

ISSUE

The issue is whether OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. In June 1978 appellant, then a 36-year-old statistician, filed an occupational disease claim alleging that he sustained a digestive system disorder due to the stress of his work duties, which included managing the collection of data relating to drug usage and treatment, extensive travel, and having discrimination suits filed against him and his employing establishment. OWCP accepted that he sustained work-related temporary aggravation of preexisting Crohn's disease. Appellant stopped working for the employing establishment on June 16, 1978. He underwent a resection of his right colon and small bowel in August 1981. In a January 17, 1983 report, Dr. Raymond Cohen, an attending Board-certified internist specializing in gastroenterology, stated that he had palpated a large mass of matted small intestine loops in appellant's right lower quadrant during examinations between August 1978 and May 1980.

In a November 20, 2001 decision,³ the Board affirmed the June 16, 1978 OWCP termination of appellant's compensation based on the February 20, 1991 opinion of Dr. Bernard Aserkoff, a Board-certified internist specializing in gastroenterology, who served as an OWCP referral physician. The Board determined that, because OWCP had relied upon the opinion of Dr. Aserkoff to terminate appellant's compensation effective June 16, 1978, the burden of proof shifted to appellant to establish continuing compensation after that date. Appellant had submitted additional medical evidence from attending physicians which created a conflict in the medical opinion evidence on the issue of whether he had continuing work-related disability after June 16, 1978. The Board directed OWCP to refer appellant to an impartial medical specialist to resolve the conflict in medical evidence.

On remand OWCP referred appellant to Dr. Joseph J. Genovese, Jr., a Board-certified internist specializing in gastroenterology, for an impartial medical examination. In a May 2, 2002 report, Dr. Genovese determined that appellant did not have a work-related disability after his termination on June 16, 1978.

Based on Dr. Genovese's report, in a June 12, 2002 decision, OWCP denied appellant's claim for continuing disability after June 16, 1978.

In a November 12, 2002 decision,⁴ the Board found that the opinion of Dr. Genovese required clarification. On remand, OWCP obtained an October 23, 2003 supplemental report from Dr. Genovese and, by decision dated November 14, 2003, denied appellant's claim for disability after June 16, 1978 finding that the opinion of Dr. Genovese constituted the weight of the medical evidence.

³ Docket No. 98-2175 (issued November 20, 2001).

⁴ Docket No. 02-1905 (issued November 12, 2002).

In an April 5, 2007 decision,⁵ the Board again found that the reports of Dr. Genovese did not constitute the weight of the medical opinion regarding whether appellant had an employment-related disability after June 16, 1978. The Board noted that the burden of proof continued to rest with appellant to offer probative evidence that he was entitled to compensation. The Board found a conflict in the medical evidence on whether there was a work-related disability after the termination of appellant's benefits on June 16, 1978. The Board directed OWCP to refer appellant to a new impartial medical specialist for an examination.

On remand OWCP referred appellant to Dr. Richard A. Baum, a Board-certified internist specializing in gastroenterology, for an impartial medical examination and an opinion on appellant's continuing disability. In a July 23, 2007 report, Dr. Baum found that the exacerbation of appellant's Crohn's disease had been temporary and the temporary aggravation had resolved. He found no continuing disability after the June 16, 1978 termination. Dr. Baum further stated that appellant's disability, as related to a temporary aggravation, should have resolved fairly quickly after cessation of his employment. It was Dr. Baum's opinion that the long-term problems appellant had experienced were related only to his underlying Crohn's disease.

In an August 22, 2007 decision, OWCP determined that appellant had not established entitlement to compensation after June 16, 1978. It found that the weight of the medical evidence regarding this matter rested with the July 23, 2007 report of Dr. Baum.

Appellant submitted a March 24, 2006 report from Dr. Robert Lerman, an attending Board-certified internist specializing in nutrition. Dr. Lerman reported that appellant suffered from a permanent work-related aggravation of his Crohn's disease as there continued to exist objective evidence of Crohn's disease, including an intestinal mass, after the termination of benefits, effective June 16, 1978.

In an August 19, 2008 decision, an OWCP hearing representative remanded the case for a supplemental report from Dr. Baum.

OWCP requested that Dr. Baum review Dr. Lerman's March 24, 2006 report to reevaluate whether appellant continued to have work-related disability after the termination of benefits on June 16, 1978. Dr. Baum found in his supplemental September 11, 2008 report that there were no new facts in the additional information which would cause him to modify his July 23, 2007 assessment.

By decision dated October 23, 2008, OWCP again determined that appellant had not established entitlement to compensation after June 16, 1978. It found that the weight of the medical evidence regarding this matter rested with the July 23, 2007 and September 11, 2008 reports of Dr. Baum. In a June 30, 2009 decision, an OWCP hearing representative affirmed OWCP's October 23, 2008 decision.

⁵ Docket No. 06-1756 (issued April 5, 2007).

