

On appeal, counsel argues that in his most recent request for reconsideration, appellant made a new legal argument regarding OWCP's analysis of the medical evidence. He asserts that appellant believed that he had sustained a consequential psychological condition and that OWCP failed to adequately address or develop this issue.

FACTUAL HISTORY

On November 27, 2002 appellant, then a 39-year-old electronic technician, filed a traumatic injury claim (Form CA-1) alleging that he was assaulted by a coworker on November 19, 2002. He asserted that he had sustained injuries to his face, stomach, groin, and right shoulder. Appellant also alleged that he sustained a submandible hematoma. He completed a statement in which he notes that he asked a coworker to move by saying "excuse me" and the coworker did not move. Appellant then tapped him on his shoulder with the papers in his hand and stated "excuse me" again. His coworker turned and hit appellant in the stomach, shoulder, and face. Appellant pushed him away and stated, "You don't need to hit me, you know I was standing right here." His coworker became more aggressive striking appellant in the groin, face, stomach, and shoulder. Appellant alleged that he felt that his coworker was very explosive and unstable and that he felt that he could be assaulted again if he was near when his coworker became startled or had a bad day.

In a report dated January 10, 2003, Dr. Seth R. Lewis, an internist, noted that appellant sustained swelling and ecchymosis about the eye and beneath his chin following the November 19, 2002 assault. He had previously diagnosed submandibular hematoma on November 27, 2002. When Dr. Lewis treated appellant on December 13, 2002, he found that appellant had developed a secondary infection of the hematoma and required surgical drainage. Appellant was hospitalized from December 13 through 15, 2002 and returned to work on January 6, 2003. Dr. Lewis opined that appellant's hematoma and subsequent abscess were directly related to the assault on November 19, 2002.

Dr. Lewis completed a report dated January 20, 2003, and found that appellant had sustained a recurrence of infection of his hematoma on January 13, 2003 which required additional hospitalization through January 18, 2003. He concluded that appellant could return to work on January 27, 2003.

On February 3, 2003 OWCP accepted appellant's claim for hematoma on the right side of the neck and subsequent submental abscess. Appellant returned to full duty with no restrictions by March 13, 2003. On December 3, 2003 OWCP authorized his request to repurchase leave from January 6 through 30, 2003.

Counsel contacted OWCP on October 6, 2005 and requested additional benefits on behalf of appellant. He alleged that appellant was entitled to past medical expenses, compensation for total disability from December 2002 through September 2003, a schedule award, and had developed a consequential emotional condition. Counsel again raises these issues on January 4 and October 12, 2006.

Dr. Richard A. Charlat, a Board-certified psychiatrist examined appellant on July 20, 2006 and reported that he was no longer able to work at the employing establishment due to a

November 2002 physical assault by a coworker which resulted in a three month hospitalization. He further reported that appellant underwent open heart surgery. Dr. Charlat opined that appellant was disabled due to the aggravated assault. He noted that appellant had experienced recurrent episodes of major depression since he was 23. Further he had recurrent passive suicidal ideation, and that he had a history of post-traumatic stress disorder (PTSD) because of his assault in November 2002, as well as an extensive history of childhood physical abuse. Appellant also reported a history of social anxiety disorder, generalized anxiety disorder, and panic disorder with agoraphobia.

In a report dated August 28, 2006, Dr. Charlat opined that appellant had increased understanding of how being traumatized by a coworker resulted in exacerbation of his recollections of childhood abuse. He found that appellant continued to experience traumatic nightmares of this event four out of seven days per week. Dr. Charlat diagnosed major depression, PTSD, generalized anxiety disorder, panic disorder with agoraphobia, and social anxiety disorder.

Appellant filed both a notice of recurrence of disability (Form CA-2a) and a notice of occupational disease (Form CA-2) on November 19, 2008, alleging that he developed anxiety, depression, and PTSD. He reported that he stopped work on June 27, 2004 and recovered physically from the assault. Appellant alleged that he began to experience psychological problems and requested to expand his claim.

