

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 October 27, 2014 appellant, then a 42-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained a back condition as a result of heavy lifting while loading and unloading trucks at work.⁴ He first became aware of his claimed condition and its relationship to his federal employment on July 12, 2010. On the reverse side of the claim form, appellant's supervisor contended that the claim appeared to be untimely because appellant was no longer on the employment rolls as of July 13, 2013.⁵

By decision dated January 26, 2015, OWCP denied appellant's occupational disease claim, finding that the medical evidence of record was insufficient to establish that he sustained a back injury causally related to the accepted work event(s). This decision was affirmed on July 28, 2015 by an OWCP hearing representative.

On August 6, 2015 appellant requested reconsideration and submitted additional factual evidence.

By decision dated November 2, 2015, OWCP reviewed the merits of appellant's claim, including the new evidence he submitted, but denied modification, finding that the evidence submitted was of insufficient probative value to modify the July 28, 2015 decision.

Appellant appealed to the Board on February 17, 2016. By decision dated June 3, 2016, the Board affirmed the November 2, 2015 OWCP decision.⁶ The Board found that appellant had not met his burden of proof to establish an injury causally related to the accepted factors of his federal employment as he submitted insufficient medical evidence addressing causal relationship.⁷

³ Docket No. 16-0683 (issued June 3, 2016). *Order Dismissing Appeal*, Docket No. 16-0683 (issued July 22, 2016). Docket No. 17-0590 (issued June 8, 2017).

⁴ The record contains a second Form CA-2, received by OWCP on October 27, 2014, also claiming a back injury due to loading and unloading trucks. Appellant reported that he first became aware of the claimed condition and its relationship to his federal employment on May 24, 2010.

⁵ Appellant's actual date of last employment was July 13, 2012.

⁶ Docket No. 16-0683 (issued June 3, 2016).

⁷ After appellant filed an appeal to the Board on February 17, 2016 regarding the November 2, 2015 OWCP denial decision, he appealed a February 24, 2016 OWCP nonmerit decision, denying further merit review of the claim pursuant to 5 U.S.C. § 8128(a), to the Board on March 15, 2016. In an order dated July 22, 2016, the Board dismissed the appeal. *Order Dismissing Appeal*, Docket No. 16-085 (issued July 22, 2016). The Board rendered the February 24, 2016 decision null and void as it had jurisdiction over the case at the time the decision was issued by OWCP.

Appellant requested reconsideration on June 17, 2016 and submitted additional medical evidence.

In an April 30, 2016 progress note, Dr. Nareshkumar B. Arulampalam, a Board-certified psychiatrist, related a history that appellant was fired from his job four years ago and that he had intermittent depression and anxiety. He indicated that appellant was seen for anxiety and sleep problems. Dr. Arulampalam performed an examination and diagnosed chronic anxiety disorder, occupational problems or work circumstances, chronic depression, unspecified, and chronic lumbar spondylosis. Regarding chronic low back pain, he indicated that the condition had continued from August 3, 2010 to the present. Dr. Arulampalam related that appellant had a recurrent muscle injury due to lifting at work while loading and unloading trucks.

In a November 23, 2015 treatment note, Dr. Patrick Casey, a Board-certified psychiatrist, reported a history that appellant had been unfairly fired from his job four years earlier and that he had intermittent depression and anxiety since that time.

By decision dated September 9, 2016, OWCP again reviewed the merits of appellant's claim, including the new evidence submitted by appellant, but denied modification of its prior decision, finding that the evidence submitted was of insufficient probative value to modify the November 2, 2015 decision.

On September 26, 2016 appellant again requested reconsideration and submitted additional factual and medical evidence.

On August 3, 2010 Dr. Darren K. Shimabukuro, Board-certified in internal medicine, reported that appellant had early lumbar degenerative disc disease with recurrent muscular back injury due to his work activities.

In a May 5, 2016 report, Dr. Marc Montecillo, a Board-certified internist, related that appellant was seen for low back pain. He diagnosed lumbar degenerative disc disease, with initial onset of back pain in 2009.

