

ISSUE

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

FACTUAL HISTORY

The case has previously been before the Board.⁴ The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On July 26, 2010 appellant, then a 57-year-old general engineer, filed an occupational disease claim (Form CA-2) alleging that he sustained an aortic aneurysm due to chronically high blood pressure caused by stress at work. He did not stop work.

In a report dated August 17, 2010, Dr. David A. Dalessandro, a Board-certified internist, diagnosed a thoracic aortic aneurysm possibly caused by latent hypertension. He related that work stress may have increased appellant's risk for developing an aortic aneurysm.

By decision dated January 20, 2011, OWCP denied appellant's claim, finding that he had not established a medical condition due to a compensable work factor.

On February 18, 2011 Dr. Dalessandro opined that exposure to stress "could have caused fluctuations in [appellant's] blood pressure resulting in a more rapid expansion of his aneurysm."⁵

The Equal Employment Opportunity Commission (EEOC), on June 13, 2011, issued an order finding that the employing establishment discriminated against appellant due to his age and created a hostile work environment from October 2008 to April 2009 in retaliation for his EEOC activity.

An OWCP hearing representative, by decision dated July 20, 2011, set aside the January 20, 2011 decision after finding that OWCP failed to determine the compensability of the work factors identified in appellant's EEOC complaint as causing his condition.

By decision dated November 18, 2011, OWCP again denied appellant's stress-related occupational disease claim. It found that he had established age discrimination, harassment, and reprisal based on the June 13, 2011 EEOC order as compensable work factors. OWCP determined, however, that the medical evidence of record was insufficient to show that appellant sustained a diagnosed condition due to the accepted employment factors.

Appellant requested a telephone hearing before an OWCP hearing representative. By decision dated January 31, 2012, an OWCP hearing representative set aside the November 8, 2011 decision. She found that OWCP did not sufficiently identify the compensable work factors. The hearing representative further determined that the medical evidence from Dr. Dalessandro was

⁴ Docket No. 16-0391 (issued September 7, 2016).

⁵ On March 2, 2012 Dr. Dalessandro opined that stress and a possible hostile work environment may negatively impact appellant's blood pressure and thus his cardiac condition and thoracic aortic aneurysm.

sufficient to warrant further development and instructed OWCP to refer appellant for a second opinion examination.

Dr. Basil M. Rudusky, a Board-certified internist, conducted a second opinion examination on August 2, 2012. He opined that work stress did not cause appellant's aortic aneurysm and found no relationship between his employment and the diagnosed condition of hypertension, hyperlipidemia, and arteriosclerotic cardiovascular disease.

Based on Dr. Rudusky's opinion, by decision dated December 19, 2012, OWCP denied appellant's claim after finding that the weight of the medical evidence failed to establish that he sustained an aortic aneurysm due to the compensable employment factors.

Appellant again requested a telephone hearing before OWCP's hearing representative. By decision dated July 23, 2013, the hearing representative set aside the December 19, 2012 after finding that a conflict existed between Dr. Dalessandro and Dr. Rudusky regarding the cause of his aortic aneurysm and its relationship to his employment.

OWCP referred appellant to Dr. Manoj Khandelwal, a Board-certified internist, for an impartial medical examination. In a report dated November 22, 2013, Dr. Khandelwal indicated that appellant had a history of hypertension, hyperlipidemia, and cigar smoking. He observed that appellant's thoracic aortic aneurysm was found incidentally during a chest x-ray, and that the condition usually occurred in males with hypertension between 60 and 70, rarely caused issues, and occurred more frequently in those who were obese, sedentary, or African Americans. Dr. Khandelwal opined that there was no definite evidence linking stress to hypertension and that the data on the subject was not conclusive or credible. He concluded that work factors did not cause or aggravate appellant's hypertension or the development of his aortic aneurysm.

