

FACTUAL HISTORY

This case has previously been before the Board. On November 16, 2009 appellant, then a 47-year-old carpenter, sustained lower back, right shoulder, right leg, and left hand injuries when he slipped on water and fell down stairs that day. OWCP accepted the claim on July 6, 2010 for contusion of left hand, sprain of left hand, left shoulder and upper arm sprain acromioclavicular, contusion of right hip and thigh, right knee and leg sprain, neck sprain, and lumbar sprain. Appellant stopped work on November 16, 2009 and received wage-loss compensation through July 14, 2011. He began receiving medical treatment on December 2, 2010 from Dr. Gerald Dworkin, Board-certified in physical medicine and rehabilitation.

In an October 29, 2013 decision, the Board affirmed OWCP's January 7, 2013 merit decision finding that appellant failed to establish that he was disabled for the period July 15 to November 30, 2011 due to his November 16, 2009 employment injury.² The Board found that the opinion of Dr. Andrew J. Gelman, a Board-certified orthopedic surgeon, was entitled to special weight as the impartial medical examiner which established that appellant was not entitled to disability compensation from July 15 to November 30, 2011 because his November 16, 2009 employment injuries had resolved.

On May 1, 2014 appellant, through counsel, requested reconsideration of the October 29, 2013 decision and submitted an April 24, 2014 medical report from Dr. Dworkin in support of appellant's claim.

By decision dated July 29, 2014, OWCP affirmed the October 29, 2013 decision, finding that appellant failed to establish that he was disabled due to his November 16, 2009 employment injury for the period July 15 to November 30, 2011.

On August 19, 2014 appellant again requested an appeal before the Board. By decision dated January 27, 2015, the Board affirmed OWCP's July 29, 2014 decision finding that appellant failed to establish that he was disabled due to his November 16, 2009 employment injuries for the period July 15 to November 30, 2011.³ The findings and facts as set forth in the prior Board decisions are incorporated herein by reference.

Following the Board's January 27, 2015 merit decision appellant, through counsel, requested reconsideration. Appellant's request for reconsideration was dated and received by OWCP on January 26, 2016. Counsel submitted a January 25, 2016 medical report from Dr. Dworkin in support of appellant's request for reconsideration.

In his January 25, 2016 report, Dr. Dworkin reported that the L5-S1 disc herniation was post-traumatic in nature with significant narrowing of appellant's bilateral, lateral recess region of the spine, causing him significant back pain with sitting, standing, and walking. As a result,

² Docket No. 13-737 (issued October 29, 2013).

³ Docket No. 14-1822 (issued January 27, 2015). Absent further merit review of the issue by OWCP, the issue is *res judicata* and is not subject to further review. See *C.M.*, Docket No. 15-471 (issued April 27, 2015); *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

appellant was incapable of working and unable to return to work. Dr. Dworkin explained that due to the severe nature of back, buttock, and leg pain, he ordered physical therapy treatment for appellant from July 15 to November 30, 2011. He diagnosed traumatic low back pain with persistent and recurrent right greater than left sciatica secondary to traumatic disc herniation at L4-5 and L5-S1 as seen on a magnetic resonance imaging (MRI) scan, and associated radiculopathies including L5-S1 radiculopathy as seen on electromyography (EMG) studies. Dr. Dworkin opined with a reasonable degree of medical certainty that appellant's listed diagnoses were a result of the November 16, 2009 work-related fall.

Dr. Dworkin further opined that appellant continued to have severe back and leg pain and was unable to work between July 15 and November 11, 2011 while he was attending physical therapy. He stated that appellant's inability to work was secondary to the work-related injury, including back pain with severe sciatica and traumatic disc herniation at L4-5 and L5-S1, complicated by bilateral L5-S1 radiculopathy. Dr. Dworkin noted that appellant was followed closely and had not had sufficient rehabilitation to return to employment prior to his discharge from therapy on November 30, 2011. He opined that returning to work would have been hazardous and would lead to a high likelihood of recurrent and severe back and leg pain, as well as the possible need for surgical intervention. Dr. Dworkin noted that there was miscommunication from his prior note which indicated that he had released appellant to full duty on July 15, 2011. He stated that this was a clerical error and should have read as scheduled for continued aggressive therapy on July 15, 2011.

By decision dated February 1, 2016, OWCP denied appellant's request for reconsideration, finding that he neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), 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.⁴ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

The Board finds that the refusal of OWCP to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

⁴ *D.K.*, 59 ECAB 141 (2007).

⁵ *K.H.*, 59 ECAB 495 (2008).

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of the claim. In his application for reconsideration, counsel for appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not advance a new and relevant legal argument. Counsel for appellant argued that Dr. Dworkin's January 25, 2016 report established appellant's claim for disability compensation. The underlying issue in this case was whether appellant was experiencing any residuals or disability of the November 16, 2009 employment injury for the period July 15 to November 30, 2011. That is a medical issue which must be addressed by relevant medical evidence.⁶ Appellant, however, failed to submit pertinent new and relevant medical evidence in support of his claim.

The only medical evidence submitted was Dr. Dworkin's January 25, 2016 report. The Board notes that the report is identical in every way to his previously submitted April 24, 2014 report which was considered by the Board in its January 27, 2015 decision.⁷ The only difference from the prior report is that the date of the report was changed to January 25, 2016. As the medical report repeats evidence already in the case record, it is duplicative, and does not constitute relevant and pertinent new evidence. Material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.⁸ A claimant may obtain a merit review of an OWCP decision by submitting pertinent new and relevant evidence. In this case, appellant failed to submit any pertinent new and relevant evidence addressing continued disability.⁹

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 present relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁰

CONCLUSION

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

⁶ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

⁷ *Supra* note 4.

⁸ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

⁹ *M.H.*, Docket No. 13-2051 (issued February 21, 2014).

¹⁰ *P.H.*, Docket No. 15-1383 (issued October 5, 2015).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 14, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board