

disability after May 13, 2010; and (3) whether OWCP properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 14, 2000 appellant, then a 57-year-old clerk, filed a traumatic injury claim alleging that on January 10, 2000 he strained his lower back while picking up boxes of materials. OWCP accepted the claim for aggravation of lumbosacral sprain. Appellant was placed on the periodic rolls for temporary total disability. OWCP also accepted aggravation of preexisting degenerative disc disease.

In an April 2, 2007 work capacity evaluation (Form OWCP-5c), Dr. Sven Knudsen Ljaamo, a treating physician Board-certified in preventive medicine and occupational medicine, diagnosed L5-S1 herniated disc and degenerative disc disease. He advised that appellant was capable of working two hours a day with physical restrictions.

In an April 4, 2007 progress note, Dr. Ljaamo provided findings on physical examination and stated that appellant was functionally disabled.³

On May 7, 2007 OWCP received an April 2, 2007 report from Dr. Ljaamo who diagnosed a herniated L5-S1 lumbosacral disc and lumbar back pain with radiculopathy. Dr. Ljaamo reported that appellant's lower back pain was aggravated by activity. He opined that appellant was medically unfit to return to his date-of-injury position or any employment.

In progress reports dated April 28 and November 12, 2008, Dr. Rudolph A. Buckley, an examining Board-certified orthopedic surgeon, diagnosed L5-S1 degenerative disc disease and disc bulge based on an April 2, 2008 magnetic resonance imaging (MRI) scan. A physical examination revealed pain with lower back range of motion, no atrophy, no instability and no weakness.

In a February 17, 2009 report, Dr. Edwin H. Mohler, a second opinion Board-certified orthopedic surgeon, conducted a physical examination of appellant and reviewed the medical records and a statement of accepted facts. He noted that appellant's claim had been accepted for aggravation of lumbosacral sprain and preexisting degenerative disc disease. On physical examination, there was reduced range of motion, difficulty balancing on heel to heel, sustained right paravertebral contraction in a single stance and right gluteus maximus weakness. Based upon a review of the April 2, 2008 MRI scan and his physical findings, Dr. Mohler diagnosed obesity, status post lumbosacral sprain, lumbar spine facet arthropathy with paravertebral muscle atrophy and L5-S1 degenerative spondylolisthesis with degenerative disc disease. He concluded that the aggravation to appellant's preexisting condition of lumbar degenerative disc disease was permanent. While appellant had residuals of his employment injury, Dr. Mohler concluded that appellant was not totally disabled. He opined that appellant was capable of returning to work full time with restrictions on lifting and avoiding repetitive bending.

³ Dr. Ljaamo related that appellant's former treating physician, Dr. Arne Pedersen, had returned to Norway.

On May 28, 2009 OWCP referred appellant to Dr. Joseph E. Ortiz, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion found between Dr. Buckley and Dr. Mohler on the issue of appellant's ability to work. A copy of appellant's job description was included with the medical information, list of questions and statement of accepted facts provided to Dr. Ortiz. The physical requirements for the position of clerk included intermittent sitting for up to 7 hours per day; intermittent lifting and carrying of less than 20 pounds for less than 30 minutes per day; intermittent bending/turning for less than 1 hour a day; and 4 to 6 hours of intermittent repetitive movements using the arms, hands and fingers.

In a July 8, 2009 report, Dr. Ortiz diagnosed status post lumbosacral sprain and L5-S1 degenerative spondylolisthesis and L5-S1 degenerative disc disease. He reviewed the medical and objective evidence and performed a physical examination. On physical examination, Dr. Ortiz noted midline lumbosacral tenderness on palpation but no evidence of spasm. He opined that appellant sustained a permanent aggravation of his preexisting L5-S1 degenerative disc disease. Dr. Ortiz concurred with Dr. Mohler's opinion that appellant was capable of working full time with restrictions of no lifting over 40 pounds and avoiding repetitive bending. He opined that appellant had permanent work restrictions which included avoiding repetitive bending and twisting motions and no lifting over 40 pounds. Dr. Ortiz reviewed the position of letter clerk that appellant held at the time of his injury and opined that it was within appellant's work restrictions. He noted that a functional capacity evaluation and work hardening program would not be beneficial.

