

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish total disability for the period September 2 through 17, 2018 due to the accepted employment injury; and (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 February 19, 2015 appellant, then a 57-year-old human resources assistant, filed a traumatic injury claim (Form CA-1) alleging that, on December 16, 2014, he sustained knee and back injuries when he slipped on ice while in the performance of duty.³ By decision dated April 1, 2015, OWCP accepted his claim for bilateral knee contusions and back contusion.⁴

On January 10, 2017 OWCP expanded the acceptance of appellant's claim to include the additional condition of intervertebral disc stenosis of the neural canal of the lumbar region.

On April 10, 2017 appellant underwent an L4 to S1 laminectomy with bilateral foraminotomies. He stopped work on that day. Effective April 10, 2017, OWCP placed appellant on the supplemental rolls for total disability.

In a report of work status (Form CA-3) dated July 31, 2017, the employing establishment indicated a return to work date of July 31, 2017, and noted that appellant had returned to work part-time, modified duty with restrictions.⁵

In a periodic progress report dated September 5, 2017, the employing establishment indicated that appellant returned to work full-time, full duty on August 28, 2017.

On January 3, 2018 OWCP authorized lumbar spine surgery. On February 28, 2018 appellant underwent an L3 laminectomy with bilateral foraminotomies and a reexploration of the

³ By decision dated February 25, 2015, OWCP denied continuation of pay (COP) during his absence from work for the 45-day period following his December 16, 2014 injury finding that his injury was not reported on an OWCP-approved form within 30 days following the injury.

⁴ On April 8, 2015 appellant filed a claim for wage-loss compensation (Form CA-7) for total disability for the period April 7 to 15, 2015. By decision dated July 1, 2015, OWCP denied appellant's claim for wage-loss compensation commencing April 7, 2015. On September 25, 2015 appellant requested reconsideration of OWCP's July 1, 2015 decision. He submitted additional medical evidence along with his request. By decision dated January 21, 2016, OWCP denied modification of its July 1, 2015 decision.

⁵ On August 15, 2017 OWCP placed appellant on the periodic rolls for the period July 31 through August 19, 2017. On August 29, 2017 it returned him on the supplemental rolls for intermittent disability for the period August 21 to 25, 2017.

lumbar spinal canal bilaterally at L4-5 and L5-S1, as well as “redo laminectomies and foraminotomies.”⁶

In a Form CA-3 dated June 8, 2018, the employing establishment noted that appellant returned to work part-time, modified duty with restrictions on June 4, 2018.

In a report dated August 24, 2018, Dr. John M. Blair, Jr., a Board-certified orthopedic surgeon, indicated that he examined appellant for back pain and bilateral leg pain. He indicated that appellant was to continue working part time.

In a report dated September 3, 2018, Dr. Katherine Colpitts, an emergency medicine specialist, noted that appellant complained of back pain while barbecuing. She diagnosed chronic bilateral low back pain with bilateral sciatica and acute bilateral low back pain with bilateral sciatica.

On September 14, 2018 appellant submitted a Form CA-7 for LWOP for total disability for the period September 2 to 15, 2018.

OWCP paid appellant on the supplemental rolls for intermittent periods of disability for the period September 2 to 15, 2018. In a development letter dated October 4, 2018, it advised appellant that it was unable to authorize total disability for the claimed period September 2 to 15, 2018 because the evidence submitted failed to demonstrate an increase in disability. OWCP informed him of the evidence needed to establish his claim. It afforded appellant 30 days to submit the necessary evidence.

In CA-7 forms dated October 9, 19, and 29, and November 8, 2018, appellant claimed compensation for LWOP for intermittent periods of disability for the periods September 17 to 28 and September 30 to November 10, 2018. OWCP paid appellant on the supplemental rolls for intermittent disability for each claimed period.

Appellant submitted physical therapy notes dated October 5, 9, and 15, and November 8, 2018. These reports indicated diagnoses of intervertebral disc stenosis of the neural canal of the lumbar region and sprain of ligaments of the lumbar spine.

