

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

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On March 25, 2004 appellant, then a 45-year-old air traffic control specialist, filed a traumatic injury claim (Form CA-1) alleging that, on March 11, 2004, he injured his back when walking down 32 flights of stairs in the performance of duty. He alleged that he sustained a permanent aggravation of his preexisting conditions of lumbar spondylolysis, degenerative disc disease, and lumbar radiculitis. OWCP initially denied his claim and the Board affirmed the initial denial on November 6, 2006.⁴

Appellant submitted a June 15, 2007 report from Dr. Christopher B. Ryan, a Board-certified physiatrist, who opined that appellant had a worsening of his back condition and a permanent aggravation of his underlying spine disease due to his March 11, 2004 work activities. On December 13, 2007 OWCP accepted appellant's claim for a temporary aggravation of his preexisting lumbar spondylosis. On February 2, 2009 it terminated his wage-loss compensation and medical benefits effective January 28, 2009 based on a second opinion report.

Dr. Ryan completed a report on July 31, 2009 and again opined that appellant's March 11, 2004 work injury of walking down several flights of stairs caused an aggravation of his lumbar spondylosis from L4 to S1. He opined that this aggravation was permanent. On September 8, 2009 an OWCP hearing representative affirmed the February 2, 2009 decision, finding that the second opinion report was the weight of the medical evidence and established that appellant had sustained only a temporary aggravation of his underlying back condition. The Board reviewed this decision on November 4, 2010⁵ and found an unresolved conflict of medical opinion between Dr. Ryan and a second opinion physician previously of record, regarding whether appellant sustained a temporary or permanent aggravation of his underlying condition.

Due to the conflict of medical opinion evidence on December 1, 2010 OWCP referred appellant for an impartial medical examination with Dr. Jeffrey Sabin, a Board-certified orthopedic surgeon. In a January 14, 2011 report, Dr. Sabin reviewed the statement of accepted facts, medical records, and appellant's history. He listed appellant's preexisting back condition and the posterior spinal fusion from L4 through S1 as well as the removal of hardware. Dr. Sabin described appellant's accepted employment incident and his resulting back pain. He

³ Docket No. 06-1524 (issued November 6, 2006); Docket No. 10-0983 (issued November 4, 2010); Docket No. 14-1575 (issued February 18, 2015).

⁴ Docket No. 06-1524 (issued November 6, 2006).

⁵ Docket No. 10-0983 (issued November 4, 2010).

noted that appellant was unable to return to work due to medication required for his back pain and that he retired in 2005. Dr. Sabin reviewed diagnostic testing and found objective evidence for a temporary aggravation. He noted that there were no imaging studies or physical examination changes to establish a permanent aggravation. Dr. Sabin opined that, at most, a soft tissue temporary aggravation would be reasonable. He found that appellant experienced pain with extension and that would result from a mobile segment. Dr. Sabin noted that, if appellant received injections in a mobile segment proximal to his L4-S1 fusions for pain relief during a prior period of treatment, then this would be supportive of a permanent aggravation. He concluded that, if there was no evidence of a mobile segment above his solid fusion, then appellant's finding supported only a temporary aggravation.

Dr. Sabin submitted a May 17, 2011 supplemental report. He noted that appellant had adequate investigation into his motion segments above his solid L4 to S1 fusion and that this investigation did not define a pain generator. Dr. Sabin noted that appellant's medical records established that there was no anatomic or physiologic pain generator proximal to the area of his fusion and that therefore there was no objective evidence for any permanent aggravation of his preexisting lumbar condition due to the employment incident. He opined that appellant had chronic pain syndrome related to his preexisting conditions and had no residuals of the temporary aggravation due to descending the stairs at work. Dr. Sabin noted that appellant's temporary aggravation and resultant total disability would have ceased two weeks after March 11, 2004.

