

ISSUE

The issue is whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

OWCP accepted that appellant, then a 43-year-old window clerk, sustained bilateral rotator cuff sprains due to factors of her federal employment. It authorized arthroscopic surgeries, which she underwent on February 7, 2007, May 21 and September 26, 2008. Appellant returned to light-duty work on December 23, 2009.⁴ She subsequently accepted a modified job offer as a sales and service associate on January 18, 2011 and performed the job.

Appellant filed a claim for wage-loss compensation for the period April 18 to May 28, 2011.⁵ She submitted a functional capacity evaluation dated January 11, 2009 and a January 20, 2011 report from Dr. Patrick McMahon, a Board-certified orthopedic surgeon, who opined that she was not capable of performing the job offered on January 18, 2011.

In a February 13, 2012 letter, OWCP notified appellant that it had accepted her claim of May 28, 2011 as a claim for a recurrence of total disability.

On May 10, 2012 appellant filed a claim for wage-loss compensation for the period May 19, 2011 through April 20, 2012.

By decision dated June 29, 2012, OWCP denied appellant's claims on the basis that the evidence submitted was not sufficient to establish that she sustained a recurrence of disability due to a change in the nature and extent of the light-duty job requirements or a change in the nature and extent of the employment-related conditions.

By decision dated February 4, 2013, an OWCP hearing representative affirmed the June 29, 2012 decision.

On January 20, 2014 appellant requested reconsideration and submitted notes prepared by a physical therapist dated July 9, 2013, which were certified by Dr. McMahon. She also resubmitted the functional capacity evaluation dated January 11, 2009 and the January 20, 2011 report from Dr. McMahon. On April 25, 2013 Dr. McMahon diagnosed pain in the joint shoulder region and bursae in addition to tendon disorders. He stated that the employing

⁴ By decision dated November 17, 2009, OWCP terminated appellant's compensation benefits on the basis that she refused a suitable position offered by the employing establishment on April 23, 2009. By decision dated December 3, 2009, it amended its prior decision because it was sent to an incorrect address and extended the effective date of the termination of appellant's compensation benefits to December 3, 2009. In a decision dated January 3, 2011, OWCP denied modification of its prior decision. By decision dated February 13, 2012, it vacated its January 3, 2011 decision on the basis that the job offered to appellant on April 23, 2009 was not a suitable position because her restrictions were not yet determined at that time and were not permanent.

⁵ OWCP indicated that appellant's claim for wage-loss compensation was being developed because the termination of her compensation benefits had been vacated in its February 13, 2012 decision, *see supra*.

establishment was unable to accommodate appellant's restrictions as defined by her functional capacity evaluation and opined that further surgery would not be helpful.

In reports dated March 1 and August 19, 2013, Dr. Zongfu Chen, a Board-certified anesthesiologist, diagnosed shoulder pain, left leg joint pain, fibromyalgia, and cervical disc disorder.

On December 23, 2013 Dr. Michael Platto, a Board-certified physiatrist, diagnosed bilateral sprain of shoulder and upper arm and rotator cuff tear and provided an impairment rating evaluation.

By decision dated April 24, 2014, OWCP denied appellant's request for reconsideration of the merits finding that she did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁶ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁷

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by 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.⁸ 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.⁹ 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.¹⁰

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹¹ and the submission of evidence or

⁶ 5 U.S.C. § 8101 *et seq.* 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).

⁷ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁸ 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608(b).

¹¹ See *A.L.*, *supra* note 8. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹²

ANALYSIS

In support of her January 20, 2014 reconsideration request, appellant submitted an April 25, 2013 report from Dr. McMahon who diagnosed pain in the joint shoulder region and bursae and tendon disorders and stated that the employing establishment was unable to accommodate appellant's restrictions as defined by her functional capacity evaluation. The Board finds that submission of this report did not require reopening appellant's case for merit review. As OWCP denied her claim based on the lack of supportive medical evidence and this report repeats evidence already in the case record, it is cumulative and does not constitute relevant and pertinent new evidence. Therefore, it is not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant further submitted reports from Drs. Chen and Platto. The Board finds that submission of these reports did not require reopening appellant's case for merit review because they did not indicate a particular change in the nature and extent of appellant's physical condition arising from the employment injury, which prevented her from performing the light-duty position, which was the issue before OWCP. Thus, the reports do not constitute pertinent new and relevant evidence and are not sufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also resubmitted a functional capacity evaluation dated January 11, 2009 and a January 20, 2011 report from Dr. McMahon. The Board finds that the submission of these reports did not require reopening appellant's case for merit review because she had submitted the same reports, which were previously reviewed by OWCP in its June 29, 2012 decision. As the reports repeat evidence already in the case record, they are duplicative and do not constitute pertinent new evidence and relevant evidence. Thus, appellant has not established a basis for reopening her case.¹³ Additionally, the physical therapy notes certified by Dr. McMahon do not address causal relationship and thus they too do not constitute pertinent new and relevant evidence.

As appellant did not meet any of the necessary requirements, she is not entitled to further merit review.¹⁴

On appeal, appellant argues the merits of her claim. The Board noted above that it only has jurisdiction over OWCP's April 24, 2014 nonmerit decision which denied her request for reconsideration and therefore is precluded from conducting a merit review.

¹² *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹³ See *D.K.*, 59 ECAB 141 (2007).

¹⁴ See *L.H.*, 59 ECAB 253 (2007).

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 4, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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