

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 April 23, 2011 appellant, then a 63-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that she sustained a left knee injury as a result of pushing a suitcase into a tunnel and twisting her knee. OWCP accepted her claim for left knee tendinitis on July 20, 2011.

On March 25, 2013 OWCP directed appellant to a second opinion examination with Dr. Daniel S. Farnum, a Board-certified orthopedic surgeon, in order to determine whether she continued to have physical limitations resulting from her work-related disability.

On March 31, 2013 appellant voluntarily retired from her position as a transportation security officer.

In a report dated April 19, 2013, Dr. Farnum examined appellant and reviewed her medical records. He diagnosed degenerative arthritis of the left knee with lateral and medial meniscal tears. Dr. Farnum noted that appellant continued to have residuals of her injury and recommended work restrictions of intermittent standing and walking for no more than two hours per day; intermittent sitting for no more than six hours per day; operating machinery for no more than two hours per day; and no bending/stooping, twisting, pushing/pulling, or lifting. In a follow-up report dated July 23, 2013, he explained that the objective basis for her work restrictions were the extensive degenerative process of her left knee.

On August 16, 2013 OWCP accepted the additional conditions of left patellar tendinitis; permanent aggravations of tears of the medial and lateral meniscus of the left knee; and permanent aggravation of arthropathy of the left knee. Appellant received compensation benefits on the supplemental rolls as of May 17, 2013 and on the periodic rolls as of August 25, 2013.

In a functional capacity evaluation (FCE) dated September 9, 2013, a physical therapist recommended work restrictions of standing occasionally no more than 30 minutes continuously; walking occasionally no more than 10 minutes continuously; climbing less than 1 percent of the time; bending occasionally no more than 30 repetitions continuously; pushing no more than 24 pounds; pulling no more than 29 pounds; light lifting of no more than 15 pounds; frequent sitting, power grasping, and reaching; and no squatting or kneeling. In a letter dated October 29, 2013, Dr. Chia Chen, Board-certified in family medicine, noted that she concurred with the September 9, 2013 FCE.

From August 16, 2013 through September 8, 2014, appellant participated in a vocational rehabilitation program. In a closure memorandum, a rehabilitation specialist noted that her targeted positions included information clerk and receptionist.

On December 9, 2014 OWCP proposed to reduce appellant's compensation for wage loss due to her ability to work as a receptionist. It noted that she had not secured employment as a

receptionist after placement for employment had ended under the vocational rehabilitation program, and referred to Dr. Chen's October 29, 2013 letter in which she concurred with the work restrictions outlined in the FCE. OWCP stated that the position of receptionist met appellant's physical requirements as outlined in the FCE because it fell into the sedentary work category. Appellant was afforded 30 days to submit additional medical evidence.

In a report dated December 4, 2014, Dr. Chen recommended that appellant intermittently stand, walk, sit, grasp/engage in fine manipulation, or operate machinery for no more than two hours per day; continuously reach above the shoulder for no more than two hours per day; and no kneeling, bending/stooping, twisting, pushing/pulling, or lifting.

By decision dated January 13, 2015, OWCP finalized its reduction of appellant's compensation due to her ability to earn wages as a receptionist. Department of Labor, *Dictionary of Occupational Titles* #237.367-038. It found that the weight of medical evidence, including her medical restrictions, rested with Dr. Farnum's report of April 19, 2013. This decision also found that the rehabilitation counselor had documented that the position remained vocationally suitable in relation to appellant's age, education, and experience, and that receptionist positions were reasonably available in her commuting area with weekly wages of \$360.00. OWCP advised that the decision did not affect her medical benefits.

On February 6, 2015 appellant, through counsel, requested a review of the written record by an OWCP hearing representative. The request included arguments that her condition was not preexisting; that OWCP erroneously assigned the weight of the medical evidence to Dr. Farnum; that appellant was forced to retire, rather than voluntarily retiring; and that appellant was not reasonably able to obtain work.

