

to the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.⁴

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).

On appeal appellant's representative contends that the medical evidence submitted in support of his request for reconsideration was sufficient to warrant a merit review of his case.

FACTUAL HISTORY

This case has previously been before the Board. In a June 21, 2011 decision, the Board found that the case was not in posture for a decision regarding whether appellant sustained back, neck, and right shoulder injuries causally related to established factors of his federal employment due to an unresolved conflict in the medical evidence.⁵ The Board directed OWCP to refer appellant to an impartial medical specialist.

In a March 6, 2014 decision, the Board found that the case was not in posture for a decision as to whether OWCP properly suspended appellant's compensation benefits, effective November 15, 2012, due to his failure to attend a scheduled medical examination.⁶ The Board found that OWCP had improperly selected Dr. Rida N. Azer, a Board-certified orthopedic surgeon, as an impartial medical examiner (IME). The case was remanded to OWCP for selection of another IME to determine whether appellant had sustained back, neck, and right shoulder injuries causally related to the established employment factors and to issue a *de novo* decision on the issue. The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The facts relevant to the current appeal are set forth below.

On July 14, 2008 appellant, then a 50-year-old safety and occupational health specialist, filed an occupational disease claim (Form CA-2) alleging that on January 1, 2008 he first became aware of his back, neck, and right shoulder conditions and realized that these conditions were caused by his employment duties. He stopped work on January 15, 2008 and has not returned to work.

Following the issuance of the Board's March 6, 2014 decision, OWCP referred appellant, together with the case record, a statement of accepted facts (SOAF), and a list of questions, to Dr. R. Marshall Ackerman, a Board-certified orthopedic surgeon, for an impartial medical

³ 5 U.S.C. § 8101 *et seq.*

⁴ Following the issuance of the August 1, 2016 OWCP decision and on appeal, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

⁵ Docket No. 10-1788 (issued June 21, 2011).

⁶ Docket No. 13-1553 (issued March 6, 2014).

examination. In an August 12, 2014 medical report, Dr. Ackerman examined appellant and found that his preexisting cervical condition, degenerative lumbar disc changes, and degenerative tears of the right shoulder had not changed or worsened as a result of his work activities. He noted that there were no objective findings on physical or diagnostic test examination commensurate with his subjective complaints. Dr. Ackerman concluded that appellant had no work-related condition and was capable of returning to his date-of-injury position.

In a November 3, 2014 decision, OWCP denied appellant's occupational disease claim. It accepted the employment factors stated by appellant, but found that the weight of the medical evidence rested with Dr. Ackerman's impartial medical opinion and established that appellant had not sustained right upper extremity, back, and neck injuries due to the established employment duties.

On November 24, 2014 appellant requested a telephone hearing with an OWCP hearing representative. On January 22, 2015 he requested that the Branch of Hearings and Review subpoena a coworker who would testify about the work duties he performed while he served as appellant's replacement.

In an April 22, 2015 interim decision, an OWCP hearing representative denied appellant's request to subpoena the coworker.

During a May 27, 2015 telephone hearing, appellant contended that Dr. Ackerman had not explained his finding of degenerative conditions in the absence of supportive diagnostic test results.

In a June 11, 2015 report, Dr. Michael E. Batipps, a Board-certified neurologist, examined appellant and provided an impression of a work injury sustained on January 4, 2008⁷ and cervical disc herniations with right cervical radiculopathy, right shoulder rotator cuff partial tear with chronic right shoulder, and chronic lumbosacral radiculopathy due to the January 4, 2008 injury. He also provided an impression of repetitive stress injuries to both arms due to work activities with resultant bilateral carpal tunnel syndrome. Dr. Batipps concluded that appellant was totally disabled due to his injuries. He reviewed appellant's medical record, including Dr. Ackerman's August 12, 2014 report, and disagreed with his opinion that appellant did not have a work-related condition as his examination was truncated and incomplete.

