

(2) 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

On August 19, 2016 appellant, then a 58-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that, while at work on June 13, 2016, he slipped and fell while ascending stairs to a parking lot. He stopped work on June 14, 2016. On February 23, 2017 OWCP accepted the claim for sprain of right knee anterior cruciate ligament (ACL) and unspecified rotator cuff tear or rupture of right shoulder.

OWCP received three Form CA-7s claiming intermittent disability compensation for periods commencing October 24, 2016 and continuing.

In a September 29, 2016 progress note, Dr. Joseph DiCostanzo, a Board-certified physiatrist, noted appellant's history of the June 13, 2016 employment injury, provided examination findings and noted the results of the diagnostic testing performed on June 17, 2016.³ He diagnosed right knee pain, right hip pain, right shoulder pain, neck pain, low back pain, right knee ACL tear, right rotator cuff tear, left knee joint pain, and lumbar muscle strain. Dr. DiCostanzo placed appellant off work from September 29 through October 28, 2016 due to "incapacitating injury or pain."

Dr. DiCostanzo continued to treat appellant. In work status reports dated October 31 and December 1, 2016, and January 5, 2017,⁴ he continued to place appellant off work due to "incapacitating injury or pain." In his October 31, 2015 report, Dr. DiCostanzo noted examination findings and diagnosed right knee joint pain, right hip joint pain, right shoulder joint pain, neck pain, low back pain, right knee ACL tear, right rotator cuff tear, and lumbar muscle strain. In his December 1, 2016 report, he noted examination findings and diagnosed lumbar muscle strain, right knee joint pain, right hip joint pain, right shoulder joint pain, right rotator cuff tear, and right knee ACL tear.

In a February 9, 2017 report, Dr. DiCostanzo noted appellant's examination findings. He diagnosed right knee joint pain, right hip joint pain, right shoulder joint pain, neck pain, low back pain, right knee ACL tear, right rotator cuff tear, and lumbar muscle strain. Dr. DiCostanzo released appellant to work at appellant's request due to financial reasons.

In a March 15, 2017 progress note, Dr. DiCostanzo reported examination findings and assessed a right rotator cuff tear, right knee ACL tear, and lumbar muscle strain. He opined that

³ X-rays of the hips revealed degenerative changes of both hips and degenerative changes of lumbosacral spine; an x-ray of right knee found no acute bony abnormality; an x-ray of the right shoulder showed no acute bony abnormality and mild degenerative changes at the acromioclavicular joint and glenoid humeral joint; an x-ray of the cervical spine showed mild degenerative disc disease and bilateral neural foramen narrowing; and an x-ray of the lumbosacral spine revealed mild degenerative disc disease.

⁴ There is no narrative report from Dr. DiCostanzo on January 5, 2017, just an industrial work status report.

appellant was temporarily totally disabled from regular work from March 15 through April 21, 2017.

By development letter dated May 2, 2017, OWCP advised appellant that additional evidence was needed to establish disability from work for the periods claimed. It requested that he submit a comprehensive medical report from his physician which explained with objective findings how his accepted condition had worsened such that he could no longer perform the duties of his position. OWCP noted that pain was not a valid reason for being off work without corresponding objective findings. It also noted that Dr. DiCostanzo had diagnosed a lumbar muscle strain and advised of the medical evidence needed to expand the claim since a back strain was not an accepted work-related condition. OWCP requested a surgical report for the claimed postsurgery recovery from October 24 through 28, 2016.⁵ Appellant was afforded 30 days to submit this evidence.

In an April 12, 2017 progress note, Dr. DiCostanzo reported examination findings and provided assessments of lumbar muscle strain, lumbar disc degeneration, right knee joint pain, right hip joint pain, right shoulder joint pain, neck pain, low back pain, right knee ACL tear, and right rotator cuff tear. He noted that shoulder, knee, and hip conditions were accepted for this claim, but no lower back condition was accepted. Dr. DiCostanzo opined that, based on the history, mechanism of injury, and his examination, appellant's diagnosed conditions were more than likely was caused by the work injury and therefore were industrial injuries.

In an April 27, 2017 progress report, Dr. DiCostanzo reported a history of injury occurring on October 17, 2007 while appellant was reaching for lights and strained his back. He indicated that, since that time, appellant had chronic low back pain. Results from a March 4, 2013 lumbar spine magnetic resonance imaging (MRI) scan revealed chronic stable disc bulges and stable mild central spinal canal stenosis secondary to a broad-based disc bulge and facet joint arthropathy. No diagnosis was provided.

