



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and history contained in the prior appeals are incorporated herein by reference.

The relevant facts include that in 1992 appellant, then a 37-year-old mail processing clerk, filed an occupational disease claim (Form CA-2), which was accepted for bilateral carpal tunnel syndrome, lateral epicondylitis, right, and calcifying tendinitis of the left shoulder. On November 25, 2008 OWCP found that her actual earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity.

Appellant filed claims (Forms CA-7) for wage-loss compensation beginning December 2, 2009 because the employing establishment had withdrawn her limited-duty position on that date due to the National Reassessment Process (NRP). OWCP denied her claims for wage loss by decision dated October 29, 2010, finding that she had failed to establish that her formal loss of wage-earning capacity should be modified. Appellant requested a review of the written record by the Branch of Hearings and Review.

By decision dated February 17, 2011, the hearing representative affirmed the October 29, 2010 decision denying modification of the wage-earning capacity determination. Appellant requested reconsideration of that decision and, by decision dated March 12, 2012, OWCP reviewed the merits of the claim, but denied modification of the prior OWCP decisions.

Appellant appealed to the Board on April 5, 2012 and, by decision dated January 15, 2013,<sup>3</sup> the Board set aside the March 12, 2012 OWCP decision and remanded the case for OWCP to properly develop the evidence under FECA Bulletin 09-05, which had specific procedures in place when a limited-duty position was withdrawn under the NRP.

By letter dated February 11, 2013, OWCP requested additional information from the employing establishment related to appellant's modified-duty position. It requested that the employing establishment confirm that the position, upon which the wage-earning capacity decision was based, was a *bona fide* position.

In a letter dated April 3, 2013, Rachel Munoz, the health and resources manager, responded that the modified job offer was not makeshift work. She explained that appellant was offered a position as a modified mail processing clerk based upon the employee's medical restrictions consistent with "Employee Labor Management 546." Ms. Munoz noted that a grievance was settled and appellant was awarded a bid as a general clerk and continued to work

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<sup>2</sup> By decision dated April 26, 2002, the Board affirmed the termination of appellant's wage-loss compensation and medical benefits effective January 4, 2000 but remanded the case to OWCP for payment of wage-loss compensation for intermittent dates of medical examinations. Docket No. 00-1097 (issued April 26, 2002); *petition for recon. denied* October 17, 2002. By decision dated February 2, 2005, the Board affirmed the denial of appellant's claims for shoulder and neck conditions causally related to her accepted employment injuries, affirmed the denial of intermittent wage-loss compensation for the period August 25 to October 10, 2003, and affirmed the denial of a merit review under 5 U.S.C. § 8128(a). Docket No. 04-1195 (issued February 2, 2005).

<sup>3</sup> Docket No. 12-1001 (issued January 15, 2013).

in that capacity. She noted that appellant was required to pass a typing test and was awarded the position because of her specialized skill.

In an April 11, 2013 decision, after further developing the evidence pursuant to the Board's remand, OWCP denied modification of its November 25, 2008 wage-earning capacity decision. It found that the original wage-earning capacity decision had been based on an actual, *bona fide* position, that it had been based on appellant's medical restrictions at the time, that there was no material change in the nature or extent of the work-related conditions, and that she continued to be capable of performing the duties of that limited-duty position.

On April 22 and June 23, 2013 appellant again requested reconsideration. She argued that her wage-earning capacity position was makeshift. Appellant claimed that she was offered duties within her medical restrictions, but they were not for an actual position. She requested compensation from December 2, 2009, the date she was sent home. In addition, appellant submitted medical reports from Dr. Michael E. Hebrard, a Board-certified physiatrist, dated July 11 and August 13, 2013. Dr. Hebrard found no evidence of peripheral neuropathy or that she should remain at the modified sedentary position.

By decision dated September 17, 2013, OWCP found the evidence of record insufficient to modify its April 11, 2013 decision. It noted that the employing establishment had verified that the position was not makeshift and there was no evidence that she could no longer perform the light duties set out in the wage-earning capacity determination.

On February 23 and 25, 2014 appellant requested reconsideration and submitted additional arguments.

