

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).

FACTUAL HISTORY

On November 5, 2012 appellant, then a 53-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained an occupational disease of his right shoulder due to sorting and delivering mail, lifting mail trays, and carrying a mailbag on his right shoulder over time. OWCP accepted that he sustained a partial right rotator cuff tear. Appellant stopped work on July 17, 2014 and received wage-loss compensation on the daily roll beginning July 17, 2014.

OWCP had previously accepted that appellant sustained several other work-related conditions, including right wrist and hand (metacarpophalangeal joint) sprains sustained on February 3, 1998 (File No. xxxxxx156), plantar fibromatosis of the right foot sustained as of August 2, 1999 (File No. xxxxxx175), synovitis/tenosynovitis of the left leg and medial meniscus tear of the left knee sustained as of February 17, 2004 (File No. xxxxxx575), and a dog bite of the right leg sustained on February 17, 2004 (File No. xxxxxx590).

In an August 28, 2014 report, Dr. Daniel Kharazzi, an attending Board-certified orthopedic surgeon, diagnosed several right shoulder conditions, including impingement, acromioclavicular joint degeneration, partial rotator cuff tear, and superior labrum tear from anterior to posterior. He indicated that appellant could not push or pull with his right arm, lift more than five pounds, or perform overhead work with his right arm.

On September 8, 2014 the employing establishment offered appellant a full-time position as a customer care agent in Agua Dulce, California. The position involved communicating with customers through telephone calls, e-mails, and online chats, and responding to their inquiries about postal products and services. The physical requirements of the position included walking continuously/intermittently for five hours per day and lifting up to five pounds. The position did not require overhead lifting, pushing, or pulling with the right arm, and it allowed the employee to type and use a computer mouse at his or her own speed. The position permitted alternating between sitting and standing as needed for comfort and the employee would use a headset to answer telephone calls.

Appellant signed the job offer on September 19, 2014 noting, "I accept with protest." In a September 20, 2014 statement, he explained that he accepted the customer care agent position with protest because the position required him to change from the carrier craft to the clerk craft, travel 55 miles from his home to get to work, change his start time from 7:30 a.m. to 10:05 a.m., and change his rotating day off. Appellant also noted that he was not permanent and stationary with respect to his medical condition because he was awaiting surgery on his right shoulder.

On October 20, 2014 Dr. Kharazzi performed an OWCP-authorized arthroscopic decompression, acromioplasty, and bursectomy surgery of appellant's right shoulder. The

employing establishment advised that appellant failed to report for work on October 20, 2014 in the customer care agent position.⁴

On December 23, 2014 and March 16, 2015 OWCP requested that Dr. Kharazzi submit a report describing appellant's current medical condition and providing an assessment of his ability to work.

On March 19, 2015 appellant underwent a functional capacity evaluation (FCE) which showed that he was capable of occasionally lifting and carrying up to 35 pounds, pushing up to 61 pounds, and pulling up to 52 pounds.

In June 2015, an employing establishment official advised OWCP that appellant had retired effective April 30, 2015 that he and continued to receive FECA benefits after that date.

Due to lack of a sufficient response from Dr. Kharazzi, OWCP referred appellant to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on his ability to work. It provided Dr. Ha'Eri with a recent statement of accepted facts which delineated all of appellant's accepted work-related conditions and also provided him with a description of the customer care agent position offered by the employing establishment.

In a July 24, 2015 report, Dr. Ha'Eri reported the findings of the physical examination he conducted on that date and diagnosed right shoulder degenerative rotator cuff tendinitis (temporarily aggravated by work duties) and status post arthroscopic impingement release of the right shoulder. He advised that he had reviewed the results of appellant's March 19, 2015 FCE and opined that appellant could work as a customer care agent, but not as a mail carrier. In a July 14, 2015 form entitled Work Capacity Evaluation (Form OWCP-5c), Dr. Ha'Eri indicated that appellant could work eight hours with restrictions, including lifting, pushing, and pulling no more than 20 pounds (three hours per day for each action), reaching above shoulder level with his right arm for no more than one hour per day, and operating a motor vehicle at work for no more than two hours per day.

In September 2015, OWCP received a July 13, 2015 report from Dr. Kharazzi who indicated that appellant could work with restrictions of lifting up to 25 pounds, no forceful pushing or pulling, and no repetitive overhead work with his right arm.

On October 28, 2015 the employing establishment advised OWCP that the customer care agent position was still available to appellant.