In a note dated October 16, 2018, Dr. Blair indicated that appellant needed to be excused from work from for the period October 2 to 15, 2018 due to a lumbar and bilateral leg flare up.

In a note dated October 28, 2018, Dr. Blair noted that appellant had a “flare up” and needed to be off work from September 2 through 17, 2018. He explained that appellant would have flare ups resulting in increased pain and spasms which meant he would need to be excused from work for a full workday.

⁶ Beginning March 5, 2018, appellant submitted a claim for compensation (Form CA-7) for leave without pay (LWOP) for total disability commencing February 28, 2018. OWCP placed him on the supplemental rolls for total disability effective February 28, 2018. Beginning June 14, 2018 appellant submitted CA-7 forms for LWOP for intermittent periods of disability commencing May 27, 2018. OWCP subsequently placed him on the supplemental rolls for intermittent periods of disability beginning May 27, 2018.

By decision dated November 13, 2018, OWCP denied appellant's claims for compensation for total disability for the period September 2 through 17, 2018 finding that the medical evidence of record failed to establish total disability due to his accepted employment-related injury.

In a report dated October 30, 2018, Dr. Blair indicated that appellant sought treatment for ongoing back pain with bilateral leg pain. He noted that he had advised appellant that he would experience occasional flare ups. In a duty status report (Form CA-17) of the same date, Dr. Blair diagnosed lumbar strain and noted that appellant could resume part-time work dated back to June 4, 2018.

In a report dated December 20, 2018, Dr. Blair indicated that appellant presented with increasing pain, numbness, and tingling in his lower extremities, and he needed a letter to "address his two-week absence from work."

On February 13, 2019 appellant requested reconsideration of OWCP's November 13, 2018 decision. Along with his request, he submitted duplicative medical records, including the August 24, 2018 report and October 28, 2018 notes from Dr. Blair, the September 3, 2018 hospital report, and numerous diagnostic examination and physical therapy reports previously considered by OWCP in its November 13, 2018 decision.

Appellant also submitted follow-up reports dated January 10 and February 1, 2019 from Dr. Blair.

In a report dated February 19, 2019, Dr. Peter E. Krumins, a Board-certified orthopedic surgeon, indicated that he examined appellant for bilateral knee pain. He diagnosed arthritis of both the left and right knee.

By decision dated March 6, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA⁷ has the burden of proof to establish the essential elements of his or her claim, including that disability or a specific condition for which compensation is claimed is causally related to the employment injury.⁸ For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.⁹

⁷ *Supra* note 1.

⁸ *T.H.*, Docket No. 19-0436 (issued August 13, 2019); *see B.K.*, Docket No. 18-0386 (issued September 14, 2018); *see also Amelia S. Jefferson*, 57 ECAB 183 (2005); *Nathaniel Milton*, 37 ECAB 712 (1986).

⁹ *T.H.*, *id.*; *see D.G.*, Docket No. 18-0597 (issued October 3, 2018); *Amelia S. Jefferson*, *id.*

The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the 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 a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.¹²

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 reliable, probative, and substantial medical evidence.¹³ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work.¹⁴ The physician's opinion must be based on the facts of the case and the complete medical background of the employee, must be one of reasonable medical certainty, and must include objective findings in support of its conclusions.¹⁵

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.¹⁶ To do so would essentially allow an employee to self-certify his or her disability and entitlement to compensation.¹⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish total disability for the period September 2 through 17, 2018 due to the accepted employment injury.

The medical evidence received relevant to the claimed period of disability was a note from Dr. Blair who reported that appellant had a "flare up" and needed to be off work from September 2 to 17, 2018. The Board finds that Dr. Blair did not sufficiently explain how appellant's inability to work was related to his accepted conditions caused by the December 16, 2014 employment injury. Dr. Blair did not discuss objective findings to support his inability to work, nor did he

¹⁰ 20 C.F.R. § 10.5(f); *T.H., id.*; *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

¹¹ *G.T.*, Docket No. 18-1369 (issued March 13, 2019); *Robert L. Kaaumoana*, 54 ECAB 150 (2002).

