

ISSUE

The issue is whether OWCP properly determined that appellant's requests for reconsideration were insufficient to warrant merit review of the claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 18, 2010 appellant, then a 40-year-old mail handler, filed a claim for occupational disease (Form CA-2) alleging neck, arm, and knee injuries as a result of his federal employment duties of loading and unloading trucks. He stopped work as of June 17, 2010.

Appellant underwent a left elbow ulnar nerve release on June 25, 2010.

OWCP accepted the claim on October 7, 2010 for lesion of the left ulnar nerve. In addition, it expanded the accepted conditions to include neck sprain, bilateral knee derangement, displacement of cervical intervertebral disc without myelopathy, and brachial neuritis or radiculitis. OWCP initially paid wage-loss and medical compensation benefits on the supplemental rolls and later appellant was placed on the periodic rolls as of December 19, 2010.

On February 13, 2013 the employing establishment offered appellant a full-time position as a customer care agent. The physical requirements of the position were reported as sitting up to eight hours with some standing, simple grasping up to eight hours intermittently, pushing/pulling of a computer mouse up to eight hours, and fine manipulation using a keyboard up to eight hours.

OWCP prepared a statement of accepted facts (SOAF) dated April 4, 2013 and referred appellant, along with a description of the customer care agent position, to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion examination and a determination of appellant's work capacity. In a report dated May 1, 2013, Dr. Ha'Eri provided a history and results on examination. He opined that appellant was not capable of performing the customer care agent position as it required that he repeatedly use his hands eight hours per day with no breaks.

The record indicates that on May 28, 2013 appellant underwent C4-6 anterior microdiscectomy and interbody fusion surgery. In a toxicology report dated August 13, 2013, he tested positive for one prescription drug, Tapentadol, and for THC-COOH. The report indicated that the referring physician was Dr. Hrair Darakjian, a Board-certified orthopedic surgeon.

On December 24, 2013 OWCP prepared a new SOAF and again referred appellant to Dr. Ha'Eri for a second opinion examination. In a December 24, 2013 letter, the employing

³ Docket No. 15-1494 (issued December 24, 2015).

establishment clarified that while in the offered customer care agent position appellant could sit or stand as needed for comfort and there was no continuous typing.

In a report dated February 5, 2014, Dr. Ha'Eri provided a history and results on examination. He diagnosed left elbow cubital tunnel syndrome, bilateral knee patellofemoral stress syndrome, cervical sprain/strain, and aggravation of preexisting multilevel cervical degenerative disc disease and protrusions, giving rise to neck pain and upper extremity radiculopathies, left worse than right. Dr. Ha'Eri opined that the degenerative cervical condition had been permanently aggravated by the employment injury. He indicated that the cervical surgery had failed and appellant continued to have neck pain and stiffness associated with bilateral upper extremity radiculopathy. As to the offered position, Dr. Ha'Eri reported: "It is my opinion that the claimant is able to return to a sedentary work as long as he has 15 minutes of break every two hours. The job offer of customer care agent was reviewed and it seems a suitable position for him." Dr. Ha'Eri also provided physical restrictions that included one hour reaching above shoulder, 10 pounds pushing, pulling and lifting, and two hours of repetitive movements of the wrist and elbows.

In a toxicology report dated March 17, 2014, appellant tested positive for two nonprescribed substances: THC-COOH and 7-Aminoclonazepam.

On March 28, 2014 the employing establishment offered appellant the full-time customer care agent position. Appellant refused the job offer, indicating that it was not medically suitable. He submitted an April 3, 2014 report from Dr. Darakjian, who provided a history and results on examination, indicating that he had reviewed records, including the job of customer care agent. Dr. Darakjian diagnosed status post cervical anterior interbody fusion with residual radiculopathy, and status post left cubital tunnel syndrome. He reported that appellant continued to take pain medication, Nucynta (Tapentadol) and Neurontin (Gabapentin), and was currently managing his pain well with this medication.

According to Dr. Darakjian, the medication made appellant drowsy, and he had difficulty sitting in one position more than 45 minutes at a time. He reported that appellant was unable to perform repetitive movements, such as typing on a keyboard or using a computer mouse more than 15 minutes at a time. Dr. Darakjian opined that appellant "is not capable of performing the duties of customer care agent for a call center due to the length of time needed to focus, sit, and use the hands to operate the computer. He remains totally disabled."