On April 7, 2010 OWCP issued a notice proposing to terminate appellant's wage-loss benefits based upon Dr. Ortiz's report which found that appellant was capable of working his date-of-injury position with physical restrictions.

By correspondence dated April 29, 2010, appellant disagreed with the proposal to terminate his wage-loss compensation. He requested that OWCP schedule a functional capacity evaluation to determine his work capability.

By decision dated May 13, 2010, OWCP terminated appellant's wage-loss benefits effective that day.

Appellant requested reconsideration. He submitted a 2009 work capacity evaluation form,⁴ which indicated that he was capable of working eight hours per day with a restriction of up to two hours per day of lifting up to 40 pounds and avoiding repetitive bending and twisting.

OWCP received a May 17, 2010 report from Dr. Reginald Q. Knight, a treating Board-certified orthopedic surgeon, who diagnosed chronic pain syndrome and L5-S1 degenerative disc disease with probable L5-S1 grade 1 spondylolisthesis based on review of an April 2008 MRI scan. A review of appellant's history revealed he retired in 2000 due to his inability to work since the January 10, 2000 employment injury. The physical examination revealed decreased forward flexion, normal lumbar spine rotation, some Waddell-type mannerism, mild paraspinal muscle spasms and negative Babinski sign, negative bilateral flip test. Dr. Knight reviewed MRI scans dated February 4, 2003 and April 2008 and noted there was no significant change from the

⁴ It is unclear as to the date and month of the report and the physician's signature is illegible.

earlier scan. He recommended a functional capacity evaluation be performed to determine appellant's work capability based on his current function. A physical examination revealed decreased lumbar forward flexion but normal rotation.

By decision dated August 17, 2010, OWCP denied modification of the May 13, 2010 decision.

On August 30, 2010 appellant requested reconsideration. He noted that Dr. Knight did not concur with the report of Dr. Ortiz and had requested a functional capacity evaluation.

By decision dated September 17, 2010, OWCP denied appellant's request for further merit review.⁵

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁶ After it has determined that an employee has disability causally related to his federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

Under FECA, the term disability means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.⁹ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.¹⁰ 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.¹¹ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical

⁵ The Board notes that, following the September 17, 2010 decision, OWCP received additional evidence. Appellant also submitted evidence to the Board. However, the Board may only review evidence that was in the record that was before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁶ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁸ See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁹ *K.C.*, Docket No. 09-1666 (issued August 25, 2010); *D.M.*, 59 ECAB 164 (2007); *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

¹⁰ See *Merle J. Marceau*, 53 ECAB 197 (2001).

¹¹ See 20 C.F.R. § 10.5(f); *Robert A. Flint*, 57 ECAB 369 (2006); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.¹²

Section 8123(a) of FECA provides in pertinent part: if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹³ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹⁴

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained aggravations of lumbosacral sprain preexisting degenerative disc disease as a result of the accepted January 10, 2000 employment injury. It determined that a conflict in medical evidence arose between the opinions of appellant's treating physician, Dr. Buckley, and Dr. Mohler, an OWCP second opinion physician, regarding appellant's work capacity and physical limitations. In order to resolve the conflict, it properly referred him, pursuant to section 8123(a) of FECA, to Dr. Ortiz for an impartial medical examination and an opinion on the matter.¹⁵

In a July 8, 2009 report, Dr. Ortiz reviewed the history of injury, the medical treatment records, statement of accepted facts, list of questions and noted appellant's complaints. He provided physical examination findings of midline lumbosacral tenderness on palpation and no evidence of spasm. Based on his review of the diagnostic testing and physical examination findings, Dr. Ortiz advised that the January 10, 2000 injury caused a permanent aggravation of appellant's preexisting L5-S1 degenerative disc disease. Appellant was found capable, however, of full-time work with restrictions. The restrictions were to avoid repetitive bending and twisting motions and no lifting over 40 pounds. Dr. Ortiz reviewed appellant's date-of-injury position as a clerk and concluded that it was within her work restrictions provided the limitations noted.