¹² *See* 20 C.F.R. § 10.5(f); *N.M.*, Docket No. 18-0939 (issued December 6, 2018).

¹³ *J.A.*, Docket No. 18-1304 (issued May 1, 2019); *William A. Archer*, 55 ECAB 674 (2004).

¹⁴ *B.W.*, Docket No. 19-0049 (issued April 25, 2019); *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹⁵ *T.H.*, *supra* note 8; *C.B.*, Docket No. 18-0633 (issued November 16, 2018).

¹⁶ *T.H., id.*; *J.S.*, Docket No. 16-1014 (issued October 27, 2014); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁷ *See S.G.*, Docket No. 18-1076 (issued April 11, 2019); *William A. Archer, supra* note 13; *Fereidoon Kharabi*, 52 ECAB 291 (2001).

explain why he was unable to work part-time, limited-duty during the period in question.¹⁸ As noted above, 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.¹⁹ As Dr. Blair has not provided medical rationale for his conclusion that appellant was unable to work due to his accepted employment injury, this evidence is of limited probative value and is insufficient to establish appellant's total disability claim.²⁰

As the medical evidence of record does not contain sufficient rationale to establish disability during the period September 2 to 17, 2018, the Board finds that appellant has not met his burden of proof to establish his claim.

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

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA²¹ 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.²²

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.²³

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.²⁴ If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.²⁵ If the request is timely, but fails to meet at least one

¹⁸ *T.H.*, *supra* note 8; *see M.C.*, Docket No. 16-1238 (issued January 26, 2017); *see also Jaja K. Asaramo*, 55 ECAB 200 (2004) (the Board found that, for conditions not accepted or approved by OWCP as due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury). *M.M.*, Docket No. 16-0541 (issued April 27, 2010).

¹⁹ *Supra* note 7.

²⁰ *T.H.*, *supra* note 8; *G.R.*, Docket No. 15-1685 (issued June 14, 2016); *S.B.*, Docket No. 13-1162 (issued December 12, 2013).

²¹ *Supra* note 1.

²² 5 U.S.C. § 8128(a).

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

²⁴ *Id.* at § 10.607(a).

²⁵ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

of the requirements for reconsideration, it will deny the request for reconsideration without reopening the case for review on the merits.²⁶

ANALYSIS -- ISSUE 2

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).

Appellant's request for reconsideration 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. Consequently, he 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).

The Board further finds that appellant has not submitted relevant and pertinent new evidence in support of his request for reconsideration under 20 C.F.R. § 10.606(b)(3). The Board notes that the underlying issue in this case is whether he established total disability for the period September 2 through 17, 2018 causally related to the accepted employment injury. In support of his reconsideration request, appellant submitted duplicative medical records, including the August 24, 2018 report and October 28, 2018 note from Dr. Blair, the September 3, 2018 hospital report from Dr. Colpitts, and numerous diagnostic examination and physical therapy reports previously considered by OWCP in its November 13, 2018 decision. However, the submission of this evidence does not require reopening of appellant's case for review on the merits as the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.²⁷

In addition, he submitted new reports dated January 10 and February 1, 2019 from Dr. Blair, and a report dated February 19, 2019 from Dr. Krumins. However, none of these reports address the underlying issue in this case, *i.e.*, whether appellant established entitlement to total disability compensation for the period September 2 to 17, 2018. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.²⁸ As such, this evidence is insufficient to warrant reopening appellant's case for a merit review.

Because appellant had not submitted new evidence relevant to the issue of disability entitlement with his February 13, 2019 request for reconsideration, he is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(3).

²⁶ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

²⁷ *S.W.*, Docket No. 19-1498 (issued January 9, 2020); *N.L.*, Docket No. 18-1575 (issued April 3, 2019); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

²⁸ *Id.*; *see also M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

The Board accordingly finds that appellant has not met 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.²⁹

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish total disability for the period September 2 through 17, 2018 due to the accepted employment injury. The Board further 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 March 6, 2019 and November 13, 2018 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2020
Washington, DC

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

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

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

²⁹ *C.C.*, Docket No. 18-0316 (issued March 14, 2019); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).