

FACTUAL HISTORY

This case has previously been before the Board. By decision dated July 22, 2014, the Board found that appellant had not established that he has more than 26 percent impairment of his lung and that OWCP properly refused to reopen his claim for further review under 5 U.S.C. § 8128(a).² The law and facts of the previous Board decision is incorporated herein by reference.

On January 14, 2014 appellant filed a Form CA-7 claiming compensation for the period April 11, 2011 through December 31, 2013 noting that his check stopped. In a January 10, 2014 statement, he indicated that he was claiming wage loss as his check stopped and his black lung condition had worsened. Appellant alleged that he was no longer able to work.

In a January 22, 2014 developmental letter, OWCP advised appellant that there was no evidence that he became disabled due to his work-related lung condition at the time he chose to retire in 1989. It noted that medical evidence dated October 19, 2012 indicated that his pneumoconiosis was only accountable for a small portion of his symptoms, with a major part of his disability being due to chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to a history of smoking and the aging process. OWCP requested that appellant submit medical evidence that he became disabled on April 11, 2011 onward due to the accepted pneumoconiosis condition. Appellant was afforded 30 days to submit the requested information.

In response OWCP received a duplicate copy of appellant's January 10, 2014 statement indicating his black lung condition had worsened.

In a January 27, 2014 letter, Dr. Bernard J. Buchanan, a Board-certified internist, indicated that appellant's black lung contributed to more than 60 percent of his disability. He indicated that his past correspondence in September 2009 detailed the confirmation of the diagnosis. Dr. Buchanan also noted appellant's medical regime and symptoms. A nebulizer letter of medical necessity was provided for the diagnosis of bronchitis with COPD emphysema along with a request for medical authorization of medical equipment and medicine.

By decision dated March 11, 2014, OWCP denied appellant's claim for compensation for the period April 11, 2011 through December 31, 2013, finding that the medical evidence submitted was insufficient to explain why she was unable to work during the period claimed.

On October 21, 2014 OWCP received appellant's request for reconsideration. Appellant stated that he was sending in evidence which documented he was under care of a black lung clinic. Evidence received included a duplicate copy of Dr. Buchanan's January 27, 2014 report. Also received was a March 28, 2014 x-ray, interpreted by Dr. Wayne Myers, a Board-certified radiologist, who concluded that the x-ray showed moderate-to-severe pulmonary emphysema, chronic interstitial lung disease, and a questionable nodule of the left upper lobe. In addition,

² Docket No. 13-657 (issued July 22, 2014). On June 21, 2000 appellant, a retired 55-year-old machinist, filed an occupational disease claim alleging that factors of his employment caused or aggravated his pulmonary pneumoconiosis and asbestosis conditions. OWCP accepted pneumoconiosis as a work-related injury and paid benefits. Appellant stopped working in 1989. He has two other accepted work injuries: (1) a lumbar strain from December 13, 1988, resolved; (2) and a hearing loss claim for which he received 54 percent bilateral noise-induced hearing loss.

appellant submitted pulmonary function reports dated January 27 and March 28, 2014, prepared by a technician.

By decision dated October 28, 2014, OWCP denied reconsideration without reviewing the merits of the case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) establish 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 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.⁵

ANALYSIS

The underlying issue on reconsideration is whether appellant has submitted sufficient evidence relevant to the issue of whether he is entitled to wage-loss compensation for the claimed period April 11, 2011 through December 31, 2013. His request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(2).

The Board also finds that he did not provide any relevant or pertinent new evidence warranting the reopening of the case on the merits. Dr. Buchanan's January 27, 2014 medical report was previously reviewed in OWCP's March 11, 2014 decision. A duplicative medical report does not require that OWCP reopen appellant's claim for further merit review.⁶ The form report regarding his hearing loss pertained to a different claim.

While the March 28, 2014 chest x-ray, as well as the January 27 and March 28, 2014 pulmonary function reports were new to this claim, they were not relevant to the issue of disability from work for the period April 11, 2011 through December 31, 2013. Thus, this information is insufficient to reopen appellant's claim for further merit review.

The Board finds that appellant did not establish that OWCP erroneously interpreted a specific point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by OWCP. Appellant did not

³ 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).

⁴ 20 C.F.R. § 10.606(b)(2).

⁵ *Id.* at § 10.608(b).

⁶ *M.W.*, Docket No. 15-499 (issued April 10, 2015).

meet any of the regulatory requirements and OWCP properly declined to reopen his claim for further merit review.⁷

On appeal appellant contends that his black lung condition has worsened and that he should be compensated. He bears the burden of proof to establish entitlement to wage-loss compensation.

Appellant may submit additional evidence to OWCP with a formal, written request for reconsideration under 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.⁸

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

The Board notes that appellant has received schedule awards for hearing loss and impairment of both lungs.⁹ To the extent appellant is claiming an increase in his permanent impairments due to his accepted pneumoconiosis condition and work-related hearing loss, he may request an increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for merit review under 5 U.S.C. § 8128(a).

⁷ *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (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).

⁸ *See A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁹ *See supra* note 2.

ORDER

IT IS HEREBY ORDERED THAT the October 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2015
Washington, DC

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

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

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