

ISSUE

The issue is 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

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

On February 2, 2018 appellant, then a 54-year-old distribution process worker, filed an occupational disease claim (Form CA-2) alleging that he sustained coccidioidomycosis, or Valley Fever, causally related to factors of his federal employment. He stopped work on October 30, 2017.

On January 29, 2018 Dr. Aarthi Chary, a Board-certified internist specializing in infectious disease, reported that she was treating appellant for a severe form of disseminated coccidioidomycosis and a pulmonary embolism likely caused by the condition. She advised that appellant had been hospitalized on multiple occasions beginning October 20, 2017 due to this condition. Dr. Chary found that appellant was disabled from employment through at least March 2018.

In an undated report received February 21, 2018, Dr. Chary discussed appellant's evaluation on October 30, 2017 for multiple pulmonary embolisms. She advised that a lymph node biopsy performed November 29, 2017 revealed Valley Fever. Dr. Chary diagnosed disseminated coccidioidomycosis, pulmonary coccidioidomycosis, and coccidioidal osteomyelitis, or "severe and widespread Valley Fever," which she noted included infections of appellant's pulmonary system and bones.

By decision dated March 8, 2018, OWCP denied appellant's occupational disease claim. It found that he had not factually established employment-related exposure to Valley Fever. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On March 26, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a report dated June 25, 2018, Dr. Chary described appellant's treatment for Valley Fever beginning October 30, 2017. She related that his work duties, including digging in soil and being around construction, predisposed him to severe infection.

⁴ Docket No. 19-0958 (issued September 24, 2020).

In an undated note received by OWCP on June 2, 2018, Dr. Chary released appellant to resume work on July 9, 2018 in an indoor environment to prevent additional exposure to the fungus.

A telephonic hearing was held before an OWCP hearing representative on August 14, 2018.

By decision dated October 26, 2018, OWCP's hearing representative affirmed the March 8, 2018 decision as modified to show that appellant had been exposed to Valley Fever spores at work. He found, however, that the medical evidence was insufficient to establish that he contracted Valley Fever due to exposure to the fungus at work.

On November 14, 2018 appellant, through counsel, requested reconsideration.

By decision dated February 11, 2019, OWCP denied modification of its October 26, 2018 decision.

A notification of personnel action, Standard Form (SF) 50, indicated that appellant retired on disability effective July 6, 2019.

Appellant appealed to the Board. By decision dated September 24, 2020, the Board set aside the February 11, 2019 decision.⁵ The Board remanded the case for OWCP to refer appellant for a second opinion examination to determine whether he sustained Valley Fever causally related to factors of his federal employment.

OWCP referred appellant to Dr. David F. Busch, a Board-certified internist specializing in infectious disease, for a second opinion examination.

In a report dated April 16, 2021, Dr. Chary advised that appellant had continued symptoms from Valley Fever, including swelling on the right hand at the fourth knuckle and finger, left ankle swelling, bilateral hammertoes, pain and tightness of his hands, knees, and legs, and chest tightness. She noted that a recent ophthalmology examination showed scleritis/episcleritis of the right eye. Dr. Chary advised that appellant was on systemic antifungals and appeared stable. She indicated that he had persistent fatigue which she felt related to his severe disseminated coccidioidomycosis. Dr. Chary opined that it would not be safe for appellant to resume his usual work and that he would likely have insufficient strength or mental ability to perform his duties. She further found that appellant's worsening inflammatory joint and eye issue were "an even greater barrier to returning to prior or related work; he has developed significant stiffness in the hands, knees, and legs, and difficulty even putting on clothes...." Dr. Chary related that "given his significant fatigue and difficulty concentrating since [his] Valley Fever diagnosis, he is also unable to work long hours (a full day) at a desk job."

⁵ *Id.*

In a report dated May 8, 2021, Dr. Busch diagnosed coccidioidomycosis, or Valley Fever, with dissemination due to appellant's work site exposure. He noted that evaluating appellant's ability to work was "not requested as part of this evaluation."

On June 2, 2021 OWCP accepted the claim for acute pulmonary coccidioidomycosis.

On June 17, 2021 counsel for appellant requested that OWCP expand its acceptance of the claim to include the diagnoses provided by Dr. Chary in her April 16, 2021 report.

On June 21, 2021 appellant filed a claim for compensation (Form CA-7) for disability from work for the period July 6, 2019 through June 17, 2021.