By decision dated April 22, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 22, 2013. In a letter dated May 14, 2013, counsel requested an oral hearing. By decision dated January 24, 2014, OWCP's hearing representative affirmed OWCP's April 22, 2013 decision, finding that Dr. Sabin's report was entitled to special weight and established that appellant's temporary aggravation had ceased. Appellant appealed to the Board, and in its February 18, 2015 decision,⁶ the Board found that Dr. Sabin's report was entitled to special weight of the medical evidence and OWCP, therefore, met its burden of proof to terminate appellant's wage-loss compensation and medical benefits. The Board further found that the additional reports from Dr. Roberta P. Anderson-Oeser, a Board-certified physiatrist, and Dr. Christopher B. Ryan, a Board-certified physiatrist and originator of the medical conflict, dated September 12 and 13, 2011, respectively, did not overcome the special weight accorded Dr. Sabin or create a new conflict.

Following the Board's February 18, 2015 decision, appellant requested reconsideration on February 18, 2016 and submitted additional medical evidence, which counsel contended created an additional conflict of medical opinion. Dr. Ryan completed a report on February 2, 2016 and provided history of injury. He opined that appellant had sustained irritation of the sacroiliac joint resulting in a permanent aggravation of lumbar spondylosis. Dr. Ryan noted that appellant currently reported pain below the fusion in the sacroiliac joints. He opined to a reasonable degree of medical certainty that, after the two level spinal fusion, appellant was left much more vulnerable to stressors aggravating the joints adjacent to the fusion, including the sacroiliac joints. Dr. Ryan noted, "There was a watershed event that occurred, which was

⁶ Docket No. 14-1575 (issued February 18, 2015).

[appellant] having to walk down the great number of stairs when the elevators malfunctioned at the control tower. The mechanism of increased and repetitive forces on the sacroiliac joints and the facet joints above the fusion are detailed in my original report.” Dr. Ryan concluded that based on appellant’s response to diagnostic injections constituted objective medical proof that appellant suffered an aggravation of the lumbar spondylosis at L2-3 and L3-4 bilaterally, and at the sacroiliac joints.

By decision dated July 8, 2016, OWCP reviewed the merits of the claim, but denied modification of its prior decision.⁷

On November 30, 2016 counsel requested reconsideration of the July 8, 2016 decision and submitted additional medical evidence. On November 11, 2016 Dr. Ryan completed an addendum to his February 2, 2016 report and opined that appellant had sustained a permanent aggravation of lumbar spondylosis at L2-3, L3-4, and the sacroiliac joints, bilaterally. In a February 15, 2017 letter, counsel argued that the opinion of Dr. Sabin was no longer entitled to special weight as appellant had submitted subsequent medical reports which provided findings and opinions based on more recent diagnostic studies which were not reviewed by the impartial medical examiner.⁸

By decision dated May 1, 2017, OWCP denied appellant’s request for reconsideration of the merits. It determined that Dr. Ryan’s November 11, 2016 report was cumulative of the evidence previously considered in which Dr. Ryan opined that appellant’s condition was permanent. OWCP further found that the legal argument submitted did not establish that OWCP erroneously applied or interpreted a point of law.

LEGAL PRECEDENT

FECA provides in section 8128(a) that OWCP may review an award for or against payment of compensation at any time on its own motion or on application by the claimant.⁹ Section 10.606(b)(3) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by submitting in writing an application for reconsideration which sets forth arguments or evidence and shows that OWCP erroneously applied or interpreted a specific point of law; or advances a relevant legal argument not previously considered by OWCP; or includes relevant and pertinent new evidence not previously considered by OWCP.¹⁰ Section 10.608 of OWCP’s regulations provides that when a request for reconsideration is timely, but does not meet at least one of these three requirements, OWCP will deny the application for review without reopening the case for a review on the merits.¹¹ Section 10.607(a) of

⁷ Counsel initially appealed the July 8, 2016 decision to the Board on August 23, 2016. He then requested that the appeal be dismissed by letter dated December 5, 2016. The Board accordingly issued an order dismissing the appeal on February 14, 2017. *Order Dismissing Appeal*, Docket No. 16-1688 (issued February 14, 2017).