By decision dated September 19, 2014, OWCP denied appellant's claim, finding that Dr. Khandelwal's opinion represented the special weight of the evidence and established that he did not sustain a medical condition causally related to compensable work factors.⁶

Appellant again requested a telephone hearing before an OWCP hearing representative. By decision dated June 25, 2015, the hearing representative affirmed the September 19, 2014 decision, finding that Dr. Khandelwal's opinion was rationalized and entitled to the special weight of the evidence.

Appellant appealed to the Board. By decision dated September 7, 2016, the Board affirmed the June 25, 2015 decision.⁷ The Board found that the opinion of Dr. Khandelwal represented the weight of the evidence as it was detailed, well rationalized, and based on a proper factual background. The Board determined that OWCP provided him with an accurate statement of accepted facts and work history. The Board noted that Dr. Khandelwal discussed all the risk factors for a thoracic aneurysm and identified those exhibited by appellant, found that the medical

⁶ OWCP issued decisions on August 25 and 26, 2014 addressed to appellant, but referencing in part another appellant. It issued an amended decision on September 19, 2014.

⁷ See *supra* note 4.

literature linking stress to a thoracic aortic aneurysm was inconclusive and lacked credibility, and concluded that his condition was unrelated to work stress.

In a progress report dated June 19, 2017, Dr. Dalessandro discussed appellant's history of hypertension, dyslipidemia, a stable thoracic aortic aneurysm, and moderate aortic insufficiency. He related: "According to [appellant], in the past [he] has been exposed to a very stressful and sometimes hostile work environment. It has been well documented that emotional stress is associated with [an] increased risk of cardiovascular disease when compared to other risk factors such as smoking, hypertension, and/or diabetes mellitus." Dr. Dalessandro concluded that it was "certainly possible that [appellant's] stressful work environment could have contributed to some undiagnosed hypertension in the past which could then have contributed to [his] development of his thoracic aortic aneurysm." He enclosed a page of references to medical articles.

On July 18, 2017 appellant requested reconsideration. He maintained that Dr. Khandelwal failed to properly consider the medical literature supporting causal relationship between stress and the development of thoracic aortic aneurysms. Appellant noted that Dr. Dalessandro found that stress was associated more than other risk factors with the occurrence of cardiovascular disease, in contrast to the finding of Dr. Khandelwal, and referenced medical literature in support of his finding. He maintained that the proper issue was whether work factors accelerated or aggravated his aortic aneurysm, noting that the medical evidence established that his aneurysm grew in size at the time he was exposed to a hostile work environment. Appellant indicated that Dr. Dalessandro recommended that appellant take time off work due to the negative effect of stress on his aneurysm, and that the request was approved by the employing establishment under the Family and Medical Leave Act (FMLA).

Appellant submitted a December 16, 2016 request for 12 weeks of leave under the FMLA due to his thoracic aortic aneurysms. On December 16, 2016 Dr. Dalessandro completed a certification of health care provider for employee's serious health condition FMLA form. He found that work stress could worsen appellant's blood pressure affecting appellant thoracic aortic aneurysm and that he required medical leave to control his blood pressure.

By decision dated October 16, 2017, OWCP denied appellant's request for reconsideration under 5 U.S.C. § 8128(a). It found that he had not raised a relevant legal argument or submitted new and relevant evidence sufficient to warrant reopening his case for further merit review. OWCP noted that Dr. Dalessandro's June 19, 2017 report was similar to prior reports of record.

On appeal appellant asserts that the report of Dr. Dalessandro constitutes relevant and probative new evidence and questions why OWCP failed to review the merits of his case. He contends that the impartial medical examiner failed to review the medical literature or the established compensable work factors. Appellant maintains that the issue should be whether stress accelerated or aggravated his aneurysm rather than the etiology of the aneurysm. He notes that the employing establishment approved his FMLA request to avoid work stress due to his medical condition.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁸

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (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.⁹

A request for reconsideration must also be received by OWCP within one year of the date of OWCP decision for which review is sought.¹⁰ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.¹¹ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.¹²

ANALYSIS

The most recent decision on the merits of appellant's claim was the Board's September 7, 2016 decision. OWCP received his request for reconsideration on July 18, 2017. Appellant's request for reconsideration was timely filed because it was received within one year of the last merit decision issued September 7, 2016.¹³

The issue presented on appeal is whether appellant's July 18, 2017 request for reconsideration met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim.

