

ISSUE

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

On appeal, appellant's representative contends that the factual and medical evidence submitted in support of appellant's request for reconsideration constitutes new evidence and argument not previously considered by OWCP.

FACTUAL HISTORY

On January 13, 2011 appellant, then a 25-year-old safety and occupational health specialist, filed an occupational disease claim (Form CA-2) alleging that on January 9, 2008 he first became aware of his bilateral carpal tunnel syndrome and severe eye impairment. He further alleged that on April 1, 2008 he first realized that his conditions were caused or aggravated by using a keyboard and mouse while simultaneously holding his wrist in awkward positions and gripping tightly for long periods of time at work.

Appellant submitted medical and diagnostic reports dated January 17 to May 29, 2008. In a May 29, 2008 report, Dr. Luke I. Kao, a Board-certified neurologist, reviewed the results of a nerve conduction velocity and electromyogram (NCV/EMG) studies and assessed right C5-6 radiculopathy and bilateral carpal tunnel syndrome, mild on the right and minimal on the left.

By letter dated February 7, 2011, OWCP advised appellant of the deficiencies in his claim and requested that he submit additional factual and medical evidence. It also requested that the employing establishment respond to appellant's allegations.

In a February 12, 2011 letter, appellant requested an extension to respond to the February 7, 2011 development letter. He corrected his occupational disease claim form to reflect that he not only sustained bilateral carpal tunnel syndrome, but also hand repetitive strain injuries.

OWCP received an unsigned return-visit patient sheet from Maryland Center for Eye Care dated February 18, 2005 which noted findings on examination and addressed appellant's eye condition.

In a March 14, 2011 report, Dr. Constantine A. Misoul, a Board-certified orthopedic surgeon, noted that appellant worked at the employing establishment from December 2005 until January 2008 as a safety specialist. He reported his bilateral hand and cervical and lumbar spine symptoms, described his work duties, provided findings on physical examination, and noted an impression of bilateral carpal tunnel syndrome.

In a May 3, 2011 decision, OWCP denied appellant's occupational disease claim, finding that the evidence of record did not establish fact of injury as the evidence failed to show that the claimed events occurred as alleged. It noted that he did not submit any factual evidence in response to the February 7, 2011 development letter.

On May 23, 2011 appellant, through his representative, requested reconsideration. In a declaration dated May 16, 2011 and an undated affidavit, appellant attributed his carpal tunnel syndrome to his work duties. In the May 16, 2011 declaration he described the job duties which included repetitive hand, wrist, and finger motions; using automated office equipment approximately six to seven hours during his nine-hour workday; and archiving and sorting file documents, binders, references, and books, three to four hours a day, five days a week. Appellant attributed his increasingly worsening vision to his computer use. In the declaration he noted that he first noticed his claimed hand injury on January 4, 2008 while reaching overhead to get documents at work. Appellant's right hand began to tingle around January 9, 2008. He also had continuous numbness in his right hand and experienced pain, numbness, and tingling in his wrist and finger. Appellant performed full-duty work until January 14, 2008 when he stopped work due to pain from his claimed occupational disease. In the undated affidavit, he contended that his hand injury and pain were exacerbated by working at a fast pace and in a fixed posture for long durations without being afforded sufficient recovery time. Appellant attributed his eye condition to poor lighting in his work area.

Appellant submitted a copy of his job description as a safety and occupational health specialist. It included reviewing and analyzing available materials on the employing establishment's program, developing an evaluation plan for the employing establishment, coordinating the selection of sites for and to conduct field reviews by regional offices, participating in opening conferences with employing establishment safety and health officials and managers to discuss an evaluation plan, and conducting or leading on-site headquarters evaluation of the employing establishment. It also included analyzing field evaluation reports and findings of headquarters reviews to develop recommendations for improving program effectiveness, briefing appropriate supervisors and employing establishment officials on findings and recommendations preparatory to a closing conference, and participating in a closing conference and preparing a final report and executive summary for submission by the Secretary of Labor to an employing establishment head being evaluated and for submission with the employing establishment's comments to the Office of Management and Budget.