On June 23, 2021 the employing establishment advised that appellant was working prior to his separation on July 6, 2019. It noted that Dr. Busch had not evaluated his ability to work and requested that OWCP obtain a supplemental report regarding his ability to work and whether the acceptance of his claim should be expanded to include additional conditions.

In a development letter dated February 7, 2022, OWCP advised appellant of the deficiencies of his claim for disability and requested that he submit a reasoned opinion from his physician explaining why he was unable to perform the duties of his position beginning July 9, 2018. It afforded him 30 days to submit the requested information.

On February 10, 2022 Dr. Chary diagnosed a severe and disseminated Valley Fever infection since 2017 and its sequelae, including disseminated coccidioidomycosis, pulmonary coccidioidomycosis, coccidioidal osteomyelitis, a bone infection, soft tissue/muscle coccidioidomycosis, and post-infections arthritis/reaction arthritis, a type of autoimmune arthritis caused or triggered by Valley Fever. She indicated that appellant was last evaluated on February 11, 2022 and that he had continued episodes of anterior uveitis believed to be sequela of his Valley Fever infection. Dr. Chary advised that appellant had chronic unchanged abnormalities, including left ankle swelling, bilateral hammertoes, and a left fifth toe subluxation. She noted that he also had back nodules that corresponded to an area on diagnostic studies that may represent an active fungal infection. Dr. Chary discussed appellant's symptoms of significant joint pain, stiffness, and swelling and painful vision. She opined that he was unable to operate heavy machinery due to his severe joint pain and stiffness and also because he was on a blood thinner for a lung clot. Dr. Chary found that appellant also had cognitive slowing due to his chronic illness. She noted that he had been given accommodations of a part-time desk job at work for a period but that this option was not available long term. Dr. Chary related, "Given fatigue and cognitive/concentration issues, even a full-time desk job would be taxing and not possible for him. Lastly, appellant's workplace had significant potential for exposure to dust/dirt in an area/location endemic for coccidioidomycosis...." Dr. Chary recommended against appellant working in an environment where he could be again exposed to high amounts of the fungus.

On April 21, 2022 OWCP requested that appellant submit copies of the diagnostic studies referenced by Dr. Chary in her report. It afforded him 30 days to submit the requested information.

Subsequently, OWCP received a positron emission tomography (PET) scan and computerized tomography (CT) scan of the whole body, performed on February 10, 2022, which revealed a history of disseminated coccidioidomycosis with "stable nodal disease involving the

axillary and right perihilar stations, as well as the medial left thigh subcutaneous tissue. There are two new hypermetabolic foci within the musculature of the left erector spinatus and posterior compartment of the right lower thigh.”

On May 3, 2022 counsel requested that OWCP expand its acceptance of the claim to include disseminated coccidioidomycosis and chronic pulmonary coccidioidomycosis.

In a June 15, 2022 memorandum of telephone call (Form CA-110), appellant advised that he had stopped work because he could no longer perform the duties of his position, including lifting and driving a forklift. He related that his employer had accommodated his restrictions but only for a period of time. Appellant asserted that the employing establishment had withdrawn his limited-duty assignment. He used leave to try to find another position but was unsuccessful, and therefore had retired in July 2019.

In a Form CA-110 dated June 15, 2022, an OWCP claims examiner advised that an individual that she contacted with the employing establishment believed that it had accommodated appellant’s work restrictions until his retirement date but would follow-up with management to confirm whether the accommodations had been withdrawn.

In a letter dated June 16, 2022, OWCP informed counsel that he had indicated that the employing establishment had withdrawn his limited-duty position. It noted that the employing establishment had not made a formal job offer as at the time his claim had not been accepted. OWCP indicated that it would obtain an opinion from its district medical adviser (DMA) regarding his claim for expansion.

On July 5, 2022 the employing establishment related that appellant had returned to work from July 9, 2018 until July 5, 2019 on a regular first shift. It noted that before July 9, 2018 he had used leave and leave without pay (LWOP). Prior to his retirement, appellant had requested reassignment through the reasonable accommodation process. The employing establishment advised that before his retirement he was “working in another work center.”

On August 8, 2022 Dr. Chary attributed appellant’s acute pulmonary coccidioidomycosis and disseminated widespread coccidioidomycosis to his federal employment. She noted that he was on blood thinner medication for multiple blood clots in the lungs, and when she tried to get him off the medication, he had a recurrent blood clot in his lung. Dr. Chary noted that a PET/CT scan showed continued active lymph nodes in the lungs.