In a letter dated March 19, 2014, OWCP requested that the employing establishment provide additional information to clarify the details of the modified position of a mail processing clerk. In response, the employing establishment provided another copy of its April 3, 2013 letter and penciled in the date "May 15, 2014."

By decision dated May 28, 2014, OWCP denied modification of its prior decision. It reviewed the evidence and found it failed to establish that the wage-earning capacity decision should be modified.

On June 1 and August 25, 2014 appellant again requested reconsideration. She reiterated that her wage-earning capacity decision was based upon a temporary makeshift position which terminated one year and six months after it was offered and she claimed that, as the work she had been doing was not necessary, it was not an actual position. Appellant further argued that OWCP had failed to review her evidence or her grievance.

On August 11, 2014 OWCP received a July 30, 2014 supplemental report from Dr. Hebrard. Dr. Hebrard opined that appellant's claims for wage loss were work related. He explained that her conditions developed from repetitive grasping, fingering, and pinching, flexion and extension of the hand and wrist, pressuring the median nerve in the carpal tunnel and over time, she developed paresthesias, weakness, and pain. Dr. Hebrard opined that appellant had weakness, stiffness, inflammation of the hands, and increased paresthesias. He noted that there was a subjective increase in pain which impeded her activities of daily living and her work

performance which required grasping, fingering, and pinching, pushing, pulling, reaching, and lifting. Dr. Hebrard found that the activities and processes caused an aggravation of an underlying, preexisting condition. He explained that it was his opinion “with a reasonable degree of medical certainty that there is a causal relationship between [appellant’s] occupational exposure (date of injury of May 23, 1987) and her ongoing chronic condition.” Dr. Hebrard opined that appellant had permanent disability and impairment and, in light of the progression of pathology, might need wrist surgery.

By decision dated September 4, 2014, OWCP denied modification of its prior decision. It found that the new evidence did not show a material change to the nature and extent of the original work-related conditions.

On September 19, 2014 appellant again requested reconsideration. She argued that the original decision and rating were in error, she was retrained and or vocationally rehabilitated, and her medical condition changed from the original accepted condition. Appellant explained that she originally had several claims that were doubled and her claim was accepted for muscle spasm of the right trapezius area, right trapezius strain, and right tendinitis. She argued that Ms. Munoz provided only a statement and no proof of a bid posting that the modified assignment was an actual position. Appellant also argued that limited-duty assignments were provided to employees during the recovery process when the effects of the injury were considered temporary. She argued that her assignment was temporary and ended on December 1, 2009. Additionally, appellant indicated that she filed a grievance and it was found that the job was ended because it was unnecessary and the tasks were assigned to other employees with bidded positions. She argued that she sustained a material physical change in the nature and extent of her work-related conditions. Appellant explained that she now had subluxation of the shoulder, bicipital tenosynovitis, rotator cuff syndrome, bilaterally, and bursitis. She argued that OWCP failed to include her accepted conditions when her files were doubled. Appellant argued that she began the rehabilitation process in April 2007 and was able to return to the employing establishment in the capacity of a general clerk.

Appellant provided copies of previously submitted evidence and a claim for compensation. Also submitted was a July 16, 2014 report from Dr. Hebrard. Dr. Hebrard noted seeing appellant for bilateral shoulder pain, worse on the right. He noted findings and diagnosed shoulder subluxation, bicipital tendinitis, and rotator cuff syndrome, bursitis. Dr. Hebrard opined that there was a causal relationship between a September 5, 1985 work event and appellant’s current condition.<sup>4</sup>

In a decision dated March 19, 2015, OWCP denied appellant’s request for reconsideration finding that the evidence submitted was insufficient to warrant a merit review of its prior decision. It found that the evidence was cumulative and repetitive and thus substantially similar to evidence or documentation already contained in the case file and previously considered.

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<sup>4</sup> Dr. Hebrard referenced claim number xxxxxx120. This claim is not before the Board on the present appeal.