Appellant also submitted a July 23, 2008 report from Dr. Michael A. Franchetti, a Board-certified orthopedic surgeon, a June 7, 2011 NCV/EMG study report from Dr. Kao, and a work capacity evaluation (Form OWCP-5c) with an illegible date from Dr. Hampton J. Jackson, Jr., a Board-certified orthopedic surgeon. The physicians diagnosed occupationally-related lumbar, cervical, bilateral hand, and right shoulder conditions and noted appellant's disability from work.

In a June 24, 2011 memorandum, the employing establishment disagreed with appellant's description of his work duties and advised that he was involved in a broad range of activities, allowed one hour a day for lunch, routinely took several breaks throughout the day, did not work six to seven hours a day at his computer, and was not forced to perform repetitive hand and finger motions or work at a fast pace and in a fixed position at his workstation. It noted that he was not at work on January 4, 2008 as he was on scheduled annual leave and it did not receive notice of his injury and limitations prior to the filing of his claim.

In a July 20, 2011 statement, appellant disagreed with the employing establishment's June 24, 2011 memorandum. He asserted that he performed work duties and sustained injuries, as he had alleged.

By decision dated July 28, 2011, OWCP denied modification of the May 3, 2011 decision. It found that appellant did not submit any evidence to establish the claimed work factors and that the employing establishment disputed his account.

On August 29, 2011 OWCP received a July 19, 2011 report from Dr. Jackson which noted findings on examination and found that appellant had bilateral carpal tunnel syndrome causally related to the injury which manifested on January 9, 2008.

In a letter dated July 20, 2012, appellant, through his representative, requested reconsideration and submitted an August 9, 2011 report from Dr. Eric G. Dawson, an orthopedic surgeon. Dr. Dawson noted appellant's work duties as a safety specialist at the employing establishment, conducted an examination, and reviewed diagnostic test results. He opined that appellant's bilateral carpal tunnel syndrome, right worse than left side, was due to his repetitive work motions. Dr. Dawson advised that he was not able to return to his work duties.

In an October 17, 2012 decision, OWCP denied modification of the July 28, 2011 decision.

On June 14, 2013 appellant requested reconsideration and contended that a declaration of W.R., a former coworker, should cure the deficiencies in his claim. In a partial copy of his May 11, 2013 affidavit, W.R. noted that he and appellant had similar work duties as safety and health specialists at the employing establishment. Based on his observation, appellant's duties were technical in nature and required him to spend many hours a day at his workstation. W.R. indicated that while a position description provided that appellant was required to attend meetings and professional development conferences, these duties were not indicative of a routine day. He maintained that his computer station duties subjected him to more than a usual risk for sustaining neck, shoulder, back, and waist injuries than a nonvisually challenged employee.

In an August 12, 2013 decision, OWCP denied further merit review of appellant's claim. It found that the evidence submitted was irrelevant or immaterial.³

On September 17, 2013 appellant requested reconsideration. In an undated affidavit, W.R. noted his own work duties as a safety and health specialist. He also noted that on several occasions he witnessed that appellant's physical difficulties impacted his work capability. W.R. related appellant's account of the overwhelming effect a project he worked on for two to three months archiving and filing old documents had on his health.

In a December 16, 2013 decision, OWCP denied modification of the August 12, 2013 decision. It found that W.R.'s affidavit was insufficient to establish appellant's claimed employment factors.

On December 15, 2014 appellant's representative requested reconsideration and contended that a report from Dr. Eric L. Weisbrot, a specialist in family medicine, established a

³ In the August 12, 2013 decision, it appears that OWCP did not review W.R.'s May 11, 2013 affidavit. It listed the evidence submitted in support of appellant's June 8, 2013 request for reconsideration, but did not list or address W.R.'s May 11, 2013 affidavit.

causal relationship between appellant's bilateral carpal tunnel syndrome and work duties. In a December 12, 2014 report, Dr. Weisbrot noted appellant's safety and occupational health specialist work duties, provided findings on physical examination, and opined that appellant had carpal tunnel syndrome causally related to his work duties.