By letter dated April 18, 2014, OWCP advised appellant that it found the job offer of customer care agent suitable. It found that Dr. Ha'Eri represented the weight of the medical evidence. Appellant was advised of the provisions of 5 U.S.C. § 8106(c)(2) and further advised that if he failed to accept the position he should provide written explanation of reasons within 30 days.

Appellant submitted a letter on May 8, 2014 and asserted that the SOAF was not entirely accurate as he was only a supervisor from 2004 to 2006 for a couple of months a year.⁴ He again

⁴ The December 24, 2013 SOAF had indicated that appellant worked as a supervisor in the year prior to his injury.

opined that the job offered was not medically suitable based on the evidence. The record contains a toxicology report dated May 12, 2014, indicating positive results for Zolpidem and 7-Aminoclonazepam. In a toxicology report dated June 5, 2014, appellant tested positive for Tramadol, Zolpidem, and 7-Aminoclonazepam.

By letter dated June 27, 2014, OWCP advised appellant that the reasons for refusing the job offer were not acceptable. It advised that he had had an additional 15 days to accept the position or his entitlement to wage-loss compensation and schedule award benefits would be terminated.

On August 4, 2014 appellant submitted a July 3, 2014 report from Dr. Darakjian, who provided results on examination. Dr. Darakjian noted that he had found in his April 3, 2014 report that appellant could not perform the customer care agent position, and his opinion remained unchanged.

By decision dated July 16, 2014, OWCP terminated appellant's compensation benefits and entitlement to a schedule award, effective July 16, 2014, pursuant to 5 U.S.C. § 8106(c)(2). It found Dr. Ha'Eri represented the weight of the medical evidence, as there was no evidence from a treating physician disputing his findings directly. With regard to medications, OWCP found that the toxicology reports dated May 12 and June 5, 2014 did not reflect any positive tests for the prescribed medications, but August 13, 2013 and March 17, 2014 reports were positive for marijuana use. It noted that Dr. Darakjian had not addressed these results.

In a report dated August 28, 2014, Dr. Darakjian indicated that appellant continued to report neck pain. He stated that appellant reported that the prescribed medication of Nucynta and Gabapentin made him sleepy. Dr. Darakjian stated that appellant was disabled "as he is not able to do even the modified duties that have been provided to him due to the fact that he has difficulty with prolonged sitting, repetitive use of the hands, typing, focusing and concentrating on his work."

Appellant requested a telephonic hearing with an OWCP hearing representative, which was held on March 18, 2015. At the hearing, he argued that acceptance of his claim should be expanded to include a permanent aggravation of the cervical condition. By decision dated June 3, 2015, the hearing representative affirmed the July 16, 2014 suitable work termination. He found that OWCP met its burden of proof to terminate compensation for refusal of suitable work.

On June 30, 2015 appellant filed a timely appeal to the Board. The Board affirmed the June 3, 2015 hearing representative's decision on December 24, 2015.⁵ The Board reviewed the evidence and found that Dr. Ha'Eri had provided a rationalized medical opinion that appellant could perform the offered customer care agent position.

Appellant, through counsel, requested reconsideration on February 22, 2016. In a report dated October 1, 2015, Dr. Darakjian provided a history and results on examination. He opined that appellant was totally disabled.

⁵ *Supra* note 2.

By decision dated April 7, 2016, OWCP found that the reconsideration request was insufficient to warrant merit review.

On May 20, 2016 appellant, through counsel, again requested reconsideration. Counsel argued that Dr. Ha'Eri's report was insufficient to establish that appellant could perform the offered position, because he had referred to limiting repetitive motion. According to counsel, the customer case agent position required repetitive motion and pushing/pulling. Appellant submitted a July 7, 2016 report from Dr. Darakjian. Dr. Darakjian provided results on examination and opined that appellant could not work in a position that required sitting for more than 20 to 30 minutes at a time.

By decision dated August 12, 2016, OWCP declined to review the merits of the claim. It found the evidence and argument was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

On August 22, 2016 appellant, through counsel, again requested reconsideration. Counsel again argued that the offered job required repetitive motion. He also argued that the reports from Dr. Darakjian showed that appellant was taking prescribed medications. Counsel asserted that Tramadol corresponded to a prescribed medication, and OWCP should have sought clarification from an OWCP medical adviser.