In an October 28, 2015 letter, OWCP advised appellant that the customer care agent position offered by the employing establishment on September 8, 2014 was deemed to be suitable and advised him that his entitlement to wage-loss compensation and schedule award benefits could be terminated under 5 U.S.C. § 8106(c)(2) if he failed to accept suitable work without good cause. It discussed the reasons he provided in his September 20, 2014 letter for his failure to report to the position and advised him that these reasons were not considered valid. OWCP indicated that the medical evidence showed that appellant was now capable of

⁴ On October 19, 2014 appellant began receiving wage-loss compensation on the periodic roll.

performing the physical duties of the position and noted, "Please note that even if you are retired, that is not a valid reason for refusing a suitable offer of employment. You are expected to accept the offered position and return to work if medically capable." It provided appellant 30 days to accept the customer care agent position offered by the employing establishment or provide good cause for not doing so.

Appellant submitted a letter to OWCP in which he noted that he continued to receive FECA benefits, but that he intended to collect retirement benefits after his FECA benefits ceased. He also submitted a July 19, 2015 letter in which the Office of Personnel Management (OPM) advised him that his Civil Service Retirement System (CSRS) or Federal Employees Retirement System (FERS) annuity would be suspended while he was receiving FECA benefits, but that he could receive CSRS or FERS benefits if his FECA compensation ended.

On December 14, 2015 the employing establishment advised OWCP that the customer care agent position was still available to appellant.

In a December 14, 2015 letter, OWCP again informed appellant that all the reasons he provided for refusing the customer care agent position were invalid. It discussed the documents that he had submitted regarding his retirement. OWCP advised appellant that he had 15 days to accept the customer care agent position offered by the employing establishment and indicated that his entitlement to wage-loss compensation and schedule award benefits would be terminated if he failed to report to the position within the allotted period. Appellant did not accept the customer care agent position within the allotted period.

On January 21, 2016 the employing establishment advised OWCP that the customer care agent position was still available to appellant.

In a January 21, 2016 decision, OWCP terminated appellant's entitlement to wage-loss compensation and schedule award benefits effective January 21, 2016 due to his refusal of suitable work without good cause pursuant to 5 U.S.C. § 8106(c)(2).

In a letter dated and received on January 17, 2017, appellant, through counsel, requested reconsideration of OWCP's January 21, 2016 decision. Counsel argued that appellant provided a valid reason for refusing the customer care agent position as he had informed OWCP that he was receiving disability retirement benefits. He asserted that OWCP never informed appellant that retirement was not a valid excuse for refusing a suitable job offer and that it did not cite a statute, rule, or regulation that "disqualified [appellant's] excuse." Counsel alleged that the employing establishment was disingenuous when it offered appellant the customer care agent position because it had already certified to OPM that it could not accommodate appellant's impairment. He asserted that appellant could not have received FERS benefits unless the employing establishment had certified to OPM that it could not accommodate appellant with a job due to his impairment.

In an April 7, 2017 decision, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that, although his reconsideration request was timely, the argument he submitted through counsel did not constitute new and relevant argument or evidence requiring reopening of his claim for reconsideration of the merits.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ A timely application for reconsideration, including all supporting documents, 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.⁸ When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a 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

ANALYSIS

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 his application for reconsideration, he did not show that OWCP erroneously applied or interpreted a specific point of law. Appellant also did not identify a specific point of law or show that it was erroneously applied or interpreted, nor did he advance a new and relevant legal argument not previously considered by OWCP. The underlying issue in this case was whether OWCP properly terminated his entitlement to wage-loss and schedule award compensation, effective January 21, 2016, due to his refusal of suitable work without good cause, pursuant to 5 U.S.C. § 8106(c)(2).

⁵ This section provides in pertinent part: “[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).

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.608(a), (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).

A claimant may also be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant has not submitted any such evidence in this case. In support of appellant's reconsideration request, counsel argued that appellant provided a valid reason for refusing the customer care agent position because he informed OWCP about the postretirement benefits he was receiving. He asserted that OWCP never informed appellant that retirement was not a valid excuse for refusing a suitable job offer and that it did not cite a statute, rule, or regulation that "disqualified [appellant's] excuse."

These arguments would not require reopening of appellant's claim for reconsideration on the merits because counsel's contentions are repetitive of arguments addressed by OWCP in its January 21, 2016 decision.¹²

Counsel further alleged that the employing establishment was disingenuous when it offered appellant the customer care agent position because it had already certified to OPM that it could not accommodate appellant's impairment and that he could not have received FERS benefits unless the employing establishment had certified to OPM that it could not accommodate him with a job due to his impairment. However, these arguments merely relate to appellant's concerns about postretirement benefits and counsel has not adequately explained how they are relevant to the issue of the present case, *i.e.*, termination of entitlement to compensation under 5 U.S.C. § 8106(c)(2) due to failure to accept suitable work. As noted above, submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹³

The Board accordingly finds that appellant has not met 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 his claim pursuant to 5 U.S.C. § 8128(a).

¹² See *supra* note 10.

¹³ See *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 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