

and delivering of mail she performed in her job for the prior 12 years. She stopped work on November 24, 2006.²

OWCP accepted lateral epicondylitis of her right elbow. The accepted conditions were later expanded to include medial epicondylitis of her right elbow. Appellant received disability compensation on the daily rolls beginning November 27, 2006. On July 31, 2008 she underwent OWCP-sponsored right lateral and medial epicondylar revision surgery.

Appellant returned to part-time work for the employing establishment on July 13, 2010. She stopped work again on August 8, 2010 and has not returned.

In January 2013 OWCP assigned appellant to a vocational rehabilitation counselor as part of a vocational rehabilitation program designed to return her to work.

In a decision dated September 24, 2013, OWCP adjusted appellant's compensation effective September 24, 2013, under sections 8113(b) and 8104 of FECA, because she failed, without good cause, to undergo vocational rehabilitation as directed.³ It reduced her compensation based on her ability to earn wages in the constructed position of telephone solicitor.

In late May 2014 appellant's vocational rehabilitation counselor selected the position of telephone solicitor from the Department of Labor's *Dictionary of Occupational Titles* (DOT). The position bears the DOT No. 299.357-014. The vocational rehabilitation counselor determined that appellant was able to perform the position of telephone solicitor and that state employment services showed the position was available in sufficient number so as to make it reasonably available within her commuting area. She determined that appellant had failed to cooperate with vocational rehabilitation efforts because she ceased participation in vocational training without good cause.

Appellant requested a hearing with an OWCP hearing representative and, in a May 14, 2014 decision, the hearing representative reversed OWCP's September 24, 2014 decision because the medical evidence OWCP relied upon to find that appellant could work as a telephone solicitor was considered to be stale.

In late May 2014 OWCP referred appellant to Dr. Aleksander Curcin, a Board-certified orthopedic surgeon, for an examination and opinion on her ability to work. It provided Dr. Curcin with a description of the job duties and physical requirements of her regular job as a rural carrier and the constructed position of telephone solicitor.⁴

² Under File No. xxxxxx904, OWCP accepted a right hand contusion on October 21, 2000 when she hit her right hand. The claim was administratively closed on September 24, 2001. Appellant also filed a claim (File No. xxxxxx941) for a sprained right wrist due to an April 25, 2006 fall. The claim was not formally adjudicated and it was administratively closed on May 1, 2006.

³ OWCP had advised appellant of this proposed action in a letter dated August 16, 2013.

⁴ OWCP provided Dr. Curcin with a statement of accepted facts which discussed appellant's factual and medical history, including her history of medical conditions and surgeries, whether related to her federal employment or not.

In a report dated June 23, 2014, Dr. Curcin discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He indicated that appellant still had some residuals of her accepted work injuries and could not perform her regular work, but posited that she could work with restrictions. Dr. Curcin provided an opinion that, when considering all of appellant's medical conditions, she was capable of performing the position of telephone solicitor.

In a July 17, 2014 letter, OWCP advised appellant that, under sections 8113(b) and 8104 of FECA, it proposed to adjust her compensation because she had failed, without good cause, to undergo vocational rehabilitation as directed. It provided her 30 days to resume her participation in vocational rehabilitation efforts or show good cause for not doing so. OWCP informed appellant that, if she did not resume her participation in vocational rehabilitation efforts or show good cause for not doing so in the allotted period, it would reduce her compensation based on the determination that she would have been able to earn wages in the constructed position of telephone solicitor if she had completed the vocational rehabilitation program. It indicated that the June 23, 2014 opinion of Dr. Curcin, OWCP's referral physician, showed that she could work as a telephone solicitor.

Appellant submitted reports of attending physicians, including several reports of Dr. Demetri Adarnes, a Board-certified internist.

In an October 7, 2014 decision, OWCP adjusted appellant's compensation effective October 7, 2014, under sections 8113(b) and 8104 of FECA, because she failed, without good cause, to undergo vocational rehabilitation as directed. It found that she had failed to resume her participation in vocational rehabilitation efforts or show good cause for not doing so and adjusted her compensation based on the determination that she would have been able to earn wages in the constructed position of telephone solicitor if she had completed the vocational rehabilitation program. OWCP found that the weight of the medical evidence regarding appellant's ability to work rested with the well-rationalized June 23, 2014 opinion of Dr. Curcin. It also found that the reports of her attending physicians were of limited probative value regarding her ability to work.⁵

Appellant submitted an October 22, 2014 letter in which she indicated that OWCP relied on stale medical evidence to determine her ability to work and argued that the June 23, 2014 report of Dr. Curcin did not contain a probative medical opinion on her ability to work. She requested a hearing with an OWCP hearing representative. During the hearing held on May 11, 2015, appellant testified that she felt that she was physically unable to work as a telephone solicitor.