In a letter dated March 13, 2009, counsel requested that OWCP address appellant's claim for medical expenses and emotional conditions. He submitted a report dated August 3, 2003 from Dr. James Milavetz, a Board-certified cardiologist, describing appellant's history of thoracic back pains since an assault six to seven months earlier. Dr. Milavetz diagnosed unstable angina with moderate to severe ischemia in the left ventricle as well as L5-S1 disc problem with flank pain.

Dr. Gary L. DeVries, a clinical psychologist, completed notes dated May 10, 2004 through September 6, 2006 addressing appellant's symptoms of stress and depression.

Dr. Lewis completed a June 24, 2005 report in support of appellant's claim for disability retirement. He described appellant's physical and emotional conditions including hypertension, diabetes, coronary artery disease, obstructed sleep apnea, surgical gallbladder removal, and end-stage osteoarthritis of the knees. Dr. Lewis found that appellant was depressed and had struggled with mood disorder since the physical assault in 2002. He also noted that subsequent legal proceedings had been stressful and worsened his mood disorder.

Dr. Charlat examined appellant on July 20, 2006 due to severe depression, panic attacks, social anxiety, and PTSD. He attributed appellant's PTSD to his assault and traumatic injury in November 2002 as well as an extensive history of childhood physical abuse between the ages of 8 and 18 years old. Dr. Charlat noted that appellant reported recurrent daily traumatic recollections of his physical injury, hypervigilance, and an exaggerated startle response. He attributed appellant's generalized anxiety disorder and panic disorder with agoraphobia to the physical assault in November 2002.

Appellant was admitted to the hospital on October 4, 2008 for psychiatric inpatient evaluation. Dr. Michael S. Roundy, a Board-certified psychiatrist, diagnosed PTSD marked by severe irritability and limited insight.

Dr. Charlat examined appellant on October 8, 2008 and diagnosed major depression, PTSD, generalized anxiety disorder, panic disorder with agoraphobia, and social anxiety disorder. He provided medication.

Dr. Craig K. Swainer, a clinical psychologist, examined appellant on October 14, 2008. He described appellant's November 2002 employment incident as an assault by a coworker who had worked in special forces in the military, resulting in severe facial injuries. Dr. Swainer found that appellant had some difficulties with social anxiety and agoraphobia. He also reported symptomatology associated with PTSD.

OWCP requested additional factual and medical evidence from appellant in support of his claimed recurrence of disability on June 16, 2010. Counsel responded to this request on July 15, 2010 and argued the November 2002 assault was so unprovoked and violent that it caused PTSD. He noted that appellant underwent heart surgery in 2003 and returned to light-duty work at the employing establishment from October 2003 through the spring of 2004. Counsel alleged that the employing establishment harassed appellant and refused his accommodation requests. He described appellant's treatment including a right total knee replacement in March 2006. Appellant worked intermittently in the private sector from 2004 to December 2007.

Appellant submitted treatment notes from Dr. Lewis dated March 25, 2002 through September 5, 2003. He reported chest pain on March 17, 2003 and attributed this condition to stress at work as a result of initiating legal procedures against his boss and coworker. Appellant reported right-sided flank pain on June 11 and 18, 2003. Dr. Lewis attributed appellant's low back pain to strain or muscle tear when appellant unloaded 60-pound items from his locker at work three weeks previously.

By decision dated August 13, 2010, OWCP denied appellant's claim for recurrence of disability beginning June 24, 2004. It found insufficient medical evidence to establish a causal relationship between his accepted employment injury and his claimed emotional condition, knee conditions, spinal conditions, or heart condition.

On September 8, 2010 counsel requested an oral hearing from OWCP's Branch of Hearings and Review. The hearing was held on November 10, 2011. Appellant testified that his heart attack was caused by the 2002 assault. He alleged that his assailant was a third-degree black belt and special forces Marine who was 6'3" and weighed 275 pounds. Appellant stated that he was hit so hard that it resulted in damage to his heart. He further alleged that the employing establishment harassed him. Appellant indicated that he filed a separate occupational disease claim (Form CA-2) regarding this aspect of his claim.