By decision dated July 23, 2015, OWCP's hearing representative affirmed the November 3, 2014 decision. He found that Dr. Ackerman's report was entitled to the special weight accorded an impartial medical specialist as the physician provided a rationalized medical opinion based on a proper factual background. The hearing representative further found that Dr. Batipps' report was not sufficiently rationalized to overcome the weight accorded to Dr. Ackerman's opinion.

⁷ Appellant had also filed an occupational disease claim (Form CA-2) on January 31, 2011 for bilateral carpal tunnel syndrome due to his repetitive work duties. OWCP denied this claim under File No. xxxxxx939. File No. xxxxxx939 is not before the Board on the present appeal.

In a March 10, 2016 letter, received on May 7, 2016, appellant, through his representative, requested reconsideration and contended that an accompanying affidavit, dated May 5, 2016, from appellant's coworker was sufficient to establish that his work duties caused his claimed neck, back, and right shoulder conditions.

By decision dated May 9, 2016, OWCP denied appellant's request for reconsideration, finding that his representative's March 10, 2016 letter and coworker's May 5, 2016 affidavit were not relevant to the medical issue of causal relationship as the work duties of appellant had already been accepted.

In a July 19, 2016 letter, appellant again requested reconsideration of the July 23, 2015 decision. He noted that his reconsideration request was based on new medical evidence, a July 7, 2016 report from Dr. Janet L. Wasson, a Board-certified general surgeon. Appellant contended that Dr. Ackerman's impartial report was not entitled to special weight because he did not explain his finding of no work-related condition when it was visible on diagnostic test results.

In a decision dated August 1, 2016, OWCP found that the July 19, 2016 request for reconsideration was insufficient to warrant merit review of appellant's claim.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.⁸ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).⁹ This section provides that the application for reconsideration must be submitted in writing and 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.¹⁰ Section 10.608(b) provides that when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹¹

ANALYSIS

On July 19, 2016 appellant requested reconsideration of OWCP's hearing representative's July 23, 2015 decision which affirmed the denial of his occupational disease

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.608(a).

¹⁰ *Id.* at § 10.606(b)(3).

¹¹ *Id.* at § 10.608(b).

claim. The underlying issue on reconsideration is medical in nature, whether appellant had a medical condition causally related to the established employment factors.

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered. In a July 19, 2016 request for reconsideration, he contended that OWCP's hearing representative improperly accorded special weight to Dr. Ackerman's impartial report as the basis for denying his claim. Appellant contended that Dr. Ackerman did not provide a rationalized medical opinion based on the diagnostic test results of record. This argument was previously raised by appellant and addressed by OWCP's hearing representative in his July 23, 2015 merit decision. 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.¹² Because this argument has been previously considered, it was insufficient to require OWCP to conduct a merit review. Consequently, the Board finds that appellant is not entitled to further review of the merits based on the first and second requirements under section 10.606(b)(3).

A claimant may also be entitled to a merit review by submitting pertinent new and relevant evidence not previously considered. As stated, the underlying issue is medical in nature. Appellant related that his request for reconsideration was based on Dr. Wasson's July 7, 2016 report. The Board notes, however, that the report was not of record prior to the issuance of OWCP's August 1, 2016 decision denying his July 19, 2016 request for reconsideration.

The Board finds, therefore, that appellant's argument does not establish legal error on a specific point of law or advance a relevant legal argument not previously considered. Furthermore, appellant also did not submit any relevant or pertinent new evidence not previously considered.

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 medical evidence submitted in support of appellant's request for reconsideration was sufficient to warrant a merit review of his case. The record does not indicate that appellant submitted any relevant and pertinent new medical evidence in support of his July 19, 2016 request for reconsideration prior to the issuance of OWCP's August 1, 2016 decision denying the request.

CONCLUSION

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

¹² *J.P.*, 58 ECAB 289 (2007).

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 14, 2017
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