Appellant submitted a July 7, 2016 report from Dr. Darakjian, who reported that appellant complained of constant neck pain. Dr. Darakjian wrote that a urine test showed positive findings for Tramadol, which was a byproduct of prescribed Nucynta, Clonazepam, and Zolpidem. Appellant also submitted a September 1, 2016 report from Dr. Darakjian, who provided results on examination.

By decision dated November 18, 2016, OWCP declined to review the merits of the claim. It found appellant had not met any of the requirements to warrant a merit review of the case under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP."⁷ 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the

⁶ 5 U.S.C. § 8128(a) (provides that "[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").

⁷ 20 C.F.R. § 10.606(b)(3).

requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.⁸

The submission of a new medical report does not itself require reopening the claim for merit review.⁹ The evidence must address the particular issue involved in the case.¹⁰

ANALYSIS

In the present case, the Board has jurisdiction to review appellant's two nonmerit reconsideration decisions, dated August 12 and November 18, 2016.

The Board finds that appellant has failed to show that OWCP erroneously applied or interpreted a specific point of law. Counsel argued that the evidence from Dr. Ha'Eri did not show that the customer care agent position was medically suitable. He argued that the job required repetitive motion pushing/pulling, and Dr. Ha'Eri had limited repetitive movement of the wrist and elbow, as well as pushing and pulling.

It is well established that where the legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.¹¹ As the Board explained in the prior decision, Dr. Ha'Eri specifically indicated in his February 5, 2014 report that he had reviewed the customer care agent position requirements. The facts of the case indicate that Dr. Ha'Eri had initially reviewed the job in his May 1, 2013 report, and at that time found it was not suitable as he had to use his hands repeatedly for eight hours per day without breaks. Later on February 5, 2014 based on a new SOAF, Dr. Ha'Eri indicated that appellant could return to sedentary work so long as he had 15-minute breaks every two hours. The Board found in its prior decision that Dr. Ha'Eri had provided a rationalized medical opinion, based on a complete background, that appellant could perform the offered position. Dr. Ha'Eri clearly and unequivocally found that appellant could perform the offered job.

Counsel also raised an argument with respect to medications. Dr. Darakjian had reported that appellant was taking pain medications in his April 4, 2014 report. This argument was discussed by the Board in the prior decision.¹²

On reconsideration appellant argued that medication found on a June 5, 2014 toxicology test, Tramadol, was a byproduct of prescribed medications. The relevant issue in the case was whether appellant could perform the customer care agent position. Whether or not Tramadol may be a byproduct of a prescribed medication is not the issue. The question was how the taking

⁸ 20 C.F.R. § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

⁹ *See Kevin M. Fatzer*, 51 ECAB 407 (2000).

¹⁰ *Richard L. Ballard*, 44 ECAB 146 (1992).

¹¹ *See Norman W. Hanson*, *supra* note 8.

¹² Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. *See H.G.*, Docket No. 16-1191 (issued November 25, 2016).

of a prescribed medication prohibited his performance of the offered job. The Board finds the argument raised has no reasonable color of validity.¹³

As to the submission of new and pertinent medical evidence, the Board finds appellant did not meet this standard. Appellant submitted a July 7, 2016 report from Dr. Darakjian that briefly referred to Tramadol as a byproduct of prescribed medications. Again, the underlying issue was whether the medications appellant was taking prior to the July 16, 2014 termination would have rendered the offered position unsuitable. Dr. Darakjian did not discuss the issue.

The Board accordingly finds that appellant has failed to meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent evidence not previously considered by OWCP. OWCP properly denied the reconsideration request without merit review in this case.

On appeal counsel reiterates the arguments raised before OWCP that appellant had submitted a new legal argument and relevant evidence. He also appears to argue the August 12, 2016 OWCP decision was a review of the merits because it found the evidence was insufficient to overturn the prior decision. The August 12, 2016 decision clearly indicated that it was denying merit review of the claim. OWCP found that the evidence submitted was irrelevant to the underlying issue and not sufficient to warrant a merit review.

For the reasons discussed above, the Board finds that appellant did not meet the requirements for a merit review of the claim.

CONCLUSION

The Board finds OWCP properly determined that appellant's requests for reconsideration were insufficient to warrant merit review of the claim under 5 U.S.C. § 8128(a).

¹³ *Supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 18 and August 12, 2016 are affirmed.

Issued: July 21, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board