In a February 11, 2011 decision,⁶ the Board found a continuing conflict in the medical evidence between Dr. Baum and Dr. Lerman and as to continuing disability caused by the accepted condition of temporary aggravation of preexisting Crohn's disease. The Board remanded the case referral to a new impartial medical specialist for an examination and an opinion on the persistent question of whether appellant had established continuing disability after June 16, 1978.

On remand OWCP referred appellant to Dr. Gary Thompson, a Board-certified internist specializing in gastroenterology. In his July 8, 2011 report, Dr. Thompson discussed the progression of appellant's Crohn's disease since the late 1960s, the treatment appellant had received for his condition, and reported the findings of his examination. He discussed the relationship between psychological stress and the manifestation of symptoms related to Crohn's disease. Dr. Thompson stated, "In summary, the claimant has unfortunately suffered from the chronic, unpredictable, and sometimes devastating natural history of Crohn's disease. His illness was not due to his employment factors."

In a July 11, 2011 decision, OWCP denied appellant's claim for continuing disability after June 16, 1978 based on the opinion of Dr. Thompson.

In a June 10, 2012 letter received on June 13, 2012, appellant requested reconsideration of OWCP's July 11, 2011 decision and again asserted that he had actually suffered a permanent, work-related aggravation of his preexisting Crohn's disease. He argued that he continued to have disability due to this permanent, work-related condition. Appellant claimed that Dr. Thompson failed to provide adequate medical rationale in support of his opinion that there was no work-related medical condition or disability after June 16, 1978.

In a September 28, 2012 decision, OWCP affirmed its July 11, 2011 decision after reviewing the merits of appellant's arguments.

In a September 21, 2013 letter received on September 26, 2013, appellant requested reconsideration of OWCP's September 28, 2012 decision and presented arguments in support of his reconsideration request. He argued that, despite the fact that OWCP had accepted only a temporary, work-related aggravation; the evidence clearly established a permanent aggravation. Appellant contended that the July 8, 2011 report of Dr. Thompson was not well rationalized because it did not explain why the work-related residuals ceased after June 16, 1978. He argued that Dr. Thompson ignored medical evidence and also suggested that Dr. Thompson actually found a work-related permanent aggravation. Appellant also argued that OWCP's September 28, 2012 decision was internally inconsistent. Finally, he expressed his belief that it was illogical for OWCP to conclude that his condition had been suddenly "cured" of any work-related aggravation on June 16, 1978, his last official day of employment.

In a March 24, 2014 decision, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It noted that his arguments were not new or relevant and had already been considered and rejected.

⁶ Docket No. 10-502 (issued February 11, 2011).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁷ OWCP's 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 argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹² While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹³

ANALYSIS

OWCP issued a decision on September 28, 2012 finding that appellant had not established work-related disability after June 16, 1978. Appellant requested reconsideration of that decision on September 26, 2013.

The Board lacks jurisdiction to review the merits of the underlying issue of whether appellant properly accepted only a temporary aggravation of Crohn's disease. The Board's jurisdiction is limited to determining whether OWCP properly denied a merit review of his request for reconsideration.

The issue is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), which require OWCP to reopen the case for review of the merits. In his application for reconsideration, appellant failed to show that OWCP had erroneously applied or interpreted a specific point of law. He also failed to advance a new and relevant legal argument. Appellant's argument was, and remains, that OWCP erred by accepting only a temporary work-related aggravation of his preexisting Crohn's disease. He asserts that the evidence established a

⁷ Under section 8128 of FECA, "[t]he 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).

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.607(a).

¹⁰ *Id.* at § 10.608(b).

¹¹ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

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

¹³ *John F. Critz*, 44 ECAB 788, 794 (1993).

permanent aggravation. Appellant has already made this argument many times. OWCP has considered and rejected it based on the record. A repetitious argument does not require a reopening of appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).¹⁴

The Board notes that the issue in this case remains whether appellant had, or has, a work-related disability after June 16, 1978. That is a medical issue which must be addressed by relevant medical evidence.¹⁵ Appellant has argued that the July 8, 2011 opinion of Dr. Thompson was not well rationalized and should not constitute the weight of the medical evidence. However, OWCP has previously considered and rejected his argument as well.

The Board notes that appellant has filed numerous papers in this appeal and at other stages in the proceedings which relate to factual and legal issues. These briefs, letters, memoranda, and other submissions make clear appellant's disagreement with OWCP's decisions over a number of years. The Board has reviewed these arguments and factual assertions as they relate to the narrow confines of this appeal.

At this time, the only question to be decided is whether appellant has shown that OWCP erred when it denied him a merit review of his claim in its decision of March 24, 2014. The vast preponderance of appellant's submissions do not address this test and need not be discussed in deciding the single issue presented in his appeal to this Board.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) to warrant a review of the merits. Appellant did not show that OWCP had erroneously applied or interpreted a specific point of law; he did not advance a relevant legal argument not previously considered by OWCP; and he failed to submit relevant and pertinent new evidence. As such, the Board finds that, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁴ See *supra* note 12.

¹⁵ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

ORDER

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

Issued: September 2, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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