The Board finds that 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 by OWCP.

On reconsideration, appellant argued that the independent medical examiner, Dr. Khandelwal failed to properly consider the medical literature finding a connection between stress and thoracic aortic aneurysms. He additionally contended that OWCP failed to address the

⁸ 5 U.S.C. § 8128(a).

⁹ 20 C.F.R. § 10.606(b)(3); *see also* *L.G.*, Docket No. 09-1517 (issued March 3, 2010).

¹⁰ *Id.* at § 10.607(a).

¹¹ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

¹² *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹³ Although OWCP's last merit decision was dated June 25, 2015, the one-year period for filing a timely request for reconsideration accompanies any subsequent merit decision, including any merit decision issued by the Board. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

relevant issue of whether work factors aggravated or accelerated his aortic aneurysm and instead considered whether employment factors directly caused the condition. The Board, however, previously addressed these arguments in its September 7, 2016 decision. Findings made in a prior Board decision are *res judicata* absent any further review by OWCP.¹⁴

Appellant further contended that Dr. Dalessandro, in his June 19, 2017 report, opined that stress contributed to cardiovascular disease over other risk factors and supported his finding with references to medical literature. He also asserted that Dr. Dalessandro found that he should take time off from work due to the adverse impact of stress on his thoracic aortic aneurysm and that the employing establishment approved the request for leave. The underlying issue, however, is whether the medical evidence is sufficient to establish that appellant sustained high blood pressure and an aortic aneurysm causally related to the accepted work factors. Appellant's lay opinion regarding his condition is not relevant to the medical issue in this case, which can only be resolved through the submission of probative medical evidence from a physician.¹⁵ He, therefore, is not entitled to review of the merits of his claim based on the first and second above-noted requirements of section 10.606(b)(3).

Appellant further failed to submit any relevant and pertinent new evidence with his request for reconsideration. In a December 16, 2016 FMLA request form, Dr. Dalessandro advised that appellant should be off work due to the effect of work stress on his high blood pressure and its negative impact on his aortic aneurysm. He did not, however, address the relevant issue of whether appellant experienced high blood pressure worsening his aortic aneurysm as a result of compensable employment factors. Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.¹⁶

In a June 19, 2017 report, Dr. Dalessandro advised that medical literature supported that stress increased the risk of cardiovascular disease as opposed to risk factors such as hypertension, diabetes mellitus, and smoking. He indicated that appellant related that he was exposed to stress and a hostile environment at work and opined that it was possible that work stress could have contributed to hypertension and thus to the development of the thoracic aortic aneurysm. OWCP, however, previously reviewed reports from Dr. Dalessandro finding that stress may have worsened appellant's high blood pressure and thoracic aortic aneurysm. The Board has held that evidence which is cumulative of material already in the case record is insufficient to warrant reopening a claim for merit review.¹⁷ Thus, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP.

On appeal appellant maintains that the newly submitted report from Dr. Dalessandro constitutes new and relevant medical evidence, that Dr. Khandelwal failed to properly review the medical literature and compensable work factors, and that the issue was whether stress aggravated or accelerated appellant's aneurysm. As discussed, however, these contentions have either already

¹⁴ See *H.G.*, Docket No. 16-1191 (issued November 25, 2016); *R.T.*, Docket No. 16-0543 (issued May 20, 2013).

¹⁵ See *C.N.*, Docket No. 17-1475 (issued May 23, 2018).

¹⁶ *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

¹⁷ See *L.W.*, Docket No. 17-1171 (issued May 18, 2018).

been addressed by the Board and are thus *res judicata* absent further review by OWCP or are not pertinent to the underlying medical issue.¹⁸

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 evidence not previously considered. 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 his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the October 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2018
Washington, DC

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

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

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

¹⁸ See *supra* notes 13 and 14.