



## **FACTUAL HISTORY**

On April 17, 2007 appellant, a 53-year-old rural mail carrier, filed an occupational disease claim alleging that he sustained injuries to his cervical spine and upper extremities as a result of employment activities.<sup>3</sup> OWCP accepted his claim for aggravation of degeneration of thoracic intervertebral disc and aggravation of degenerative disc disease at C4-5.

OWCP found a conflict in medical opinion between appellant's treating physician, Dr. Patrick M. Curlee, a Board-certified orthopedic surgeon, who opined that he was totally disabled, and a second opinion physician, Dr. Carl Huff, a Board-certified orthopedic surgeon, who opined that his accepted conditions had resolved and that he was able to return to regular duties. Appellant was referred to Dr. James Galyon, a Board-certified orthopedic surgeon, in order to resolve the conflict. In a November 15, 2007 report, Dr. Galyon diagnosed degenerative disc disease at C4-5, which he opined was continually aggravated by driving a postal vehicle and retrieving mail. He advised that appellant was capable of sedentary work only and recommended that he be restricted from working more than six hours per day, from reaching above the shoulder and from lifting more than 10 pounds.

On February 7, 2008 the employing establishment offered appellant a four-hour-a-day modified rural carrier position, which it characterized as "sedentary clerical work." Duties included: (1) processing "kill mail;" (2) answering telephones (taking messages and paging appropriate employees; and (3) serving as lobby director (assisting and directing customers). On February 21, 2008 OWCP notified appellant that it found the February 7, 2008 job offer to be suitable and in accordance with Dr. Galyon's restrictions, and gave him 30 days to accept the position or provide an acceptable reason for rejecting it. On February 25, 2008 appellant informed OWCP that he was unable to perform the duties of the offered position due to his lower back and neck condition. On March 26, 2008 OWCP advised appellant that his reasons for refusing the position were unacceptable and provided him 15 days to accept the position.

Appellant submitted a report dated April 9, 2008 from Dr. Roger Vogelfanger, a Board-certified psychiatrist, who had treated appellant for depression. Dr. Vogelfanger opined that he would be unable to return to work due to his history of depression and chronic pain.

By decision dated April 14, 2008, OWCP terminated appellant's compensation benefits based on his refusal to accept suitable employment. On April 20, 2008 appellant requested an oral hearing.

In a decision dated December 23, 2008, a hearing representative affirmed the April 14, 2008 decision finding that the physical requirements of the offered position conformed to Dr. Galyon's restrictions. The representative stated that appellant had failed to submit any substantive medical evidence proving disability for the offered position based on his emotional, low back, carpal tunnel, shoulder or acid reflux conditions. He found that Dr. Vogelfanger's

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<sup>3</sup> A review of FECA indicates that appellant's May 16, 1986 traumatic injury claim was accepted for chronic lumbar strain (File No. xxxxxx167). Appellant's February 23, 2005 claim for neck and back injuries was denied (File No. xxxxxx154). His March 6, 2007 emotional disease claim was also denied (File No. xxxxxx35).

April 9, 2008 report was deficient, as it did not provide examination findings or address appellant's ability to perform the duties of the position offered on February 7, 2008.

On December 22, 2009 appellant, through his representative, submitted a request for reconsideration together with additional medical evidence. Counsel argued that OWCP failed to consider the entirety of appellant's physical conditions, both work related and nonwork related, as required by Office procedures. He contended that if a claimant was disabled from a position due to a nonwork-related medical condition arising subsequent to a compensable injury, the position will be considered unsuitable.<sup>4</sup> Counsel contended that the newly submitted medical reports were sufficient to meet appellant's burden of proof.

Appellant submitted a June 4, 2009 report from Dr. Vogelfanger, who stated that he had treated appellant on a regular basis since March 16, 2007 when he was diagnosed with major depressive episode severe, dysthymia and alcohol dependency. Dr. Vogelfanger noted that, as of April 9, 2008, appellant was taking medications (including prozac, klonopin and lyrica) capable of causing dizziness, abnormal coordination, emotional liability, confusion, nervousness, anxiety, weakness and problems concentrating. Noting that he had reviewed the position offered to appellant on February 7, 2008, he opined that appellant was not able to return to work on April 9, 2008 and was not able to be physically present to perform those tasks. As of March 31, 2008 appellant was having periods of uncontrollable crying, was experiencing sleep disturbance on a regular basis and when even driving near any postal facility, reported severe anxiety, which was manifested by difficulty breathing, shaking and feelings of impending doom. When he attempted unsuccessfully to return to work in 2007, he reported ongoing anxiety in interacting with others. Dr. Vogelfanger opined that appellant's inability to interact with others would preclude his ability to perform the duties of the offered position.