## LEGAL PRECEDENT

As a general rule, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner should evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>5</sup> Nonetheless, in cases where arguments submitted have previously been addressed by OWCP and in which a claimant submits no new or relevant evidence, OWCP may address the request under the provisions found in section 8128 of FECA and deny merit review.<sup>6</sup>

The OWCP procedure manual provides that when appellant files a request for reconsideration after a wage-earning capacity is in place, OWCP should carefully review the request to determine whether it is actually a request for reconsideration of a prior decision, rather than a request for modification of the wage-earning capacity.<sup>7</sup>

Under section 8128(a) of FECA,<sup>8</sup> OWCP may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provide that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(1) Shows that [OWCP] erroneously applied or interpreted a specific point of law; or

“(2) Advances a relevant legal argument not previously considered by OWCP; or

“(3) Constitutes relevant and pertinent new evidence not previously considered by [OWCP].”<sup>9</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>10</sup>

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<sup>5</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>6</sup> *A.P.*, Docket No. 14-851 (issued September 2, 2014). *See also G.A.*, Docket No. 14-1505 (issued November 5, 2014).

<sup>7</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Case/Disability Management*, Chapter 2.1501(4)(a) (June 2013).

<sup>8</sup> *Supra* note 1 at § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.606(b).

<sup>10</sup> *Id.* at § 10.608(b).

## ANALYSIS

The only decision before the Board in this appeal is the decision of OWCP dated March 19, 2015 denying appellant's request for reconsideration, finding that the evidence of record was insufficient to warrant a merit review. The Board finds that OWCP properly handled this case as a request for reconsideration rather than a request for modification of the wage-earning capacity determination.

On November 25, 2008 OWCP found that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. In merit decisions dated April 11 and September 17, 2013 and May 28 and September 4, 2014, it denied her requests for modification of the wage-earning capacity decision. Appellant again requested reconsideration on September 19, 2014.

Appellant disagreed with OWCP's September 4, 2014 denial of her request for reconsideration and timely requested reconsideration on September 19, 2014. In this request for reconsideration, she repeated her previous arguments that the original decision and rating were in error, she was retrained and or vocationally rehabilitated, and her medical condition changed from the original accepted condition. Appellant argued that Ms. Munoz provided only a statement and no proof of a bid posting that the modified assignment was an actual position.

Appellant also argued that limited-duty assignments were provided to employees during the recovery process when the effects of the injury were considered temporary. She believed that her assignment was temporary because it ended on December 1, 2009. Additionally, appellant indicated that she filed a grievance and it was found that the job was ended because it was unnecessary and the tasks were assigned to other employees with bid positions. She argued that she sustained a material physical change in the nature and extent of her work-related conditions. Appellant explained that she now had subluxation of the shoulder, bicipital tenosynovitis, rotator cuff syndrome, bilaterally, and bursitis. She argued that OWCP failed to include her accepted conditions when doubling her claims. Appellant also argued that she started the rehabilitation process in April 2007 and was able to return to the employing establishment in the capacity of a general clerk.

The Board finds that OWCP had previously considered all of these or similar arguments when it had previously denied appellant's requests for modification of her wage-earning capacity determination in the prior decisions. Appellant did not present any relevant or pertinent new evidence or arguments which had not been previously considered. The Board has held that evidence or argument which repeats or duplicates the existing case record does not constitute a basis for reopening a case.<sup>11</sup>

Appellant also presented no new relevant evidence with her request for reconsideration to support her arguments regarding the suitability of the position utilized by OWCP when it issued its November 25, 2008 wage-earning capacity decision. She provided a July 16, 2014 report from Dr. Hebrard which pertained to a separate claim. Dr. Hebrard did not otherwise address

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<sup>11</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *see also A.K.*, Docket No. 15-451 (issued April 13, 2015).

whether appellant had a material change in the nature and extent of her work-related conditions.<sup>12</sup>

Appellant therefore did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, OWCP properly denied a merit review.

### **CONCLUSION**

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

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 19, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 2015  
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>12</sup> See *Betty A. Butler*, 56 ECAB 545 (2005) (evidence that does not address the particular issue involved does not constitute a basis for reopening a claim).