On December 14, 2011 counsel argued that OWCP should further develop appellant's claim by referral to an additional physician. He submitted a ruling from the Social Security Administration (SSA) dated June 15, 2010 finding that appellant had onset of disability on December 1, 2007. Appellant's impairments were listed as morbid obesity, coronary artery

disease, coronary artery bypass graft, bilateral knee degenerative joint disease, bilateral total joint arthroplasty, degenerative disc disease of the lumbar spine, diabetes mellitus, sleep apnea, and depression.

By decision dated January 25, 2012, the OWCP hearing representative found that appellant had not met his burden of proof to establish a recurrence of disability beginning June 27, 2004. He noted that appellant's occupational disease emotional condition claim would not be addressed in this claim file, but in the file associated with his CA-2 form. The hearing representative further noted that appellant claimed both a physical condition, a heart attack, and psychiatric conditions due to the November 2002 assault. He reviewed the SSA decision and determined that this decision did not establish entitlement to compensation under FECA. The hearing representative concluded that none of the medical evidence was based on a complete and accurate history or provided an opinion that appellant became disabled as a result of a work-related heart condition or psychiatric condition.

On January 22, 2013 counsel requested reconsideration. He argued that in a note dated August 3, 2002, Dr. Milavetz reported thoracic and back pain since the assault and that Dr. Lewis attributed appellant's mood disorder to the 2002 physical assault in his June 24, 2005 report. Counsel contended that the medical evidence from appellant's attending physicians was sufficient to require OWCP to further develop the medical evidence or to accept his claims.

Appellant submitted additional notes from Dr. Lewis dated September 22, 2003 through June 22, 2005. Dr. Lewis noted on August 6, 2004 that appellant quit his job at the employing establishment to reduce his stress. On January 15, 2003 appellant underwent an x-ray of his sternum which was normal. He underwent a coronary artery bypass on August 4, 2003.

In a decision dated March 21, 2013, OWCP denied modification of the prior decision. It found that the reports from Dr. Lewis were not based on a detailed and accurate factual background, and attributed appellant's emotional condition to the development of his claim, which was not a compensable employment factor. OWCP determined that appellant had not established a recurrence of total disability on or after June 2004.

Counsel again requested reconsideration on September 14, 2013. He argued that appellant had obtained the necessary medical evidence to establish a causal connection between appellant's 2002 employment incident and his physical and psychological injuries. Counsel submitted two additional medical reports to establish causal relationship between the assault and the diagnosed conditions.

Dr. Tricia Ferrin, an osteopath, completed an undated report and noted treating appellant since 2008. She diagnosed PTSD. Dr. Ferrin opined that most of appellant's problems started after he had difficulties at work. She indicated that appellant had struggled with depression and anxiety following trauma at work.

Dr. Dennis E. Ahern, a clinical psychologist, completed a report on April 16, 2013. He noted that appellant was assaulted on November 19, 2002 by a coworker resulting in physical and psychological problems. Dr. Ahern first treated appellant on October 30, 2009 and diagnosed PTSD. He opined that the original trauma was still affecting appellant with

flashbacks, dreams, hypervigilance, and avoidance of related situations. Dr. Ahern found that appellant had grown increasingly depressed, developed a generalized anxiety disorder, and developed increasing agoraphobia. He concluded, “In my opinion, the PTSD symptoms are causally related to the assault in 2002 and the aftermath within the workplace, in that he would not have developed PTSD without that set of stressors.” Dr. Ahern indicated that appellant had continuing disability due to this condition.