By decision dated July 9, 2015, OWCP's hearing representative affirmed the January 13, 2015 decision to reduce appellant's benefits. It found that appellant had not established that the loss of wage-earning capacity (LWEC) determination should be modified as Dr. Chen's December 4, 2014 statement of work restrictions did not suffice to explain why she was incapable of working as a receptionist. The hearing representative further noted that she had not provided any evidence that scarcity of jobs in her area meant that she had no employment prospects. He also noted that appellant's argument that her retirement was not voluntary had no bearing on the issue of her wage-earning capacity. The hearing representative concluded that no evidence had been received which supported the arguments that OWCP's January 13, 2015 LWEC determination was erroneous with respect to medical suitability, vocational suitability, or geographic availability.

On July 6, 2016 appellant requested reconsideration of OWCP's July 9, 2015 decision. With her request, she attached a letter, arguing that the original decision failed to correctly evaluate the medical evidence, that the decision was erroneous because it failed to adequately and accurately assess the job market in appellant's geographic area, that the LWEC decision should be modified because there had been a material change in the nature and extent of appellant's injury-related condition, and that OWCP had failed to provide sufficient medical treatment or evaluation.

By decision dated September 28, 2016, OWCP denied appellant's request for reconsideration without reviewing the merits of her case. It found that she had only submitted a letter containing various arguments on reconsideration, and that those arguments were repetitious of arguments previously considered by OWCP.

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.³ Section 10.608(b) of OWCP's regulations provide 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.⁴

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).

OWCP issued a January 13, 2015 decision reducing appellant's compensation due to her ability to work as a receptionist. By decision dated July 9, 2015, OWCP's hearing representative affirmed the January 13, 2015 decision and found that appellant had not established that the January 13, 2015 LWEC determination should be modified. On July 6, 2016 appellant requested reconsideration of OWCP's July 9, 2015 decision.

The issue is whether the argument and evidence appellant submitted in support of her request for reconsideration is sufficient to warrant further merit review pursuant to 20 C.F.R. § 10.606(b)(3). The Board finds that she did not show that OWCP erroneously applied or interpreted a specific point of law and did not submit relevant and pertinent new evidence. Therefore, the Board finds that OWCP properly determined that appellant was not entitled to further review of the merits.⁵

With her request, appellant attached a letter, arguing that the original decision failed to correctly evaluate the medical evidence, that the decision was erroneous because it failed to

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

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

⁵ *B.P.* Docket No. 12-0104 (issued December 13, 2012). The Board affirmed the denial of reconsideration pursuant to 5 U.S.C. § 8128(a) as appellant did not submit any new evidence or legal argument to support her allegation that her LWEC determination should be modified. In *P.G.*, Docket No. 13-0475 (issued May 17, 2013) however the Board found that appellant's request for reconsideration, which provided a new legal argument, constituted a request for modification of OWCP's LWEC determination. Appellant's request for modification of the LWEC was not properly evaluated as a request for reconsideration under 5 U.S.C. § 8128(a) as appellant had presented a new legal argument for modification of October 20, 1994 LWEC determination.

adequately and accurately assess the job market in appellant's geographic area, that the LWEC decision should be modified because there had been a material change in the nature and extent of appellant's injury-related condition, and that OWCP had failed to provide sufficient medical treatment or evaluation.

The Board finds that the arguments contained in appellant's reconsideration request had already been considered by OWCP in its decision of July 9, 2015. OWCP had previously considered the medical evidence in the July 9, 2015 and prior decisions. It had responded to appellant's argument regarding a scarcity of jobs in her area in its July 9, 2015 decision. As these arguments were previously considered and rejected by OWCP, they are cumulative and duplicative in nature and therefore are insufficient to warrant a merit review.⁶

Appellant also provided no medical evidence of a material change in the nature and extent of her injury-related condition. Furthermore, no evidence was provided in support of her arguments that OWCP had failed to provide sufficient medical treatment or evaluation. While appellant's wage-loss compensation benefits were reduced to reflect her wage-earning capacity, her entitlement to medical benefits was not terminated and medical care remained available.

Appellant did not submit any pertinent new and relevant evidence not previously reviewed by OWCP. The sole document submitted on reconsideration consisted of legal arguments previously considered by OWCP.

The Board accordingly finds that appellant did not 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 new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Appellant may request modification of the wage-earning capacity determination supported by new evidence or argument, at any time before OWCP.

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).

⁶ *Id. B.P.*, Docket No. 12-0104 (issued December 13, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 28, 2016 is affirmed.

Issued: September 1, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board