position consisted of moderate physical effort to operate hand and foot controls while driving, turning and stopping the forklift truck and raising, lowering and tilting the loads being moved. The physical requirements also required frequent lifting, positioning and carrying supplies and equipment weighing from 20 to 50 pounds and occasionally up to 70 pounds. Work duties were performed inside and outside in cold, damp, drafty and hot areas. An employee was subject to injury from falling objects, collisions, shifting loads and overturning.

Appellant resubmitted a duplicate copy of OPM's October 28, 2013 letter.

In a March 18, 2014 decision, OWCP denied further merit review of appellant's claim. It found that he had failed to establish that it had erroneously applied or interpreted a point of law or to submit new and relevant evidence or argument not previously considered. OWCP found that the evidence submitted was cumulative in nature.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁵ has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁷

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable certainty and must be supported by medial rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁸ Neither the fact that appellant's condition became apparent during a period of employment nor, his or her belief that the condition was caused by his or her employment is sufficient to establish a causal relationship.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof to establish that his federal employment caused or aggravated his back and left eye conditions. Appellant identified the factors of employment that he believed caused his claimed conditions, including driving a

⁵ See *supra* note 1.

⁶ C.S., Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁸ *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, *id.* at 351-52.

⁹ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

forklift through bad potholes and being exposed to airborne metal and chemicals while driving a forklift 10 hours a day, 6 to 7 days a week. He alleged that OSHA testing confirmed his work exposures. Appellant contended that Dr. Fenton removed a piece of fine metal from his eye. His CA-2 form indicated that he worked 10 hours a day, 4 days a week and not 6 to 7 days a week as alleged. Mr. Fagan, a supervisor, advised that appellant performed very little forklift work. He further advised that he was not aware of the driving conditions described by appellant. The record does not contain any OSHA test results finding the existence of airborne metal and chemicals during the period appellant worked at the employing establishment. It also does not contain a report from Dr. Fenton providing a history that he removed a piece of metal from appellant's left eye as a result of driving a forklift truck. Additionally, none of the medical evidence of record contains a history of injury consistent with appellant's description of the alleged employment factors.

There is no probative evidence that appellant rode through potholes or was exposed to airborne metal and chemicals while driving a forklift 10 hours a day, 6 to 7 days a week at work. Because he did not meet his burden of proof to establish the existence of any employment factors which he believed caused or aggravated his claimed back and left eye conditions, he did not meet his burden of proof to establish any employment-related conditions.¹⁰

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128 of FECA,¹¹ 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.¹² 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.¹³ Section 10.608(b) of the implementing regulations states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.¹⁴

ANALYSIS -- ISSUE 2

On February 18, 2014 appellant disagreed with OWCP's January 31, 2014 decision, denying his occupational disease claim on the grounds that he had failed to establish fact of injury, indicating that he had not submitted evidence to support that the claimed injury occurred

¹⁰ See *M.H.*, Docket No. 07-1453 (issued October 18, 2007).

¹¹ See *supra* note 1. Under section 8128 of FECA, 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).

¹² 20 C.F.R. § 10.606(b)(3).

¹³ *Id.* at § 10.607(a).

¹⁴ *Id.* at § 10.608(b); see also *Norman W. Hanson*, 45 ECAB 430 (1994).

as described and he had not submitted any medical evidence to support his claim. He requested reconsideration. The underlying issue on reconsideration is factual in nature.

In his request for reconsideration, appellant contended that he was denied due process because the failure of Mr. Blocker, his former supervisor, to respond to his request for documents regarding the dates he complained about bad potholes and the dates Mr. Blocker submitted orders to maintenance to have them repaired caused OWCP's 30-day response limitation for submitting the requested evidence to expire and the denial of his claim. However, Mr. Blocker's alleged behavior does not demonstrate an error in the decision under review. Appellant did not cite legal precedent or specific supportive evidence. Where the legal argument presented has no basis in fact or precedent, OWCP is not required to reopen the case for merit review.¹⁵

Appellant contended that medical evidence clearly showed that his condition was not severe or disabling during his 2008 employing establishment examination. As the basis of OWCP's decision denying his claim was factual in nature, the Board finds that his contention regarding the weight of the medical evidence is not relevant to the issue at hand. The submission of evidence or argument that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁶ The Board finds, therefore, that appellant's contention is insufficient to reopen his claim for merit review.

Appellant alleged discrimination by the claims examiner who denied his claim because he was African American. He also alleged that the claims examiner was biased against him because he had knowledge about the existence of documents that he could have obtained prior to ruling against him.¹⁷ Moreover, appellant's arguments are not supported by any additional evidence submitted to the record. The Board finds, therefore, that her arguments do not establish a legal error on a specific point of law or advance a relevant legal argument. Consequently, appellant was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).¹⁸

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. Appellant's position description, while new, does not address the employment factors which he claimed caused his back and left eye conditions. The position description required him to operate, a forklift truck inside and outside under hazardous work conditions, but it did not provide whether he was required to ride through potholes or whether he was exposed to airborne metal and chemicals while driving the vehicle. Thus, the Board finds that the position description is not relevant and pertinent and thus, insufficient to reopen appellant's claim for a merit review.¹⁹

¹⁵ See *Norman W. Hanson*, 40 ECAB 1160 (1989).

¹⁶ *R.M.*, 59 ECAB 690 (2008); *Betty A. Butler*, 56 ECAB 545 (2005).

¹⁷ *Id.*

¹⁸ 20 C.F.R. § 10.606(b)(3).

¹⁹ See cases cited, *supra* note 17.

Dr. Dodson's January 23, 2014 report addressed appellant's diagnosed cervical and lumbar conditions and resultant total disability. The document from Arkansas Spine and Pain listed instructions to follow before the performance of a February 25, 2014 procedure. The submitted medical evidence is not relevant as the underlying issue is factual in nature; whether appellant has established employment factors which he claimed caused his back and left eye conditions.²⁰ The Board finds, therefore, that Dr. Dodson's report and the Arkansas Spine and Pain document are insufficient to reopen appellant's claim for a merit review.

Appellant submitted a duplicate copy of OPM's October 28, 2013 decision letter. This evidence was previously of record and considered by OWCP in its January 31, 2014 decision. It is well established that evidence which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.²¹ Further, the Board has long held that findings of other federal agencies are not dispositive with regard to questions arising under FECA.²² The Board finds, therefore, that OPM's letter is insufficient to reopen appellant's claim for a merit review.

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 by OWCP. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained back and left eye injuries causally related to factors of his federal employment. The Board further finds that OWCP properly denied his request for further merit review of his claim pursuant to 5 U.S.C § 8128(a).

²⁰ *Id.*

²¹ *Denis M. Dupor*, 51 ECAB 482 (2000).

²² *See also J.F.*, 59 ECAB 331 (2008); *see D.I.*, 59 ECAB 158 (2007).

ORDER

IT IS HEREBY ORDERED THAT the March 18 and January 31, 2014 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 17, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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