In an October 17, 2016 report, Dr. Val Valco, a Board-certified internist, related that appellant had a history of chronic back pain which was now controlled. He also noted that appellant related that he was able to perform his employment duties, including lifting 70-pound boxes 5 days per week for up to 8 hours per day.

By decision dated December 22, 2016, OWCP reviewed the merits of the claim, but denied modification of the September 9, 2016 decision. It found that the medical evidence submitted was insufficient to establish a causal relationship between appellant's diagnosed back condition and the accepted factors of his federal employment.

On January 3, 2017 appellant requested reconsideration and again submitted additional factual and medical evidence.

By decision dated January 10, 2017, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that he had not demonstrated

that it had erroneously applied or interpreted a point of law and had not submitted relevant and pertinent new evidence.

On January 23, 2017 appellant appealed OWCP's September 9 and December 22, 2016 decisions to the Board.⁸ By decision dated June 8, 2017, the Board affirmed those decisions, again finding that appellant had not met his burden of proof to establish a back injury causally related to the accepted factors of his federal employment as he submitted insufficient medical evidence to establish causal relationship.⁹ The Board determined that Dr. Arulampalam's April 30, 2016 report and Dr. Casey's November 23, 2015 treatment note were of limited probative value on the issue of causal relationship and were thus insufficient to meet appellant's burden of proof. The Board noted that Dr. Arulampalam and Dr. Casey were psychiatrists and did not treat appellant for a back condition. In addition, the Board noted that Dr. Arulampalam provided only a brief reference to a history of chronic back pain due to lifting at work, without providing additional detail or explanation. Further, the Board noted that Dr. Casey did not discuss an employment-related back condition.

On October 31, 2017 by OWCP, appellant requested reconsideration and submitted additional evidence. In a statement dated July 12, 2010, he contended that the reports of Dr. Arulampalam and Dr. Casey should be considered probative medical evidence as psychiatrists are considered to be physicians as defined under FECA.

By decision dated December 19, 2017, OWCP again denied further merit review of appellant's claim under 5 U.S.C. § 8128(a). It found that his request for reconsideration neither raised substantive legal questions, nor included new and relevant evidence.

LEGAL PRECEDENT

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹⁰ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).¹¹ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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.¹² Section 10.608(b) provides that, when a request for reconsideration is

⁸ Appellant did not appeal the January 10, 2017 decision to the Board.

⁹ Docket No. 17-0590 (issued June 8, 2017).

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.608(a).

¹² *Id.* at § 10.606(b)(3).

timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹³

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).

In support of his request for reconsideration, appellant submitted a statement dated July 12, 2010 in which he contended that the reports of Dr. Arulampalam and Dr. Casey should be considered probative medical evidence as psychiatrists are considered to be physicians as defined under FECA. However, as noted, the Board does not have jurisdiction over the merits of the case. Moreover, the Board previously addressed the sufficiency of the reports of Dr. Arulampalam and Dr. Casey in its June 8, 2017 decision and found that this evidence was of limited probative value on the issue of causal relationship and insufficient to establish appellant's burden of proof. The Board reasoned that, while the physicians were psychiatrists, they did not treat appellant for a back condition. The Board found that Dr. Arulampalam provided only a brief reference to a history of chronic back pain due to lifting at work, without providing additional detail or explanation. The Board further found that Dr. Casey did not discuss an employment-related back condition. The Board's prior findings are *res judicata* absent further merit review by OWCP under section 8128 of FECA.¹⁴ For the reasons provided, appellant's July 12, 2010 statement is insufficient to warrant reopening his claim for further merit review.

The Board, therefore, finds that in his October 31, 2017 request for reconsideration, 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. Thus, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The Board further finds that appellant did not submit relevant or pertinent new evidence not previously considered. The underlying issue in this case is whether appellant submitted sufficient medical evidence establishing a back condition causally related to the accepted employment factors. Appellant did not submit any medical evidence in support of his request for reconsideration. The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3) in his October 31, 2017 request for reconsideration. 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).

¹³ *Id.* at § 10.608(b).

¹⁴ *See F.E.*, Docket No. 17-0503 (issued July 21, 2017); *H.G.*, Docket No. 16-1191 (issued November 25, 2016).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2018
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