

the filing of this appeal, pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.⁴

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

This case has previously been before the Board.⁵ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 13, 1995 appellant, then a 43-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained pain in her right arm, shoulders, back, and neck causally related to factors of her federal employment. OWCP accepted the claim for neck sprain, right shoulder sprain, right rotator cuff syndrome, right lateral and medial epicondylitis, and tenosynovitis of the right hand and wrist. Appellant performed limited-duty work until September 29, 2009, when the employing establishment could no longer provide work within her restrictions. OWCP paid her wage-loss compensation on the supplemental rolls for total disability beginning September 30, 2009 and on the periodic rolls beginning October 25, 2009.

In reports dated February 24 and April 23, 2011, Dr. Ramon L. Jimenez, a Board-certified orthopedic surgeon and OWCP referral physician, found that appellant could perform modified employment walking up to four hours per day, reaching above the shoulder, bending and stooping for two hours per day, pushing and pulling up to 10 pounds for four hours per day, and performing repetitive hand and wrist movements no more than three hours per day.

By decision dated May 31, 2012, OWCP reduced appellant's compensation effective June 3, 2012 based on its finding that she had the capacity to work in the selected position of surveillance system monitor. Appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on September 26, 2012).

By decision dated December 20, 2012, an OWCP hearing representative affirmed the May 31, 2012 loss of wage-earning capacity (LWEC) determination. She found that OWCP had properly determined that appellant had the physical and vocational capacity to work as a surveillance systems monitor and had properly determined her wage-earning capacity using the

³ 5 U.S.C. § 8101 *et seq.*

⁴ The record contains a December 3, 2018 decision suspending appellant's wage-loss compensation as appellant failed to submit a Form CA-1032. She has not appealed this decision and thus it is not before the Board at this time. *See* 20 C.F.R. § 501.3.

⁵ Docket No. 13-0938 (issued August 20, 2013).

Shadrick formula.⁶ The hearing representative further found that she had sufficient English skills to perform the selected position based on her prior work history and her participation at the hearing.

Appellant appealed to the Board. By decision dated August 20, 2013, the Board affirmed the December 20, 2012 decision. The Board found that the opinion of Dr. Jimenez constituted the weight of the evidence and established that appellant could perform the position of surveillance system monitor. The Board further found that OWCP had properly determined that she had the vocational capacity, including sufficient English skills, to perform the position of surveillance systems monitor.

On May 1, 2014 appellant accepted a position with the employing establishment as a modified mail processing clerk. She returned to work on May 19, 2014, but stopped on May 23, 2014, contending that she could not perform intermittent keyboarding four to eight hours per day.

On August 22, 2014 appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning May 23, 2014 causally related to September 18, 1992 and January 24, 2003 employment injuries. She advised that she had returned to work on May 19, 2014, but had stopped work on May 23, 2014 as the position required duties outside of her work restrictions.

By decision dated November 12, 2014, OWCP found that appellant had not established an employment-related recurrence of disability.

On November 11, 2015 appellant, through her representative, requested reconsideration, arguing that the employing establishment had failed to provide her with work within her restrictions.

By decision dated February 9, 2016, OWCP denied modification of its November 12, 2014 LWEC determination “because there is no medical evidence to substantiate a recurrence.”

On January 4, 2017 appellant, through her representative, requested reconsideration. In a statement dated December 30, 2016, her representative contended that the February 18, 2016 report from Dr. Robert J. Harrison, Board-certified in internal and preventive medicine, clarified her work restrictions and established that OWCP’s LWEC determination was erroneous.

In a February 18, 2016 report, Dr. Harrison advised that on February 8, 2010 he had mistakenly indicated that appellant could lift up to 15 pounds, rather than finding that she could only lift 5 pounds. He disagreed with Dr. Jimenez’ finding that she had a 10-pound weight restriction and advised that he based his opinion on the results of his examination and a 2010 functional capacity evaluation (FCE).

Appellant submitted numerous CA-17 forms dated 2006 to 2016 from Dr. Harrison finding that she could lift and carry up to five pounds for eight hours per day.

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953). The formula developed in the *Shadrick* decision has been codified at 20 C.F.R. § 10.403(d), which provides that the employee’s wage-earning capacity in terms of percentage is obtained by dividing the employee’s actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.

By decision dated March 31, 2017, OWCP denied modification of its February 9, 2016 decision.

On October 11, 2017 appellant, through her representative, again requested reconsideration.

In support of her request, appellant submitted an August 17, 2017 report from Dr. Harrison, who indicated that he had reviewed OWCP's March 31, 2017 decision. Dr. Harrison discussed the findings from a February 5, 2011 magnetic resonance imaging (MRI) scan of appellant's lumbar spine and opined that she could lift only five pounds due to her low back condition.

Appellant further submitted evidence predating the LWEC determination addressing her lumbar spine condition due to an employment injury, assigned OWCP File No. xxxxxx853, and CA-17 forms associated with OWCP File No. xxxxxx853 regarding limitations due to her lumbar spine condition.⁷

By decision dated January 9, 2018, OWCP denied modification of its March 31, 2017 decision. It found that the criteria for modifying an LWEC determination had not been satisfied.

On July 9, 2018 appellant, through her representative, requested reconsideration. In a statement dated July 2, 2018, her representative related that the April 2 and 9, 2018 reports from Dr. Harrison established that the LWEC determination should be modified. He further asserted that Dr. Jimenez, in his February 4, 2011 report, had failed to evaluate her lower back condition.

Appellant resubmitted reports from Dr. Harrison dated August 30 and December 20, 2010 and May 2, 2011. She further submitted a May 5, 2011 MRI scan and CA-17 forms dated 2010 and 2011 submitted under OWCP File No. xxxxxx853.

