

FACTUAL HISTORY

On November 22, 2013 appellant, a 61-year-old health technician, filed an occupational disease claim (Form CA-2) alleging that he sustained a lower back injury due to factors of his federal employment, including many years of lifting and pulling patients in the performance of duty. He stated that he first became aware of his condition and attributed it to his employment on March 20, 2013. The employing establishment indicated that appellant first reported his condition to his supervisor on March 20, 2013.

By decision dated May 19, 2014, OWCP denied the claim as appellant failed to establish fact of injury. It found that the evidence was insufficient to establish that the alleged work events and injuries occurred as alleged.

On July 14, 2014 appellant requested reconsideration and submitted a position description and a memorandum dated July 1, 2014 from the employing establishment stating that appellant's duties included assisting and transporting patients by stretcher and wheelchair to and from procedures at least 30 times per day, which required pushing, pulling, and lifting. He also submitted a narrative statement dated July 8, 2014 alleging that he first injured his back at work on August 23, 2005 while assisting a total care patient into his vehicle. Appellant further alleged a second injury to his lower back on September 13, 2012 while assisting a patient onto a stretcher for transport.

By decision dated October 8, 2014, OWCP denied modification of its prior decision.

On January 28, 2015 appellant requested reconsideration and submitted medical reports and diagnostics studies dated July 12, 2002 through May 29, 2014. Two duty status reports (Form CA-17) dated August 24 and 31, 2005 from a physician assistant diagnosed lumbar strain and indicated on the employing establishment's portion of the form that appellant was injured at work on August 23, 2005 while lifting a patient into a car.³ In a March 25, 2010 report, Dr. Jan Diehl, a radiologist, found an abnormal magnetic resonance imaging (MRI) scan of the lumbar spine and noted that appellant twisted his back while pushing a heavy patient at work.

By decision dated May 29, 2015, OWCP denied appellant's request for reconsideration of the merits finding that he did not submit pertinent new and relevant evidence and did not show that OWCP erroneously applied or interpreted a point of law not previously considered by OWCP.

LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right. It vests OWCP with discretionary authority to determine whether it will review

³ Previous duty status reports in the record contain similar histories on the employing establishment's side of the form.

an award for or against compensation.⁴ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).⁵

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP regulations provide that the evidence or argument submitted by 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.⁶ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁷ 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.⁸

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁹ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.¹⁰

ANALYSIS

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a). Appellant did not demonstrate that OWCP erroneously applied or interpreted a point of law. Moreover, he did not advance a relevant legal argument not previously considered by OWCP.

In support of his January 28, 2015 reconsideration request, appellant submitted medical reports and diagnostics studies dated July 12, 2002 through May 29, 2014, including two duty status reports from a physician assistant and an MRI scan report from a radiologist. The Board finds that submission of these reports do not require reopening appellant's case for merit review as they do not address the factual issue, whether the claimed work events happened as alleged. As noted, OWCP denied the claim based on the lack of supportive factual evidence establishing that the alleged work events and injuries occurred as alleged. The Board, therefore, finds that

⁴ 5 U.S.C. § 8101 *et seq.* Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

⁵ See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

⁶ 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

⁷ 20 C.F.R. § 10.607(a).

⁸ 20 C.F.R. § 10.608(b).

⁹ See *supra* note 5. See also *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹⁰ *Id.* See also *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

these medical reports do not constitute pertinent new and relevant evidence.¹¹ Therefore, they are insufficient to require OWCP to reopen appellant's claim for consideration of the merits.

On appeal appellant argues the merits of his claim. The Board noted above that it only has jurisdiction over OWCP's May 29, 2015 nonmerit decision which denied his request for reconsideration and therefore is precluded from conducting a merit review. Appellant did not submit any evidence to show that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP nor did he submit pertinent new and relevant evidence with his request for reconsideration. The Board finds, therefore, that he did not meet any of the necessary requirements and is not entitled to further merit review.¹²

CONCLUSION

The Board finds that OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2016
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

¹¹ See *S.P.*, 59 ECAB 184 (2007) (where a claimant did not establish an employment incident alleged to have caused his or her injury, it was not necessary to consider any medical evidence).

¹² See *L.H.*, 59 ECAB 253 (2007).