By decision dated June 16, 2017, OWCP denied appellant's claim for intermittent periods of wage-loss compensation commencing October 24, 2016. It found that the medical evidence of record failed to establish that he was disabled from work during the claimed periods as a result of his accepted conditions.

In a January 5, 2017 progress report, Dr. DiCostanzo reported examination findings and diagnosed lumbar muscle strain, right rotator cuff tear, right knee ACL tear, right hip muscle strain, right patellar tendon strain, neck muscle strain, and right shoulder muscle strain. He noted that appellant was released back to work at his request. In a January 5, 2017 work status report, Dr. DiCostanzo held appellant off work from January 6 to 8, 2017 due to "incapacitating injury or pain."

In a February 9, 2017 progress note and work status report, Dr. DiCostanzo noted examination findings and diagnosed right patellar tendon strain, right hip muscle strain, right

⁵ OWCP noted that under case number xxxxx651 appellant had an accepted right carpal tunnel condition. Appellant was advised that, if he had surgery for a right carpal tunnel release, then he could refile the Form CA-7 and Form CA-7a under that claim number.

shoulder muscle strain, and neck muscle strain. He opined that appellant was totally disabled from his regular work from February 9 through March 17, 2017.

In March 15, April 12, May 16, and June 14, 2017 progress notes, Dr. DiCostanzo noted examination findings and diagnosed right rotator cuff tear, right knee ACL tear, neck muscle strain, right hip muscle strain, right patellar tendon strain, right shoulder muscle strain, and lumbar muscle strain.

On July 6, 2017 appellant requested reconsideration.

In a July 13, 2017 report, Dr. DiCostanzo provided examination findings and diagnosed right patellar tendon strain, right hip muscle strain, right shoulder muscle strain, and neck muscle strain. In an accompanying July 13, 2017 work status report, he indicated that appellant had permanent restrictions from the June 13, 2016 work injury. No restrictions were provided. An August 30, 2017 progress report from Dr. DiCostanzo was also received.

By decision dated October 4, 2017, OWCP denied appellant's request for reconsideration. It found that the evidence submitted was either cumulative or irrelevant and immaterial.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁶ has the burden of proof to establish the essential elements of his or her claim by the weight of the evidence.⁷ For each period of disability claimed, the employee has the burden of proof to establish that he was disabled from work as a result of the accepted employment injury.⁸ Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.⁹

Under FECA the term "disability" means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.¹⁰ Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.¹¹ An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability and is not entitled to compensation for loss of wage-earning

⁶ *Supra* note 1.

⁷ See *Amelia S. Jefferson*, 57 ECAB 183 (2005); see also *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968).

⁸ See *Amelia S. Jefferson, id.*; see also *David H. Goss*, 32 ECAB 24 (1980).

⁹ See *Edward H. Horton*, 41 ECAB 301 (1989).

¹⁰ *S.M.*, 58 ECAB 166 (2006); *Bobbie F. Cowart*, 55 ECAB 746 (2004); *Conard Hightower*, 54 ECAB 796 (2003); 20 C.F.R. § 10.5(f).

¹¹ *Roberta L. Kaamoana*, 54 ECAB 150 (2002).

capacity.¹² When, however, the medical evidence establishes that the residuals or sequelae of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wages.

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹³

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish intermittent periods of disability for the claimed periods commencing October 24, 2016.

OWCP accepted appellant's claim for sprain of the ACL of his right knee and unspecified rotator cuff tear or rupture of the right shoulder. During his alleged periods of disability, appellant received medical treatment from Dr. DiCostanzo, who restricted appellant from work beginning September 29, 2016. As noted, the Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹⁴

For the period October 24 through 28, 2016, appellant claimed 40 hours leave without pay for postsurgery recovery. The record is devoid of any evidence that he underwent surgery related to the accepted conditions of sprain of the ACL of right his knee and unspecified rotator cuff tear or rupture of right shoulder, not specified as traumatic. Additionally, there is no medical evidence of record addressing that specific time period.¹⁵

Appellant also claimed wage-loss benefits as of October 31, 2016 for "incapacitating injury." However, Dr. DiCostanzo failed to provide any medical rationale supported by objective findings which explained how appellant's accepted work conditions had worsened to the point where he could no longer work during this period. In his progress notes and work status reports dated September 29, October 31, and December 16, 2015 and January 5, 2017, he took appellant off work due to "incapacity injury or pain." The Board has found, however, that when a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability.¹⁶ Dr. DiCostanzo did not discuss any objective findings to support appellant's inability to work, nor did he explain why appellant was unable to work as a result of his accepted sprain of

¹² *Merle J. Marceau*, 53 ECAB 197 (2001).

