

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 6, 2013 appellant, then a 41-year-old forestry technician, crew firefighter, filed an occupational disease claim (Form CA-2) alleging that on March 5, 2012 he first became aware that his back conditions and bilateral lower extremity radiculitis had been aggravated by his work duties.² OWCP accepted the claim for L4-5, L5-S1 disc herniation and displacement of lumbar intervertebral disc without myelopathy. By letter dated December 5, 2013, it placed appellant on the periodic rolls for temporary total disability.

In an October 7, 2013 report, Dr. Mohinder Nijjar, a second opinion Board-certified orthopedic surgeon, diagnosed L4-5 lumbar disc protrusion with left paracentral protrusion and foraminal stenosis and L5-S1 disc protrusion with associated bilateral foraminal stenosis. He reviewed the statement of accepted facts, occupational and medical histories, and medical evidence and provided physical examination findings. Based on the objective evidence and subjective complaints, Dr. Nijjar opined that appellant continued to suffer from residuals of his accepted conditions. He opined that appellant continued to be temporarily disabled from the date-of-injury position and could not work eight hours a day, but was capable of working part time with restrictions of no more than four hours per day of sitting, walking, standing, reaching above or at shoulder level; up to two hours per day of twisting; bending; up to four hours per day of climbing and squatting; and up to four hours per day of pushing and pulling up to 15 pounds. These restrictions would be in place for 6 to 12 months.

On January 15, 2014 the employing establishment offered appellant a temporary light-duty job assignment based on the work restrictions found by Dr. Nijjar. The light-duty position was as an information assistant working four hours per day five days per week. The employing establishment noted that the duties of the position included, but were not all encompassing of selling firewood, permits, and maps; answering telephones, providing information and assistance to visitors; and issuing campfire permits. It noted the work restrictions set by Dr. Nijjar and that they “may be performed in any combination to accomplish work activities.” The employing establishment requested that appellant respond by January 25, 2014 and, that, if no response was received, it would be considered that he had declined the offered position. No response was received within the allotted time.

On February 13, 2014 OWCP issued a notice proposing to reduce appellant’s compensation based on his refusal of a temporary light-duty assignment as an information assistant. It advised him that it had reviewed the proposed job offer and had determined that it met the physical restrictions set out by Dr. Nijjar and found the position suitable. OWCP found that appellant had the capacity to perform the temporary position of information assistant of \$241.40 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.³ It calculated that

² Appellant noted that he initially filed a recurrence claim under a previous OWCP File No. xxxxxx208, but was advised that as his injury was due to aggravation by his work duties that it would be considered a new occupational disease claim.

³ 5 U.S.C. § 8113.

his compensation should be adjusted to \$1,956.45 using the *Shadrick*⁴ formula.⁵ Appellant was given 30 days to report to the light-duty job assignment or show why declining the position was justified. He was reminded of the consequences for refusing an offer of suitable work.

In a March 3, 2014 progress report, Dr. A.M. Corky Rey, a treating physician, reviewed Dr. Nijjar's report and provided physical examination findings. He opined that, as appellant was about to undergo a course of spinal injection trials, he did "not believe it would be an opportune time to trial a new position."

On March 12, 2014 appellant's counsel objected to the proposed reduction of compensation. He argued that the job failed to provide any description of the requirements of the position; how much time would be spent on a particular activity; the weight appellant would be required to lift, carry, or push in a given activity; or description of the physical activities.

By decision dated March 27, 2014, OWCP reduced appellant's benefits effective April 6, 2014 to reflect that he was capable of performing the duties of the temporary light-duty assignment earning \$241.40 per week.

On April 27, 2014 appellant's counsel requested reconsideration. He argued that the temporary job failed to comply with 20 C.F.R. §§ 10.505 and 10.507 regarding the actions an employer should take and how an offer of suitable work is made. Specifically, counsel contended that the job offer failed to comply with section 10.505 as it did not provide the physical requirements and specific duties of the offered position. In addition, he argued that the employing establishment failed to inform appellant as to the date of availability or provide a description of the job duties and physical requirements of the job as required by section 10.507. Next, counsel argues that OWCP erred in reducing appellant's compensation benefits without providing the proper two notices or determining that the offered temporary job was suitable.

By decision dated July 24, 2014, OWCP denied reconsideration. It found the arguments made by counsel did not establish that it had erroneously interpreted or applied a point of law. OWCP noted that the arguments made regarding suitable work under 5 U.S.C. § 8106 were not applicable as the decision to reduce appellant's compensation was based on his refusal of a temporary light-duty job under section 10.500(a)(1).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or

⁴ 5 ECAB 376 (1953).

⁵ OWCP indicated that the salary for appellant's job when injured was \$893.36, that the current salary for his job and step as of February 13, 2014 was \$902.29, and that he was currently capable of earning \$489.11 per week, as a temporary information assistant. It therefore determined that he had 27 percent wage-earning capacity. OWCP found that appellant's current adjusted compensation rate per four-week period was \$1,956.45.

⁶ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

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.⁷ 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.⁸ 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.⁹

ANALYSIS

The only decision before the Board in this appeal is the decision of OWCP dated July 24, 2014 denying reconsideration of a March 27, 2014 decision which reduced appellant's compensation benefits based on his refusal of a temporary light-duty job. Appellant did not demonstrate that OWCP erroneously applied or interpreted a point of law nor did he advance a legal argument not previously considered by OWCP. 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).

Appellant, through counsel, requested reconsideration on April 27, 2014. Counsel argued that the temporary job offer was unsuitable as the offer failed to comply with the regulations regarding an offer of suitable work and the actions taken by the employer. In this regard, he argued that OWCP failed to follow the regulations in determining whether the temporary job offer was available or the suitability of the position. Counsel also argued that the temporary job offer provided no physical requirements or specific duties of the position as required by the regulations and failed to inform appellant as to the date of availability. These arguments were previously made and considered by OWCP when counsel objected to the proposed reduction of compensation. As these arguments are repetitive of arguments previously made, they are insufficient to constitute new and relevant legal argument.

Counsel further argued that, as appellant was on the periodic rolls, OWCP erred in reducing appellant's compensation benefits without providing the proper two notices or determining that the offered temporary job was suitable. This argument, while new, is not relevant to the issue in the current case. OWCP did not invoke the penalty provision of section 8106(c), but rather it used section 10.500(a) to reduce appellant's compensation based on his failure to accept a temporary position. Section 10.500(a) is not a penalty provision and these arguments are not relevant to the issue of whether OWCP met its burden to reduce benefits under this section. Thus, counsel has not shown that OWCP erroneously applied or interpreted a specific point of law and he has not advanced a relevant legal argument not previously considered by OWCP.

⁷ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁸ *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

⁹ *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

Consequently, appellant was not entitled to a review of the merits of his claim under section 10.606(b)(3).¹⁰

On appeal counsel argues that OWCP failed to provide proper notice and due process requirements in its implementation of 20 C.F.R. § 10.500(a)(1). These arguments pertain to the merits of the case, which are not before the Board on the present appeal.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 24, 2014 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: March 10, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁰ *Id.* at § 10.606(b)(3).