By decision dated November 19, 2013, OWCP denied modification of its prior decisions. It reviewed the reports from Drs. Ahern and Ferrin and found that these reports lacked a complete factual background as there was no discussion of appellant’s psychological state prior to the assault including physical abuse as a child, an episode of major depression, and an allegation of harassment at the employing establishment. OWCP concluded that the evidence of record was insufficient to support a psychological condition causally related to appellant’s November 19, 2002 employment injury. Thus appellant did not meet his burden of proof to establish a recurrence of disability as the accepted physical conditions had long since resolved.

Appellant again requested reconsideration through a form dated November 15, 2014 and received by OWCP on November 17, 2014. Counsel argued that appellant experienced physical and psychological fallout from the November 19, 2002 assault. He requested compensation for medical expenses and lost work time. Counsel argued that appellant became totally disabled in 2004 and was forced to resign in June 2004. He alleged that appellant’s physical and psychological conditions resulting from the 2002 work incident rendered him incapable of any employment. Counsel alleged that appellant had a work-related heart condition as well as a psychiatric condition. He disagreed with OWCP’s assessment of the medical evidence submitted by Drs. Ferrin and Ahern as lacking a complete factual and medical background, and failing to distinguish other causes of appellant’s psychological conditions. Counsel opined that OWCP should view the medical evidence as meeting appellant’s burden of proof to either accept or to further develop his emotional condition claim.

By decision dated November 19, 2014, OWCP declined to reopen appellant’s claim for consideration of the merits. It noted that appellant argued that it had not properly considered the medical evidence, but found that the evidence did not support that OWCP had erroneously applied or interpreted a point of law.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.³ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a new relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.⁴

³ *Supra* note 1 at § 8128(a).

⁴ 20 C.F.R. § 10.606(b)(3).

Section 10.608 of OWCP's regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.⁵ Section 10.607(a) of OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought.⁶

ANALYSIS

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

The issue 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 consideration of the merits of the claim. He filed a timely request for reconsideration on November 17, 2014 from the November 19, 2013 denial of modification. With his request, appellant did not submit any additional evidence and did not show that OWCP erroneously applied or interpreted a specific point of law or advance a new legal argument.

Counsel again argued that appellant experienced physical and psychological injuries from the November 19, 2002 assault. This is not a new argument as counsel has alleged physical and psychological injuries beginning in 2005. He alleged that appellant's physical and psychological conditions resulting from the 2002 employment incident rendered him incapable of any employment. Counsel further alleged that appellant had sustained an employment-related heart condition as well as a psychiatric condition. These are also not new arguments as the OWCP hearing representative addressed these claims in the January 25, 2012 decision. As these arguments were considered by OWCP in each previous decision, the arguments cannot be considered new and are insufficient to require OWCP to reopen appellant's claim for consideration of the merits in accordance with section 10.606(b)(3) of OWCP regulations. The Board has held that material which is duplicative of that already contained in the case record does not constitute a basis for reopening a case.⁷ Furthermore, where the legal argument presented has no basis in fact or precedent, OWCP is not required to reopen the case for merit review.⁸

Counsel further argued that OWCP did not properly assess the medical evidence submitted by Drs. Ferrin and Ahern. He alleged that the physicians provided a proper factual and medical background and that OWCP should view the medical evidence as meeting appellant's burden of proof to either accept or to further develop his emotional condition claim. The Board also finds that the essence of this argument is duplicative. Counsel asserted that these

⁵ *Id.* at § 10.608.

⁶ *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

⁷ *P.O.*, Docket No. 14-1675 (issued December 3, 2015). See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

⁸ *Id.* See also *Norman W. Hanson*, 40 ECAB 1160 (1989).

reports were sufficient to meet appellant's burden of proof in his September 14, 2013 request for reconsideration. His disagreement with OWCP's determination regarding these reports is not sufficient to require OWCP to reopen appellant's claim for consideration of the merits.

Accordingly, as appellant's request for reconsideration did not meet the requirements for reopening his case, the Board finds that OWCP properly denied merit review.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 18, 2016
Washington, DC

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

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

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