



## ISSUE

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

## FACTUAL HISTORY

On March 7, 2011 appellant, then a 47-year-old production technician, filed an occupational disease claim (Form CA-2) alleging that she sustained stress and depression as a result of being deployed to Kuwait the previous year. On August 26, 2011 OWCP accepted her claim for adjustment disorder with mixed anxiety and depressed mood. Appellant received intermittent compensation on the supplemental rolls from April 28 to December 2, 2011. On May 2, 2013 OWCP accepted additional conditions of major depression and post-traumatic stress syndrome.

Appellant's treating licensed clinical psychologist, Dr. Holly Deemer, continued to submit therapy progress notes. In a report dated March 19, 2015, she related that she continued to treat appellant for anxiety and depression causally related to her accepted claim.

In an April 28, 2015 report, Dr. Gary K. Arthur, a Board-certified psychiatrist, reported that appellant remained totally disabled from work. He concluded, based on "a reasonable degree of medical certainty" that the depression and post-traumatic stress disorder (PTSD) "she developed from working in Kuwait have been *continuous* and have become *chronic*." (Emphasis in the original.) Dr. Arthur recommended that appellant continue with her medications and psychotherapy.

On May 11, 2015 OWCP referred appellant to Dr. Paul James O'Leary, a Board-certified psychiatrist, for a second opinion evaluation as to whether she still had residuals of her accepted conditions, and whether appellant was in need of continued supervised psychotherapy. It notified appellant that if she obstructed the examination scheduled for June 12, 2015, her benefits would be suspended in accordance with 5 U.S.C. § 8123(d).

By letter dated May 21, 2015, addressed to appellant's last known address, she was advised that OWCP had scheduled her examination with Dr. O'Leary for June 12, 2015 at 10:00 a.m.

By letter dated June 17, 2015, a case coordinator notified OWCP that appellant did not appear for the scheduled examination with Dr. O'Leary.

In a letter dated June 19, 2015, OWCP advised appellant that it proposed to suspend her compensation for failure to appear at the June 12, 2015 examination. It advised her that, if she had good cause for her failure to attend, she should submit her reasons in writing within 14 days. If appellant did not show good cause, her benefits would be suspended. She did not provide any reasons for her failure to appear for the scheduled examination within the allotted time.

By decision dated July 6, 2015, OWCP suspended appellant's compensation, pursuant to 5 U.S.C. § 8123(d), for failure to attend the June 12, 2015 examination. It noted that the suspension would cease when appellant complied with the scheduled examination.

On July 13, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

By letter dated July 31, 2015, appellant explained that she missed her appointment with Dr. O'Leary on June 12, 2015 because she was out of town. She expressed that she was willing to attend a rescheduled appointment.

By letter dated August 21, 2015, addressed to appellant's last known address, she was advised that OWCP had rescheduled an examination with Dr. O'Leary on September 3, 2015 at 12:00 p.m. Appellant attended this appointment.

In a report dated September 7, 2015, Dr. O'Leary reported findings from his examination of appellant on September 3, 2015. He opined that appellant's psychological issues were not job related.

By letter dated September 11, 2015, OWCP notified appellant that her medical benefits had been reinstated because it had received the medical report from her September 3, 2015 appointment with Dr. O'Leary.

By letter dated June 1, 2016, OWCP scheduled an impartial medical examination to resolve a conflict in the medical evidence between appellant's treating physician, Dr. Arthur, and Dr. O'Leary, the second opinion specialist. Accordingly, it referred appellant to Dr. Dwight A. Owens, a Board-certified psychiatrist, to serve as the impartial medical examiner.

By decision dated June 8, 2016, a hearing representative found that OWCP correctly suspended appellant's medical benefits for refusing to submit to an examination for the period July 6 through 15, 2015. She found that appellant's stated reason for missing the appointment, that she was out of town, was not a justifiable reason. The explanation for missing the appointment was not received until July 31, 2015, well after the June 12, 2015 appointment and appellant attended the rescheduled appointment on September 2, 2015.

In a report dated July 7, 2016, Dr. Owens found that there was causal relationship between appellant's initial injury and the current phenomenology of her mental illness, which had not yet resolved. He noted that she was in need of continuous supervised psychopharmacology.

By letter received on October 21, 2016, appellant, through counsel, requested reconsideration of the June 8, 2016 decision. With the request, counsel attached the July 7, 2016 referee report of Dr. Owens. He argued that that the June 8, 2016 decision should be vacated.

By decision dated November 9, 2016, OWCP denied appellant's request for reconsideration. It found that the July 7, 2016 report of Dr. Owens was not relevant to the issue of whether appellant had a valid reason for not attending the June 12, 2015 appointment with Dr. O'Leary.

## LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), 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.<sup>3</sup> Section 10.608(b) of its regulations provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>4</sup>

## ANALYSIS

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).

With the request for reconsideration, received October 21, 2016, appellant submitted a referee medical report from Dr. Owens dated July 7, 2016. In this report, Dr. Owens opined that there was a continued relationship between appellant's initial injury and the current phenomenology of her mental illness, which had not yet resolved. He concluded that she was in need of continuous supervised psychopharmacology.

Appellant 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, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue is whether appellant supplied a valid reason for missing a second opinion examination appointment on June 12, 2015.<sup>5</sup> A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence relating to the underlying issue, but appellant did not submit any such evidence in this claim. Counsel argued that the July 7, 2016 report of Dr. Owens constituted evidence that should suffice to reverse the sanctions for not attending the June 12, 2015 appointment. However, the July 7, 2016 report does not contain any stated reason for missing the June 12, 2015 appointment. Dr. Owens, instead, opined on the residuals of appellant's accepted injuries and her need for continued treatment. As such, the July 7, 2016 report was irrelevant to the underlying issue of missing a scheduled appointment and the resulting sanction.<sup>6</sup> Appellant did not meet any of the requirements to warrant reconsideration of her claim.

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<sup>3</sup> 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

<sup>4</sup> *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

<sup>5</sup> The Board has held that the submission of evidence or argument which does not address the particular issue involved in the case does not constitute a basis for reopening a case. *A.M.*, Docket No. 16-1875 (issued August 23, 2017); *Edward Matthew Diekamper*, 31 ECAB 224 (1979).

<sup>6</sup> *Id.*

The Board accordingly finds that, 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).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 9, 2016 is affirmed.

Issued: December 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