

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 on a different issue.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 13, 2017 appellant, then a 40-year-old rural carrier, filed an occupational disease claim (Form CA-2) alleging that she developed right shoulder and neck pain due to factors of her federal employment which required continual use of the right upper extremity. She indicated that she first became aware of her condition on January 15, 2017, and first realized that it was caused or aggravated by her federal employment on February 8, 2017. Appellant stopped work on February 13, 2017.

By decision dated April 7, 2017, OWCP accepted the claim for cervical disc disorder with radiculopathy (mid-cervical region), sprain of right rotator cuff capsule, strain of muscle(s) and tendon(s) of the rotator cuff of right shoulder, sprain of ligaments of cervical spine, strain of muscle, fascia, and tendon at neck level, cervical spinal stenosis, and cervical spondylosis with radiculopathy.⁵ It authorized spinal fusion at C4 through C7, which appellant underwent on April 3, 2018. OWCP paid her wage-loss compensation on the supplemental rolls as of April 3, 2018 and on the periodic rolls as of September 16, 2018.

In a letter dated June 8, 2020, OWCP advised appellant that it had assigned a vocational rehabilitation counselor to assist her to return to suitable employment.

In a July 6, 2020 summary of contacts, the vocational rehabilitation counselor noted that appellant had related that she had no vocational goals as she was very busy raising two adopted children with special needs. Appellant also noted that she had been selling clothing through an online website.

In an August 21, 2020 summary of contacts, the vocational rehabilitation counselor noted that appellant indicated that she was not prepared to return to the workforce, she had no vocational, career, or educational goals, and when asked about returning to modified duty at the employing establishment, she stated that she had put that part of her life behind her.

⁴ Docket No. 18-1537 (issued June 20, 2019).

⁵ Appellant filed a claim for compensation (Form CA-7) for disability for the period February 13 through March 31, 2017. By decision dated August 8, 2017, OWCP denied appellant's disability claim. By decision dated April 30, 2018, OWCP's hearing representative affirmed the April 8, 2017 decision. By decision dated June 20, 2019, the Board found that appellant had not met her burden of proof to establish that she was disabled for the period February 13 through March 31, 2017, causally related to her accepted right shoulder and cervical conditions. *Id.*

In a January 25, 2021 closure report, the rehabilitation counselor advised that appellant had not responded to letters requesting that she contact OWCP to explore rehabilitation services. The report also noted that appellant had not answered or returned calls placed to her on September 8, 11, 15, and 21, and October 13, 2020, and despite numerous attempts, the rehabilitation counselor had not heard from her since August 27, 2020.

On February 19, 2021 OWCP informed appellant that it had closed her case for vocational rehabilitation services. It provided a constructed loss of wage-earning capacity (LWEC) memorandum, recommending a constructed LWEC, because appellant had not fully cooperated with the reemployment efforts.

In a letter dated February 24, 2021, OWCP advised appellant that the vocational rehabilitation counselor indicated that she had refused to cooperate in the development of a rehabilitation effort. It noted that the vocational rehabilitation counselor advised that appellant had not responded to letters requesting that she contact OWCP to explore possible rehabilitation services. OWCP also noted that appellant had not answered or returned calls placed to her on September 8, 11, 15, and 21, and October 13, 2020, and the vocational rehabilitation counselor had not heard from her since August 27, 2020. It further noted that during her meeting with the vocational rehabilitation counselor on August 19, 2020, appellant indicated that she was not prepared to return to the workforce, and she had no vocational, career, or educational goals. When asked about returning to modified duty at the employing establishment, she replied that she had put that part of her life behind her. OWCP explained that the medical evidence supported that appellant had the ability to obtain employment as a collection clerk earning wages of \$625.60 per week. It explained that pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to undergo vocational rehabilitation when so directed, and OWCP finds that, in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he or she not failed to undergo vocational rehabilitation. OWCP afforded appellant 30 days to contact the vocational rehabilitation counselor and participate in the rehabilitation effort or to provide good reasons for noncompliance.

In a March 4, 2021 statement, appellant related that she had sold clothing online since June 2017, but due to low sales during the past year she was no longer doing so. She also explained that she had been homeschooling both of her children for the past four years, and they were adopted from overseas with medical and behavioral issues. Appellant noted that she had informed her vocational rehabilitation counselor about her family situation. She indicated that she did not wish to seek other employment outside of her home, because this would not meet her children's needs. Appellant concluded that caring for her children was a full-time job.