In a March 13, 2015 decision, OWCP denied modification of the December 16, 2013 decision. It found that appellant failed to submit a detailed and accurate description of the work duties he believed caused his bilateral carpal tunnel syndrome.

On March 10, 2016 appellant's current representative requested reconsideration. He contended that another affidavit from W.R. established appellant's work duties. Appellant's representative further contended that a report from Dr. Michael E. Batipps, a Board-certified neurologist, established causal relationship between appellant's medical conditions and his job duties.

In a March 9, 2016 affidavit, W.R. provided essentially the same description of appellant's work duties and his physical difficulties with performing these duties as set forth in his May 11, 2013 and undated affidavits.

In a June 11, 2015 report, Dr. Batipps noted appellant's complaints of chronic daily cervical, bilateral shoulder, hand, and back symptoms. He related appellant's account of working as a safety specialist commencing in 2005 through January 4, 2008 and the development of his symptoms while working in this position. In 2005, appellant was required to constantly lift and carry large records, books, and supplies. In 2007, he was required to perform repetitive motions with both upper extremities during filing activities. Appellant also performed extensive computer keyboard activities. On January 4, 2008 he was required to reach overhead with his right hand to obtain a heavy reference book. Dr. Batipps noted a history of appellant's medical treatment and reported findings on neurological examination. He provided an impression of a January 4, 2008 work injury, cervical disc herniations with right cervical radiculopathy, right shoulder rotator cuff partial tear with chronic right shoulder pain, and chronic lumbosacral radiculopathy. Dr. Batipps advised that the diagnosed conditions were due to the January 4, 2008 work injury. He also noted an impression of repetitive stress injuries, both upper extremities, due to work-related activities with resultant bilateral carpal tunnel syndrome. Dr. Batipps opined that appellant was totally disabled due to the diagnosed conditions based on objective test results and his examination findings.

By decision dated August 5, 2016, OWCP denied reconsideration of the merits of appellant's claim. It found that the evidence submitted was repetitious, irrelevant, or immaterial.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulation provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously

⁴ *Supra* note 2. Under section 8128 of FECA, the 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).

considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ 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.⁶ Section 10.608(b) of the implementing regulations state that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁷

ANALYSIS

On March 10, 2016 appellant, through his representative, requested reconsideration of the March 13, 2015 decision that denied modification of the denial of his occupational disease claim. The underlying issue on reconsideration is factual in nature, whether appellant established the claimed factors of his federal employment that were alleged to have caused his claimed conditions.

In his March 10, 2016 request for reconsideration, appellant's representative did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered. W.R.'s March 9, 2016 affidavit, while new, essentially reiterated his previous description of appellant's work duties and physical difficulties with performing his work duties as set forth in earlier affidavits. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.⁸

Dr. Batipps' new report dated June 11, 2015 related appellant's account of constantly lifting and carrying large records, books, and supplies, repetitive use of his upper extremities when filing and performing computer keyboard activities, and reaching overhead with his right hand to obtain a heavy reference book. However, Dr. Batipps is not qualified as a finder of fact in this case as there is no evidence that he had direct knowledge of appellant's employment duties at the time in question. Furthermore, Dr. Batipps' medical opinion with respect to the cause of appellant's condition is irrelevant to the underlying factual issue.⁹ Evidence which does

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁸ *D.K.*, 59 ECAB 141 (2007).

⁹ *See Bonnie A. Contreras*, 57 ECAB 364 (2006) (where a claimant did not establish an employment incident alleged to have caused an injury, it was not necessary to consider any medical evidence).

not address the particular issue under consideration does not constitute a basis for reopening a case.¹⁰

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal, appellant's representative contends that the factual and medical evidence submitted in support of appellant's request for reconsideration constitutes new evidence and argument not previously considered by OWCP. As found, however, appellant did not submit relevant and pertinent new evidence with his reconsideration request.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 4, 2017
Washington, DC

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

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

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

¹⁰ See *K.T.*, Docket No. 15-1916 (issued February 1, 2016).