¹³ *See William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁴ *Id.*

¹⁵ *See id.*

¹⁶ *P.D.*, Docket No. 14-0744 (issued August 6, 2014); *G.T.*, 59 ECAB 447 (2008).

the ACL of his right knee and unspecified rotator cuff tear or rupture of right shoulder, not specified as traumatic.¹⁷ The Board notes that in multiple reports he continually noted appellant's right shoulder, neck, hip joint, knee, and low back pain. Dr. DiCostanzo's opinions pertaining to disability due to pain are also insufficient to establish disability compensation as the Board has held that pain is a description of a symptom and not a diagnosed medical condition.¹⁸

On March 15, 2017 Dr. DiCostanzo opined that appellant was totally disabled from March 15 to April 27, 2017.¹⁹ However, he did not explain with objective findings why appellant was disabled from work.²⁰

Dr. DiCostanzo noted appellant's prior lumbar muscle strain which occurred on October 17, 2007. However, he did not provide a well-rationalized medical opinion with objective findings which explained how the June 13, 2016 work injury caused or aggravated appellant's preexisting back condition to the point that he was rendered totally disabled from work during the claimed time periods.²¹

Accordingly, the Board finds that appellant has failed to establish intermittent disability for the claimed periods commencing October 24, 2016. As such, appellant has failed to establish that he was entitled to wage-loss compensation for the claimed periods.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,²² OWCP's regulations provide that 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.²³ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received by OWCP within one year of the date of that

¹⁷ See *M.M.*, Docket No. 16-0541 (issued April 27, 2010).

¹⁸ See *B.P.*, Docket No. 12-1345 (issued November 13, 2012) (regarding pain); *C.F.*, Docket No. 08-1102 (issued October 10, 2008) (regarding pain); *J.S.*, Docket No. 07-0881 (issued August 1, 2007) (regarding spasm).

¹⁹ At appellant's request, Dr. DiCostanzo released appellant back to work on February 9, 2017.

²⁰ See *supra* note 14.

²¹ See *supra* note 17.

²² *Supra* note 1. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

²³ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-0218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

decision.²⁴ 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.²⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 8128(a).

The Board finds that appellant's request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Consequently, appellant was not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

With respect to the third above-noted requirement under section 10.606(b)(3), appellant submitted Dr. DiCostanzo's January 5, February 9, March 15, April 12, May 16, June 14, and July 13, 2017 reports and physical therapy reports. In these reports, rather than relating appellant's multiple pain complaints, Dr. DiCostanzo listed strains corresponding to appellant's pain complaints. He did not offer further explanation regarding the cause of these strains or how they caused appellant disability during the claimed time periods. This evidence, while new to the present claim, is cumulative of evidence contained in the case record and does not constitute a basis for reopening a case.²⁶

OWCP also received new September 17, 2017 MRI scan reports. As this evidence does not address the underlying issue of disability during the time periods in question, causally related to appellant's accepted employment conditions, this evidence is insufficient to reopen his claim for further merit review.²⁷

The Board finds that, as appellant did not satisfy any of the three requirements under section 10.606(b)(3) to warrant further merit review of his claim, OWCP properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not established intermittent periods of disability beginning October 24, 2016 and continuing causally related to his accepted employment. The Board also finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

²⁴ *Id.* at § 10.607(a).

²⁵ *Id.* at § 10.608(b). *See Y.S.*, Docket No. 08-0440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

²⁶ *M.V.*, Docket No. 17-0132 (issued April 7, 2017); *Candace A. Karkoff*, 56 ECAB 622 (2005).

²⁷ *J.D.*, Docket No. 16-1253 (issued February 7, 2017); *D'Wayne Avila*, 57 ECAB 642 (2006).

ORDER

IT IS HEREBY ORDERED THAT that the October 4 and June 16, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 14, 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