By decision dated August 15, 2022, OWCP denied appellant’s claim for disability beginning June 6, 2019, causally related to his accepted employment injury.

On August 24, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP’s Branch of Hearings and Review.

Following a preliminary review, by decision dated December 5, 2022, OWCP’s hearing representative vacated the August 15, 2022 decision. The hearing representative remanded the case for OWCP to clarify the duties that appellant had performed from July 2018, when he returned to duty, until his retirement, including whether he returned to regular duty in October 2018.

By January 9, 2023 letter addressed to the employing establishment, OWCP noted that a July 23, 2018 memorandum from it advised that appellant would receive a 90-day temporary assignment performing clerical work and then return to his regular duties. It asked the employing establishment to address at what point between July 2018 and July 2019 he had performed either modified or regular duties. OWCP also asked whether modified duty was available to appellant when he retired.

In a February 8, 2023 response, the employing establishment advised that from December 1, 2017 through July 6, 2018 appellant had used a combination of leave and LWOP. On July 9, 2018 appellant returned to work performing duties that conformed to Dr. Chary's July 13, 2018 work release. His temporary detail provided that on October 8, 2018 he was to report back to his supervisor of record. The employing establishment indicated that it could not "specifically describe the duties [appellant] performed after the expiration of the July 23, 2018 temporary detail or if he returned to regular full-duty work after the expiration of the temporary detail." It further indicated, however, that he was in payroll status until July 5, 2019. The employing establishment noted that he had asked for reasonable accommodation on May 8, 2019, and it had requested medical documentation. If appellant had not retired his request would have been either approved or disapproved and he would have remained employed.

The employing establishment submitted evidence relevant to appellant's request for reasonable accommodation. It requested an explanation of the impact of his physical impairment on performing the essential functions of his date-of-injury position.

The employing establishment further submitted the July 23, 2018 notice advising appellant that effective July 9, 2018 he was temporarily detailed not to exceed 90 days. The duties of the position included document sorting and prepping, filing paperwork, answering telephones, assisting with customer service requests, and general housekeeping. The job indicated that appellant would report back for his normal shift on October 8, 2018. His tour of duty remained the same, 7:00 a.m. until 3:30 p.m. Appellant accepted the position on August 7, 2018.

By decision dated April 18, 2023, OWCP denied appellant's claim for disability from work for the period July 6, 2019 through June 17, 2021.

On April 19, 2023 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on September 27, 2023. Appellant asserted that he was working in a job with reasonable accommodation that was taken away, resulting in him retiring. He described his symptoms and noted that his regular job was as a forklift operator. Appellant related that he was given 90 days to find a job in the employing establishment with his medical restrictions. He noted that in July 2021 he received regular medical retirement. Appellant advised that he wanted to elect benefits from OWCP.

In an October 11, 2023 report, Dr. Swati Varshney, a Board-certified internist specializing in infectious disease, indicated that she was treating appellant for severe and disseminated Valley Fever infection, which involved his lungs, soft tissue/muscle, and bones. She reported, "As a result of the severe and widespread infection, he also developed post-infectious arthritis or reactive

arthritis (this is an autoimmune arthritis that was triggered by his Valley Fever infection). Dr. Varshney advised that appellant had vision changes due to anterior uveitis and/or episcleritis, which “is also felt to be an autoimmune reaction from the Valley Fever infection.” She noted that a positron emission tomography (PET) computerized tomography (CT) scan showed “waxing and waning lymph nodes that represent areas of the coccidiomycosis infection.” Dr. Varshney described appellant’s symptoms of joint pain and swelling in his hands, knees, hips, shoulders, neck, and ankles, which she noted a rheumatologist had attributed to reactive or inflammatory arthritis. She opined that he did not have the physical or cognitive ability to work because of “the infection and its debilitating sequelae.” Dr. Varshney noted that he required lifelong antifungal medication. She further found that appellant should avoid exposure to the Valley Fever fungus.

On October 24, 2023 the employing establishment noted that Dr. Chary, in her April 29, 2019 letter, advised that appellant should maintain on light duty. It indicated that he had retired while in the process of requesting reasonable accommodation.

