

ISSUE

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

FACTUAL HISTORY

In 2005 OWCP accepted that appellant, an engineer about the McArthur II, developed an aggravation of chronic obstructive pulmonary disease in the performance of duty. His pay rate has remained a disputed issue in his claim.

In the July 11, 2012 decision, an OWCP hearing representative found that the effective date of appellant's pay rate should be December 6, 2004, the date his disability began. The record indicated that appellant was earning \$50,798.00 as a second assistant engineer on December 6, 2004. Indeed, appellant represented on his initial injury claim form that he was a second engineer. The hearing representative found that average annual earnings should be determined under 5 U.S.C. § 8114(d)(2). She also found that OWCP properly included increments for penalty pay/post differential, monthly leave supplement/ nonwatch standing allowance, and subsistence and quarters. The hearing representative ultimately concluded in a decision of July 11, 2012, that appellant's weekly pay rate for compensation purposes was \$1,079.62.

On August 14, 2013 the Board affirmed the hearing representative's July 11, 2012 decision⁴ as to appellant's pay rate for compensation purposes.

On July 29, 2014 OWCP received appellant's requested reconsideration.⁵ Appellant noted that he was submitting new evidence to show that at the time disability began he was a first assistant engineer and had been since 2004 [sic]. He argued that this was relevant because the employing establishment injury compensation officer had claimed that he was a second assistant engineer on the date disability began, and that he did not work as a first assistant engineer during substantially the whole year immediately preceding the date disability began. This new evidence, appellant argued, was proof that he worked as a first assistant engineer for more than 11 straight months prior to and including the date disability began. Documentation notes:

"The employing establishment acknowledges in their letter of April 4, 2012 that [appellant] was promoted to First Asst. Engineer on June 29, 2003. It was a temporary promotion and his permanent promotion to First Asst. Engineer became effective on June 11, 2004. [Appellant] worked continuously as a First Asst. Engineer from June 29, 2003 until the date disability began on January 31, 2005."

⁴ Docket No. 13-0522 (issued August 14, 2013).

⁵ Although appellant claimed to be filing a request for reconsideration from the Board's August 14, 2013 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the August 14, 2013 Board decision was the last merit decision, the hearing representative's July 11, 2013 decision is the appropriate subject of possible modification by OWCP.

Appellant submitted a copy of the April 4, 2012 letter from the manager of the employing establishment's workers' compensation program. The manager advised that appellant was a second assistant engineer at the time of injury and was promoted, on a temporary basis, to the position of first assistant engineer on June 29, 2003, two months after the injury. The manager argued that appellant's weekly salary rate should be based on his pay rate as a second assistant engineer.

Appellant also submitted an SF-3112B, a supervisor's statement in connection with disability retirement, which indicated that the title of appellant's position of record was first assistant engineer. The statement also noted that he had entered into that position on June 11, 2004. The statement also indicated that he retired effective January 31, 2005.

By decision dated September 15, 2014, OWCP denied appellant's reconsideration request. It found that the evidence submitted was cumulative and thus substantially similar to evidence or documentation that was already contained in the case file and was thus previously considered.

On appeal, appellant argues that his pay rate should be based on his total gross earnings a year prior to the date disability began, not based on the earnings of a hypothetical second assistant engineer under 5 U.S.C. § 8114(d)(2). He argues that the new evidence he submitted is relevant and proves that he was a first assistant engineer on December 6, 2004.

LEGAL PRECEDENT

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.⁶ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP decision for which review is sought.⁸ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include pre-recoupment hearing decisions.⁹

⁶ 5 U.S.C. § 8128(a).

⁷ 20 C.F.R. § 10.606(b).

⁸ *Id.* § 10.607(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(1) (January 2004). (Emphasis deleted.)

A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of the three standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS

OWCP received appellant's reconsideration request on July 29, 2014, within one calendar year of the Board's August 14, 2013 merit decision. The request is therefore timely. The issue on this appeal is whether the evidence appellant submitted to support his request for reconsideration constitutes relevant and pertinent new evidence not previously considered by OWCP.¹¹

The April 4, 2012 correspondence from the manager of the employing establishment's workers' compensation program is not new evidence. OWCP previously received this evidence on April 9, 2012 in connection with appellant's hearing request. The hearing representative noted this evidence in her July 11, 2012 decision. Evidence that repeats or duplicates evidence already of record has no evidentiary value and constitutes no basis for reopening a case.¹² Accordingly, the Board finds that this evidence does not meet the third standard for obtaining a merit review of appellant's claim.

The August 15, 2005 SF-3112B, supervisor's statement in connection with disability retirement, is also not new evidence. OWCP previously received this evidence on August 30, 2005, together with appellant's IRS Form W-2 wage and tax statements. It later received this same evidence on March 28, 2007. As before, evidence that repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening appellant's claim. Accordingly, the Board finds that this evidence does not meet the third standard for obtaining a merit review of appellant's claim.

Appellant argues on appeal that the evidence he submitted is new and relevant and therefore entitles him to a merit review. However, as explained above, the evidence is not new. Because the evidence repeats or duplicates evidence already in the record, it provides no basis for reopening his case.

CONCLUSION

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

¹⁰ 20 C.F.R. § 10.608.

¹¹ Appellant did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP

¹² *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

ORDER

IT IS HEREBY ORDERED THAT the September 15, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 2, 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