In a letter dated July 6, 2021, OWCP noted that the present letter superseded the February 24, 2021 letter and advised appellant that the vocational rehabilitation counselor indicated that she had refused to cooperate in the continued development of a rehabilitation effort. It noted that the vocational rehabilitation counselor advised that appellant had not responded to letters requesting that she contact OWCP to explore possible rehabilitation services, that she had not answered or returned calls placed to her on September 8, 11, 15, and 21, and October 13, 2020, and despite numerous attempts, the rehabilitation counselor had not heard from her since August 27, 2020. OWCP also noted that during her meeting with the vocational rehabilitation

counselor on August 19, 2020, appellant indicated that she was not prepared to return to the workforce, she had no vocational, career, or educational goals, and when asked about returning to modified duty at the employing establishment, she stated that she had put that part of her life behind her. It noted that a full review of the file was made, and it was apparent that appellant had refused vocational rehabilitation, despite her ability to work, and had refused to sign the rehabilitation plan and award (OWCP-16). OWCP explained that, pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to undergo vocational rehabilitation when so directed, and OWCP finds that, in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had he or she not failed to undergo vocational rehabilitation. It further advised appellant: "Also, [s]ection 10.519 of Title 20 of the Code of Federal Regulations provides that, if an individual without good cause fails or refuses to participate in the essential preparatory efforts as described above, OWCP will assume, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no [LWEC], and compensation will be reduced accordingly. In effect, this will result in a reduction of compensation to zero." OWCP afforded appellant 30 days to contact the vocational rehabilitation counselor and participate in the rehabilitation effort or to provide good reasons for noncompliance. Appellant did not respond.

By decision dated August 9, 2021, OWCP reduced appellant's wage-loss compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519, effective August 10, 2021, due to her failure to cooperate with vocational rehabilitation without good cause. It found that her failure to undergo the essential preparatory effort of vocational testing did not permit OWCP to determine what would have been her wage-earning capacity had she undergone the testing and rehabilitation effort. OWCP also advised appellant that this reduction of compensation would continue until she participated in vocational testing in good faith, or showed good cause for not complying.

On October 29, 2021 appellant, through counsel, requested reconsideration and resubmitted her March 4, 2021 statement.

By decision dated November 8, 2021, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a). It found that the evidence was repetitious and consisted of documentation previously considered.

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ 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.⁷

⁶ 5 U.S.C. § 8128(a).

⁷ *Id.*; see *A.N.*, Docket No. 20-1487 (issued March 19, 2021); *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).

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.⁸

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁹ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.¹⁰ 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.¹¹

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).

In her reconsideration request, appellant, through counsel, did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. 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).¹²

The Board further finds that appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. With her reconsideration request, counsel for appellant resubmitted the March 4, 2021 statement from appellant, which was previously of record and considered by OWCP in its August 9, 2021 decision. The Board has held that evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and

⁸ 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).

⁹ *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 (September 2020). 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). *Id.* at Chapter 2.1602.4b.

¹⁰ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

¹¹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

¹² 20 C.F.R. § 10.606(b)(3); *see L.D., supra* note 7; *see also L.G., supra* note 8; *C.N., supra* note 8.

does not constitute a basis for reopening a case.¹³ Thus, appellant is not entitled to a review based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹⁴

Accordingly, the Board finds that appellant has not met any of the requirements enumerated under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied her request for reconsideration without reopening the case for review on the merits.¹⁵

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).

¹³ *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *M.G.*, Docket No. 18-0654 (issued October 17, 2018); *D.K.*, 59 ECAB 141 (2007); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁴ 20 C.F.R. § 10.606(b)(3); *see L.D.*, *supra* note 7; *K.F.*, Docket No. 19-1846 (issued November 3, 2020); *T.H.*, Docket No. 18-1809 (issued May 23, 2019); *Johnny L. Wilson*, Docket No. 98-2536 (issued February 13, 2001); *see also L.G.*, *supra* note 8; *C.N.*, *supra* note 8.

¹⁵ *See D.R.*, Docket No. 18-0357 (issued July 2, 2018); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

ORDER

IT IS HEREBY ORDERED THAT the November 8, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 27, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

A handwritten signature in cursive script, appearing to read "J. D. McGinley".

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board