



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances outlined in the prior Board decision are incorporated herein by reference. The relevant facts are set forth below.

Appellant, a 65-year-old former city carrier, has an accepted occupational disease claim (Form CA-2) for lumbar sprain and lumbar degenerative disc disease, which arose on or about October 9, 2001 (OWCP File No. xxxxxx923). He also has an accepted traumatic injury claim (Form CA-1) for lumbar sprain, which arose on June 18, 2002 (OWCP File No. xxxxxx881). OWCP administratively combined the two case records and designated File No. xxxxxx923 as the master file. It determined on August 18, 2008 that appellant received an overpayment of compensation in the amount of \$3,389.69 for the period June 19 through August 13, 2002. OWCP also found appellant at fault in creating the overpayment. By decision dated July 27, 2009, the Board affirmed the August 18, 2008 OWCP decision.<sup>3</sup>

Since the case was last before the Board, appellant underwent lumbar surgery in May 2010. He received wage-loss compensation following surgery, and then returned to work in a limited-duty capacity on September 15, 2010. On March 23, 2012 OWCP granted appellant a schedule award for three percent permanent impairment of the left lower extremity.<sup>4</sup>

Appellant's physician, Dr. J. Abbott Byrd III, an orthopedic surgeon, last released him to work in a modified-duty capacity effective July 31, 2012. He advised that appellant should continue with present light-duty restrictions.

On November 13, 2013 appellant filed a recurrence claim (Form CA-2a) alleging wage-loss compensation for temporary total disability commencing October 7, 2013. At the time of his work stoppage he was employed as a customer service supervisor. Appellant indicated that his back condition continued to bother him and the work duties he had been performing caused his condition to deteriorate to the point where he could no longer work.

Appellant submitted several reports from Dr. Byrd in support of his claim. In an October 7, 2013 report, Dr. Byrd diagnosed lumbago and lumbar stenosis, and advised appellant to remain off work pending follow-up for his mechanical back pain.

In a December 17, 2013 letter, OWCP advised appellant that additional factual and medical evidence was needed to support his claim for a recurrence commencing October 7, 2013. It subsequently received additional evidence from appellant, which included a December 3, 2013 lumbar diagnostic study and a December 6, 2013 report from Dr. Byrd, who advised that appellant's pain was probably due to the narrowing and degeneration at L4-5 with mild stenosis. Dr. Byrd also indicated that appellant should stay out of work.

---

<sup>2</sup> Docket No. 09-0219 (issued July 27, 2009).

<sup>3</sup> *Id.*

<sup>4</sup> By decision dated August 20, 2012, a representative of the Branch of Hearings and Review affirmed the schedule award decision.

By decision dated February 6, 2014, OWCP denied appellant's claim for recurrence of disability. It found that he had not established that he was disabled from work beginning October 7, 2013 due to a material change/worsening of his accepted work-related condition. The evidence also did not show that appellant's light-duty job changed such that the job duties were inconsistent with prescribed restrictions.

On February 27, 2014 appellant requested a review of the written record by OWCP's Branch of Hearings and Review. With his request, he submitted a personal written statement and copies of medical reports previously of record.

By decision dated July 14, 2014, OWCP's hearing representative affirmed OWCP's February 6, 2014 decision. He found that the evidence of record did not support a worsening of an accepted condition, nor did it show that appellant's light-duty job changed such that job duties were inconsistent with prescribed restrictions.

Appellant requested reconsideration in an undated letter received on December 15, 2014. Additional medical evidence from Dr. Byrd was submitted. By decision dated February 19, 2015, OWCP denied modification of the July 14, 2014 OWCP decision. It found the evidence submitted was of insufficient probative value to alter the July 14, 2014 decision.

On April 3, 2015 OWCP received appellant's March 30, 2015 request for reconsideration. Appellant submitted a statement along with medical evidence.

By decision dated June 18, 2015, OWCP denied modification of its prior decision. It found the evidence presented was of insufficient probative value to establish a recurrence of total disability as of October 7, 2013 due to a change in the nature or extent of light-duty requirements.

On September 15, 2015 OWCP received appellant's September 4, 2015 request for reconsideration. Evidence received in support of the reconsideration request included copies of pay stubs, an undated statement from appellant, Dr. Byrd's biography, and a November 15, 2010 duty status report (Form CA-17) from Dr. Byrd.

By decision dated February 9, 2016, OWCP denied appellant's request for reconsideration without conducting a merit review. It found that the evidence presented was either irrelevant or immaterial to the issue at hand and that appellant's request did not raise substantive legal questions.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>5</sup> 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

---

<sup>5</sup> 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).

pertinent new evidence not previously considered by OWCP.<sup>6</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>7</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>8</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's timely request for reconsideration without further merit review. The underlying issue in this case is whether appellant has submitted sufficient evidence relevant to the issue of whether he established a recurrence of disability beginning October 7, 2013 and that he continued to be disabled due to a material change or worsening of his accepted work conditions or extent of light-duty requirements. This is a medical issue. Appellant failed to submit any relevant and pertinent new evidence in support of his reconsideration request. The pay stubs and Dr. Byrd's biography are either irrelevant or immaterial to the issue. Dr. Byrd's November 15, 2010 CA-7 form, while apparently new to the record, is not relevant to the issue at hand as it is prior to the alleged recurrence date of October 7, 2013 and, therefore, is irrelevant. As the Board has held, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening the case.<sup>9</sup>

Furthermore, in his undated statement, appellant neither showed that OWCP erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by OWCP. Because he failed to meet at least one of the standards enumerated under section 8128(a) of FECA, he was not entitled to further merit review of his claim.<sup>10</sup>

On appeal appellant provided a procedural history of his case and essentially argued the merits of his case. As previously noted, the Board does not have jurisdiction over the merits of this case.

---

<sup>6</sup> 20 C.F.R. § 10.606(b)(3).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> See *A.M.*, Docket No. 16-1875 (issued August 23, 2017); *Edward Matthew Diekemper*, 31 ECAB 224-25 (1979).

<sup>10</sup> See *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); *A.K.*, Docket No. 09-2032 (issued August 3, 2010) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 8, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 25, 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