On June 16, 2009 OWCP authorized a cervical spinal fusion and removal of vertebral body and insertion of spinal fixation device.

Appellant submitted a September 23, 2009 report from Dr. Adrian Blotner, a Board-certified psychiatrist, who noted appellant's increasing neck and low back pain and described symptoms of decreased energy, anxiety, depressed mood and decreased concentration. He also submitted August 28 and September 16, 2009 reports from Dr. Leslie R. McGowan, a Board-certified urologist, regarding his bladder condition.

By decision dated May 25, 2010, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was duplicative and cumulative in nature and therefore insufficient to warrant merit review. The claims examiner stated that "most of the arguments presented [were] already addressed in the hearing decision dated December 24, 2008 and offer no new information."

On appeal appellant contends that the employing establishment was attempting to force him to accept a position he was unable to perform physically or mentally, as established by the medical evidence.

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<sup>4</sup> Counsel cited Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (December 1995).

## LEGAL PRECEDENT

In order to reopen a case for merit review under section 8128(a) of FECA,<sup>5</sup> OWCP's regulations provide that a claimant must submit evidence or argument that: (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.<sup>6</sup> To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.<sup>7</sup> 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.<sup>8</sup>

In order to obtain merit review, appellant need not submit evidence sufficient to discharge his burden of proof. Rather, the new evidence must be only relevant and pertinent and not previously considered by OWCP.<sup>9</sup>

## ANALYSIS

As noted, the Board does not have jurisdiction over the merits of this case. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2) requiring OWCP to reopen the case for review of the merits. The Board finds that appellant satisfied two of the three requirements. Therefore, OWCP abused its discretion by denying his request for further merit review.

In the December 22, 2009 request for reconsideration, appellant's representative argued that OWCP failed to consider the entirety of appellant's physical conditions, both work related and nonwork related, as required by OWCP procedures. He also contended that if a claimant is disabled from a position due to a nonwork-related medical condition arising subsequent to a compensable injury, the position will be considered unsuitable. The Board finds that counsel advanced a relevant legal argument not previously considered by the Office.<sup>10</sup>

The Board also finds that appellant submitted relevant and pertinent new evidence not previously considered by the Office.<sup>11</sup> Dr. Vogelfanger's June 4, 2009 narrative report is new

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<sup>5</sup> Section 8128(a) of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(2).

<sup>7</sup> *Id.* at § 10.607(a).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *See F.D. (S.D.)*, 58 ECAB 413 (2007); *Donald T. Pippin*, 53 ECAB 631 (2003).

<sup>10</sup> 20 C.F.R. § 10.606(b)(2). The Board notes that in denying merit review, the claims examiner stated that "most of the arguments presented [were] already addressed" in the prior decision, acknowledging that some arguments had not been addressed.

<sup>11</sup> *Id.*

evidence and is relevant to the issues addressed by the December 23, 2008 decision. The hearing representative found that Dr. Vogelfanger's prior report was deficient, in part, because it did not address appellant's ability to perform the duties of the position offered on February 7, 2008. In a June 4, 2009 report, Dr. Vogelfanger opined that appellant was unable to perform the duties of the proposed modified position due to symptoms related to his diagnosed depression and anxiety, which he described in detail and side effects of required medications. He further opined that appellant's ability to interact with others precluded his ability to perform two of the three duties identified in the job description (answering phones (taking messages and paging appropriate employees) and serving as lobby director (assisting and directing customers)). As discussed, to obtain merit review, a claimant need not submit all evidence that may be necessary to discharge his burden of proof. Rather, the evidence need only be relevant and pertinent and not previously considered by OWCP.<sup>12</sup> Dr. Vogelfanger's June 4, 2009 report satisfies this requirement.

The Board finds that appellant advanced a relevant legal argument not previously considered by OWCP and submitted relevant and pertinent new evidence not previously considered. Appellant has met the requirements for obtaining further merit review.<sup>13</sup> The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, OWCP shall issue a merit decision on the claim.

### **CONCLUSION**

The Board finds that OWCP improperly denied appellant's request for further review of the merits under 5 U.S.C. § 8128(a).

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<sup>12</sup> See *F.D. supra* note 9; *Donald T. Pippin, supra* note 9.

<sup>13</sup> 20 C.F.R. § 10.606(b)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 25, 2010 is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 9, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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