In an undated statement, appellant asserted that the vocational rehabilitation counselor had assisted her with her English on a test so that she could obtain a certificate to work as a security guard.

On April 2, 2018 Dr. Harrison related that he had reviewed OWCP's January 9, 2018 decision. He advised that, as he had previously discussed in his August 17, 2017 report, Dr. Jimenez had failed to evaluate appellant's back condition. Dr. Harrison noted that he had provided work restrictions on August 30 and December 20, 2010, and May 2, 2011 finding that she could only stand, walk, and sit for 20 minutes. He advised that an MRI scan of the low back showed neuroforminal stenosis and other degenerative changes, and necessitated work restrictions of lifting up to five pounds with no extended sitting.

In a progress report dated April 9, 2018, Dr. Harrison evaluated appellant for back and right shoulder pain. He indicated that she could perform modified employment, but that there was no work available.

⁷ OWCP accepted the claim under OWCP File No. xxxxxx853 for temporary aggravation of lumbar strain and lumbar sprain. It has not administratively combined this claim with the current claim.

In CA-17 forms) dated April 2, June 21, and August 28, 2018, Dr. Harrison provided work restrictions, including lifting up to five pounds for eight hours per day.

By decision dated October 3, 2018, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

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 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 which: (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 be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰ If it 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 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).

⁸ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁹ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

¹⁰ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). Chapter 2.1602.4b.

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).

By decision dated January 9, 2018, OWCP denied modification of its May 31, 2012 LWEC determination. On July 9, 2018 appellant timely requested reconsideration.¹³

As a general rule, if a formal LWEC determination has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner should evaluate the request according to the customary criteria for modifying a formal LWEC.¹⁴ Nonetheless, in cases where arguments submitted have previously been addressed by OWCP and in which a claimant submits no new or relevant evidence, OWCP may address the request under the provisions found in section 8128 of FECA and may deny merit review.¹⁵

The issue is whether appellant has submitted evidence or raised an argument in support of her request for reconsideration sufficient to warrant further merit review pursuant to 20 C.F.R. § 10.606(b)(3). The Board finds that she has not shown that OWCP erroneously applied or interpreted a specific point of law or raised a relevant legal argument not previously considered. Appellant's representative contended that Dr. Jimenez, OWCP's referral physician, failed to evaluate her back condition in providing work restrictions. The Board, however, previously determined that the opinion of Dr. Jimenez was sufficient to establish that she had the ability to perform the position of surveillance system monitor. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁶

In an undated statement submitted with her request for reconsideration, appellant maintained that the vocational rehabilitation counselor had to assist her with a test to obtain a certificate to work as a security guard due to her poor English skills. The Board, however, previously addressed this argument in its August 20, 2013 decision. As discussed, findings made in a prior Board decision are *res judicata* absent any further review by OWCP.¹⁷ Appellant, consequently, is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board further finds that appellant has not submitted relevant or pertinent new evidence not previously considered. In an April 2, 2018 report, Dr. Harrison opined that Dr. Jimenez had not evaluated her back in his referral examination. He found that appellant could lift only five pounds and perform no extended sitting due to her back condition. However, Dr. Harrison had previously opined, in an August 17, 2017 report, that she required a five-pound lifting limitation due to her low back condition. 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.¹⁸

¹³ See *supra* note 9.

¹⁴ *H.W.*, Docket No. 18-1175 (issued December 6, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁵ *L.W.*, Docket No. 16-1202 (issued January 25, 2018).

¹⁶ See *J.D.*, Docket No. 18-1765 (issued June 11, 2019); *J.L.*, Docket No. 17-1460 (issued December 21, 2018).

¹⁷ See *H.G.*, Docket No. 16-1191 (issued November 25, 2016); *R.T.*, Docket No. 16-0543 (issued May 20, 2013).

¹⁸ *K.O.*, Docket No. 18-0611 (issued August 3, 2018).

On April 9, 2018 Dr. Harrison discussed appellant's continued complaints of back and right shoulder pain and opined that she could perform modified-duty work. In CA-17 forms dated April 2, June 21, and August 28, 2018, he provided work restrictions. The record, however, contains similar reports from Dr. Harrison already considered by OWCP. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.¹⁹

Appellant further submitted evidence predating the LWEC determination regarding a lumbar spine condition due to a prior employment injury, including CA-17 forms providing limitations due to her back condition. OWCP, however, previously considered similar evidence regarding her lumbar condition under OWCP File No. xxxxxx853 in its January 9, 2018 decision. As noted, evidence which is cumulative or duplicative of evidence already of record does not constitute relevant and pertinent new evidence not previously considered by OWCP.²⁰ Appellant, consequently, is not entitled to a review of the merits of her claim based on the third requirement under 20 C.F.R. § 10.606(b)(3).

On appeal appellant's representative contends that OWCP erred in finding that she could perform the duties of a surveillance systems monitor as English is her second language and that OWCP failed to consider all of her accepted conditions. As discussed, however, her argument regarding her language ability has already been addressed by the Board and is thus *res judicata* absent further review by OWCP.²¹ Additionally, the Board lacks jurisdiction to review the merits of the claim. The only decision properly before the Board on this appeal is the October 3, 2018 nonmerit decision, which denied appellant's request for further merit review.

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Appellant may request modification of the LWEC 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).

¹⁹ *D.V.*, Docket No. 17-1842 (issued August 10, 2018).

²⁰ *S.M.*, Docket No. 17-1899 (issued August 3, 2018); *L.W.*, Docket No. 17-1171 (issued May 8, 2018).

²¹ *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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