The Board finds that the special weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Ortiz who was selected as an impartial medical examiner to resolve the conflict in the medical opinion.¹⁶ The July 8, 2009 report from Dr. Ortiz establishes that appellant was not totally disabled, but was capable of working with restrictions.

The Board has carefully reviewed the opinion of Dr. Ortiz and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant

¹² *Fereidoon Kharabi*, 52 ECAB 291 (2001)

¹³ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁴ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

¹⁵ *See S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Darlene R. Kennedy*, *supra* note 13.

¹⁶ *See D.F.*, Docket No. 09-1463 (issued August 12, 2010); *Bryan O. Crane*, 56 ECAB 713 (2005); *Sharyn D. Bannick*, 54 ECAB 537 (2003).

issue of the present case. Dr. Ortiz provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He provided medical rationale for his opinion by explaining that appellant was no longer disabled from working due to his accepted employment injury and was capable of working with restrictions. OWCP properly terminated appellant's wage-loss compensation effective May 13, 2010.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate claimant's compensation benefits, the burden shifted to him to establish that he had any disability causally related to his accepted injury.¹⁷

ANALYSIS -- ISSUE 2

As noted, OWCP properly relied upon the opinion of Dr. Ortiz in terminating appellant's monetary compensation, the burden of proof shifts to appellant to establish that he remains entitled to monetary compensation after that date.

In support of his reconsideration request, appellant submitted a May 17, 2010 report from Dr. Knight, who provided physical findings and diagnosed chronic pain syndrome and L5-S1 degenerative disc disease with probable L5-S1 grade 1 spondylolisthesis. Dr. Knight, however, did not directly address or offer an opinion as to whether appellant was capable of working other than recommending that a functional capacity evaluation be performed. He did not address the duties of appellant's work or the limitations recommended by Dr. Ortiz. Consequently, as Dr. Knight does not address appellant's capacity to work, his report is of diminished probative value.¹⁸ It is thus insufficient to overcome the special weight accorded Dr. Ortiz's opinion or to create a new conflict.

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 3

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁹ 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.²⁰ To be entitled to a merit review of an OWCP decision denying or

¹⁷ See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

¹⁸ See *K.W.*, 59 ECAB 271 (2007).

¹⁹ 5 U.S.C. §§ 8101-8193. 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.

²⁰ 20 C.F.R. § 10.606(b)(2). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²¹ 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.²²

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²³ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²⁴

ANALYSIS -- ISSUE 3

OWCP issued a decision dated May 13, 2010 terminating appellant's wage-loss compensation as it found he was no longer totally disabled from working due to his accepted employment injuries. Appellant requested reconsideration and on August 17, 2010 OWCP denied modification of the May 13, 2010 termination decision. He requested reconsideration of the August 17, 2010 decision.

In his August 30, 2010 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He noted that Dr. Knight had not agreed with the report of Dr. Ortiz and had recommended a physical capacity evaluation. Appellant submitted no pertinent new or relevant medical evidence in support of his request. The underlying issue in this case was whether he is totally disabled from work due to his accepted employment injury and physical restrictions. That is an issue which must be addressed by relevant medical evidence.²⁵ The Board finds that OWCP properly declined to conduct a merit review based on its prior review of the report of Dr. Knight. The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's monetary compensation effective May 13, 2010. The Board further finds that OWCP properly found he had no continuing employment-related disability after May 13, 2010. Lastly, the Board finds

²¹ 20 C.F.R. § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

²² 20 C.F.R. § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

²³ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

²⁴ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²⁵ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

that OWCP properly refused to reopen appellant's case for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 17 and August 17, 2010 are affirmed.

Issued: September 26, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board