In a decision dated June 22, 2015, OWCP's hearing representative affirmed OWCP's October 7, 2014 decision noting that it properly adjusted appellant's compensation effective October 7, 2014, under sections 8113(b) and 8104 of FECA, because she failed, without good cause, to undergo vocational rehabilitation as directed. She found that the weight of the medical evidence regarding appellant's ability to work rested with the well-rationalized June 23, 2014

⁵ In a January 6, 2015 decision, OWCP granted appellant a schedule award for nine percent permanent impairment of her right upper extremity. Appellant requested a hearing with an OWCP hearing representative and, by decision dated October 28, 2015, the hearing representative affirmed OWCP's January 6, 2015 decision.

opinion of Dr. Curcin. The hearing representative determined that the reports of appellant's attending physicians were of limited probative value regarding her ability to work.

In a June 15, 2016 letter, received by OWCP on June 21, 2016, appellant requested reconsideration of OWCP's June 22, 2015 decision. She argued that the adjustment of her compensation for failure to participate in vocational rehabilitation efforts was based on stale medical evidence. Appellant indicated that she refused to sign a vocational rehabilitation plan that was presented to her in 2014 because she felt that it contained errors regarding her ability to work. She asserted that the June 23, 2014 report of Dr. Curcin did not contain a probative opinion on her ability to work and argued that the reports of attending physicians showed that she could not work as a telephone solicitor.

Appellant submitted an October 22, 2014 letter which had previously been submitted to OWCP. She also submitted a copy of OWCP's October 7, 2014 decision.

By decision dated July 19, 2016, OWCP denied appellant's request for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a) noting that the evidence submitted by appellant in support of her timely reconsideration request was repetitious and had already been considered by OWCP in its prior decisions.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ 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.⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received 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 The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record¹⁰ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹¹ While a reopening of a case may be predicated solely on a legal

⁶ 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).

⁷ 20 C.F.R. § 10.606(b)(3).

⁸ *Id.* at § 10.607(a).

⁹ *Id.* at § 10.608(b).

¹⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

¹¹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.¹²

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.¹³ Section 8113(b) of FECA provides that, if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of FECA, OWCP, “after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his [or her] wage-earning capacity in the absence of the failure,” until the individual in good faith complies with the direction of OWCP.¹⁴

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions OWCP will take when an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed. Section 10.519(a) provides, in pertinent part:

“Where a suitable job has been identified, OWCP will reduce the employee’s future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the OWCP nurse and the employ[ing establishment]. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.”¹⁵

ANALYSIS

OWCP issued a decision on June 22, 2015. Appellant timely requested reconsideration of this decision in a document received by OWCP on June 21, 2016.¹⁶

As noted above, the Board does not have jurisdiction over the June 22, 2015 OWCP decision. 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 her application for reconsideration, appellant did not show that OWCP erroneously

¹² *John F. Critz*, 44 ECAB 788, 794 (1993).

¹³ *Betty F. Wade*, 37 ECAB 556, 565 (1986).

¹⁴ 5 U.S.C. § 8113(b).

¹⁵ 20 C.F.R. § 10.519(a).

¹⁶ OWCP’s regulations at 20 C.F.R. § 10.607(a) establish a one-year time limit for requesting reconsideration. The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of the date of the OWCP decision for which review is sought for merit decisions issued on or after August 29, 2011. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (October 2011).

applied or interpreted a specific point of law. She did not identify a specific point of law or show that it was erroneously applied or interpreted, nor did she advance a new and relevant legal argument not previously considered by OWCP.

Appellant's argument was that OWCP improperly determined that she was capable of working in the constructed position of telephone solicitor, and therefore, improperly adjusted her compensation based on this determination.¹⁷ She argued that the adjustment of her compensation for failure to participate in vocational rehabilitation efforts was based on stale medical evidence. Appellant asserted that the June 23, 2014 report of Dr. Curcin did not contain a probative medical opinion on her ability to work and argued that the reports of attending physicians showed that she could not work as a telephone solicitor. However, OWCP has already considered these arguments in its October 7, 2014 and June 22, 2015 decisions and determined that the June 23, 2014 report of Dr. Curcin did, in fact, contain a probative medical opinion showing that she could work as a telephone solicitor. OWCP determined that Dr. Curcin's June 23, 2014 medical opinion was sufficiently current and well rationalized to represent appellant's ability to work.¹⁸

The question of appellant's physical ability to work as a telephone solicitor is a medical issue which must be addressed by relevant medical evidence.¹⁹ A claimant may be entitled to a merit review by submitting pertinent new and relevant evidence, but appellant did not submit any such evidence in this case.

Appellant submitted an October 22, 2014 letter in connection with her reconsideration request, but this letter had already been submitted and considered by OWCP. The Board further notes that appellant's June 22, 2016 letter contains arguments that are similar to those contained in her October 22, 2014 letter. Appellant submitted a copy of OWCP's October 7, 2014 decision, but this document was already in the case record and would not constitute new evidence regarding appellant's ability to earn wages as a telephone solicitor.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, 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 reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁷ The Board notes that, in her June 21, 2016 reconsideration request, appellant does not appear to contest OWCP's determination that she failed to participate in vocational rehabilitation efforts.

¹⁸ Moreover, OWCP considered the attending physician reports of record and found that this evidence did not show that appellant was incapable of working as a telephone solicitor.

¹⁹ See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 18, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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