In a statement dated November 15, 2023, appellant asserted that he was forced to separate from employment. He was out of work from November 2017 to July 2018 during which time he used all of his annual and sick leave, as well as donated and leave under the Family and Medical Leave Act (FMLA). Appellant returned to work in July 2018 with restrictions. He worked at a desk filing paperwork and answering telephones from July 2018 to May 2019, when his 90-day detail ended. Dr. Chary advised in April 2019 that his illness would last his entire life and he would need to work light duty, so he began the reasonable accommodation process. The employing establishment advised appellant that his light duty had expired, and he had 90 days to find a job or be terminated from employment. On July 2, 2019 appellant filed for medical disability in lieu of being terminated as they would no longer hire him at the employing establishment with his medical restrictions.

By decision dated November 20, 2023, OWCP’s hearing representative affirmed the April 18, 2023 decision.

Subsequently, OWCP received a November 15, 2023 statement from appellant, who related that he was forced to separate from employment when he had used all of his leave as a result of his illness. Appellant indicated that he had returned to work from July 2018 to May 2019 in a modified position not to exceed 90 days. In April 2019, Dr. Chary advised that appellant had permanent work restrictions, and the employing establishment began the reasonable accommodation process. At a meeting the employing establishment advised that appellant had 90 days to find work, or it would terminate his employment. Appellant indicated that he could not find another position and resigned on July 2, 2019, in lieu of being terminated.

In a report dated February 27, 2024, Dr. Varshney described appellant’s current symptoms and physical findings from his most recent visit. She noted that he had recurrent bilateral episcleritis of the eyes from an immune reaction due to his Valley Fever infection, and again found “waxing and waning lymph nodes on diagnostic studies representing areas of infection.” Dr. Varshney further noted that appellant had significant joint stiffness and swelling of the hands, knees, hip, shoulders, neck, and ankles due to possible rheumatoid arthritis. She opined that he was unable to operate a forklift due to his significant fatigue, pain, cognitive slowing due to

chronic illness, and severe joint pain. Dr. Varshney again advised that appellant should not be exposed to the Valley Fever fungus in his environment.

On March 13, 2024 appellant, through counsel, requested reconsideration.

By decision dated March 20, 2024, OWCP denied appellant's request for reconsideration of the merits of his claim, pursuant to 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.⁶

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.⁷

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁸ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁹ 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.¹⁰

⁶ 5 U.S.C. § 8128(a); *see C.V.*, Docket No. 22-0078 (issued November 28, 2022); *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).

⁷ 20 C.F.R. § 10.606(b)(3); *see K.D.*, Docket No. 22-0756 (issued November 29, 2022); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁸ *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 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.

⁹ *Id.* at § 10.608(a); *see also D.B.*, Docket No. 22-0518 (issued November 28, 2022); *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

¹⁰ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

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 has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant legal argument not previously considered by OWCP. Consequently, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).¹¹

Moreover, appellant has not provided relevant and pertinent new evidence in support of his request for reconsideration. In support of his request, he submitted a February 27, 2024 report from Dr. Varshney, who described his continued problems from his severe Valley Fever infection, including recurrent bilateral episcleritis of the eyes, waxing and waning lymph nodes showing continued infection, and joint stiffness and swelling. Dr. Varshney found that appellant was unable to operate a forklift because of his pain, fatigue, and cognitive slowing due to his chronic illness, and should avoid environments that would expose him to the Valley Fever fungus. However, she submitted a substantially similar report on October 11, 2023. The Board has held that medical evidence that either duplicates or is substantially similar to evidence previously of record does not constitute a basis for reopening a case.¹² Therefore, Dr. Varshney's report is insufficient to warrant reopening appellant's claim for further merit review. Appellant is thus not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).

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.¹³

CONCLUSION

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).

¹¹ 20 C.F.R. § 10.606(b)(3)(i) and (ii); *see also* C.K., Docket No. 18-1019 (issued October 24, 2018).

¹² *See* L.E., Docket No. 22-0004 (issued April 14, 2023); C.B., Docket No. 22-0144 (issued March 16, 2023); B.S., Docket No. 20-0927 (issued January 29, 2021); *Eugene F. Butler*, 36 ECAB 393, 398 (1984).

¹³ D.A., Docket No. 22-0762 (issued September 30, 2022); T.G., Docket No. 20-0329 (issued October 19, 2020); C.C., Docket No. 17-0043 (issued June 15, 2018).

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 3, 2024
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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