⁸ *E.P.*, Docket No. 14-1298 (issued January 2, 2015); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(3).

¹¹ *Id.* at § 10.608.

OWCP's regulations provides that to be considered timely an application for reconsideration must be received by OWCP within one year of the date of its merit decision for which review is sought.¹²

ANALYSIS

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).

OWCP terminated appellant's wage-loss compensation and medical benefits, effective April 22, 2013 based on the findings and opinion from Dr. Sabin, the impartial medical examiner, who opined that appellant's temporary aggravation of his underlying lumbar condition had ceased.

Appellant, through counsel, timely requested reconsideration of OWCP's July 8, 2016 merit decision on November 30, 2016. In support of this request, appellant submitted a November 11, 2016 report from Dr. Ryan as well as an argument from counsel that the opinion of Dr. Sabin was no longer entitled to the special weight as appellant had submitted subsequent medical reports which provided findings and opinions based on more recent diagnostic studies which were not reviewed by Dr. Sabin.¹³ OWCP denied appellant's request for consideration of the merits, finding that Dr. Ryan's report was cumulative. It further found that the reconsideration request did not establish that it had erroneously applied or interpreted a specific point of law and did not advance a relevant legal argument not previously considered by OWCP.

The Board finds that although Dr. Ryan's November 11, 2016 report was not previously considered by OWCP, it is substantially similar and duplicative of evidence previously considered and reviewed by OWCP, and does not constitute a basis for reopening the case.¹⁴ In this report, Dr. Ryan repeated his prior opinions dating back to 2007 that appellant's aggravation of his underlying condition was permanent. As Dr. Ryan's report did not constitute new evidence, it is insufficient to require OWCP to reopen appellant's claim for consideration of the merits under sections 10.606(b)(3) and 10.608 of OWCP's regulations. The Board finds that this report did not constitute relevant and pertinent new evidence not previously considered by OWCP.

The Board further finds that counsel's argument that there was an unresolved conflict in medical opinion was also duplicative. While counsel provided citations for his contention that Dr. Sabin's report was no longer entitled to the special weight of the medical evidence, the Board notes that the arguments regarding the weight of Dr. Sabin's report are not new. Counsel made this same argument in his February 18, 2016 request for reconsideration contending that there

¹² *Id.* at § 10.607(a). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹³ *E.P.*, Docket No. 14-1298 (issued January 2, 2015); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁴ Evidence that repeats or duplicates evidence already of record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *M.B.*, Docket No. 16-1681 (issued December 14, 2017); *Denis M. Dupor*, 51 ECAB 482 (2000).

was an additional conflict of medical opinion evidence such that Dr. Sabin's report was no longer entitled to the special weight of the medical evidence.¹⁵ The Board thus finds that appellant neither established that OWCP erroneously applied or interpreted a point of law, nor advanced a relevant legal argument not previously considered by OWCP.¹⁶

On appeal counsel disagrees with the Board's February 18, 2015 decision and argues that the Board should conduct a *de novo* review of appellant's claim. However, Board decisions are final upon 30 days from the date of issuance¹⁷ and the Board's February 18, 2015 decision is, therefore, not subject to further review. Counsel further contends that the additional medical evidence submitted on reconsideration was not cumulative as it specifically addressed defects in the medical evidence previously noted by the Board. As explained above, the Board finds that this evidence is substantially similar and duplicative of evidence previously considered and reviewed by OWCP.

As appellant did not show that OWCP erred in applying a point of law, advance a relevant legal argument not previously considered, or submit relevant and pertinent new evidence not previously considered by it, OWCP properly denied his reconsideration request.

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).

¹⁵ *M.G.*, Docket No. 17-0708 (issued August 3, 2017).

¹⁶ *Id.*

¹⁷ 20 C.F.R. § 501.6(d).

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 21, 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