



## **FACTUAL HISTORY**

On February 3, 2011 appellant, a 42-year-old mail handler, filed an occupational disease claim alleging that he felt discomfort in the shoulder and arm that he had used to carry his mailbag for the past 18 years. He did not submit any evidence in support of his claim.

By decision dated April 12, 2011, OWCP denied appellant's claim on the grounds that he had failed to establish the fact of injury. The claims examiner stated that appellant had not described the injury and had not submitted any factual or medical evidence to support his claim.

On March 22, 2012 appellant, through his representative, requested reconsideration.

Appellant submitted a March 20, 2012 report from Dr. Laura Ross, a Board-certified osteopath, specializing in orthopedic surgery, who stated that she first treated appellant on September 9, 2011 for neck and left arm pain, and subsequently examined him on October 28 and December 9, 2011. She noted that appellant had been carrying a 35-pound mailbag on his left shoulder for the previous 19 years in his job as a mail carrier. Dr. Ross provided examination findings, reviewed results of x-rays and magnetic resonance imaging scans and diagnosed disc protrusion at C6-7, with C6 and C7 radiculopathy and exacerbation of mild cervical spondylosis. She opined that, due to the type of work he performed, combined with his history and his clinical and objective findings, appellant's diagnosed conditions were directly related to his described job duties.

By decision dated May 31, 2012, OWCP denied appellant's reconsideration request on the grounds that the evidence submitted did not warrant merit review. The claims examiner found that Dr. Ross' March 20, 2012 report was "of no relevance in determining the factual basis of [appellant's] claim," and was immaterial to the issue to be resolved.

On appeal, counsel argues that Dr. Ross' report constitutes new and relevant evidence warranting merit review.

## **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, section 10.606(b)(2) of Title 20 of the Code of Federal 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>3</sup> 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.<sup>4</sup> Section 10.608(b) provides that, when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section

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<sup>3</sup> 20 C.F.R. § 10.606(b)(2).

<sup>4</sup> *Id.* at § 10.607(a).

10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>5</sup>

### ANALYSIS

The Board finds that OWCP abused its discretion in denying appellant's request for reconsideration.

Appellant's request for reconsideration neither alleged, nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by OWCP. Consequently, appellant 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)(2). A claimant may obtain a merit review of an OWCP decision by submitting new and relevant evidence. The Board finds that appellant is entitled to further review of the merits based on the third requirement under section 10.606(b)(2).

In its April 12, 2011 decision, OWCP denied appellant's claim on the grounds that he had failed to establish the fact of injury, indicating that appellant had not described the claimed injury and had not submitted any factual or medical evidence to support his claim. On May 31, 2012 OWCP denied appellant's reconsideration request, finding that Dr. Ross' March 20, 2012 report was of no relevance in determining the factual basis of appellant's claim. The Board finds that Dr. Ross' report constitutes new and relevant evidence warranting merit review. Although the report is obviously medical in nature, it addresses the factual basis of appellant's claim. Dr. Ross related the history of the injury, as reported by appellant, noting that he had been carrying a 35-pound mailbag on his left shoulder for the previous 19 years in his job as a mail carrier. Based on appellant's representations and objective medical evidence, Dr. Ross opined that these work activities were the cause of his diagnosed disc protrusion, radiculopathy and exacerbation of mild cervical spondylosis. The Board also notes that the April 12, 2011 denial decision was based in part on the fact that appellant had not submitted any factual or medical evidence to support his claim. Therefore, the submission of Dr. Ross' report was responsive and relevant to the April 12, 2011 decision.

The Board finds that OWCP abused its discretion in denying appellant's request for reconsideration. Therefore, the case will be remanded to OWCP for a merit review of the claim. Following this and such other development as deemed necessary, OWCP shall issue an appropriate decision.

### 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>5</sup> *Id.* at § 10.608(b). See also *T.E.*, Docket No. 07-2227 (issued March 19, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 31, 2012 is set aside and the case is remanded for further proceedings consistent with the decision of the Board.

Issued: March 15, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board