



## **ISSUES**

The issues are: (1) whether OWCP properly refused to reopen appellant's claim for merit review pursuant to 5 U.S.C. § 8128(a) on November 29, 2012; and (2) whether it properly denied his request for reconsideration on January 17, 2013 on the grounds that his request was not timely filed and did not demonstrate clear evidence of error.

On appeal, appellant asserts that the job classification and labor market survey relied upon by OWCP in establishing his vocational rehabilitation plan exceeded his physical restrictions.

## **FACTUAL HISTORY**

This case was previously before the Board. In a February 3, 2011 decision, the Board found that on June 18, 2009 OWCP properly reduced appellant's compensation to zero under section 8113(b) of FECA because he failed, without good cause, to cooperate with vocational rehabilitation. The Board reviewed the evidence of record and found that, as appellant had not submitted any rationalized medical evidence to establish his claimed inability to continue with the approved computer-aided drafting (CAD) classroom training, there was no basis to find good cause to discontinuing participation in vocational rehabilitation. The Board affirmed a January 14, 2010 decision of an OWCP hearing representative who affirmed the June 18, 2009 OWCP decision.<sup>3</sup> On February 22, 2011 appellant filed a petition for reconsideration with the Board. He asserted that the civil drafter position, on which his vocational rehabilitation plan was based, had physical requirements outside his physical limitations. In an order dated October 26, 2011, the Board denied appellant's petition for reconsideration. The facts of the case as set forth in the Board's previous decision are incorporated herein by reference.

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<sup>3</sup> Docket No. 10-1599 (issued February 3, 2011). On February 24, 1974 appellant, a ship fitter who had a history of polio as a child, sustained a work-related left shoulder sprain, left bicep tendon rupture, right knee strain and permanent aggravation of chondromalacia of the right knee. He stopped work at the employing establishment in 1981. From 1981 to January 28, 2008, he worked in private employment. Appellant had numerous surgeries, including a right knee total arthroplasty on January 28, 2008, performed by Dr. Gregory M. Engel, a Board-certified orthopedic surgeon. OWCP accepted a recurrence of disability and placed him on the periodic compensation rolls. In reports dated June 3, August 18 and 19, 2008, Dr. Engel advised that appellant could return to work with permanent restrictions. On June 12, 2008 OWCP referred appellant to Dr. Richard E. Hall, a Board-certified orthopedist. In reports dated July 10 and August 5, 2008, Dr. Hall advised that appellant could return to full-time sedentary work with permanent restrictions. In October 2008 appellant was referred to Kierstin Clawson, a vocational consultant, who prepared a rehabilitation plan for a course of study in CAD training at a community college with a planned goal of employment as a drafter or civil drafter. Ms. Clawson provided a labor market survey and identified the position of civil drafter as within the sedentary strength category, with occasional stooping and lifting of 10 pounds occasionally and no climbing, balancing, kneeling, crawling or crouching. She advised that the job was reasonably available in the local labor market at a weekly wage of \$1,227.60. Appellant signed the plan on February 12, 2009 and it was approved by OWCP. He registered for and then withdrew from the recommended classes in April 2009 and provided reports from Dr. Engel advising that he was totally disabled. On June 18, 2009 OWCP reviewed the medical evidence, advised that the training plan was medically suitable and reduced appellant's compensation to zero on the grounds that he failed to cooperate with vocational rehabilitation efforts. Appellant requested a hearing and submitted additional reports from Dr. Engel. By decision dated January 14, 2010, OWCP's hearing representative affirmed the June 18, 2009 decision, finding that the medical evidence established that appellant could perform the duties of civil drafter.

On November 21, 2011 appellant requested reconsideration with OWCP. In a nonmerit decision dated January 5, 2012, OWCP denied his request.

In correspondence dated January 15, 2012, received by OWCP on February 7, 2012, appellant again requested reconsideration. In a February 9, 2012 decision, OWCP denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error.

The record reflects that on February 15, 2012 OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a March 21, 2012 report, Dr. Dinenberg described physical examination findings and diagnosed degenerative joint disease of both knees. He advised that appellant could work eight hours a day, sitting duties only, with permanent physical restrictions. By letter dated May 7, 2012, OWCP informed appellant it accepted permanent aggravation of preexisting degenerative joint disease of the left knee.

On May 11, 2012 appellant again requested reconsideration. He submitted a January 26, 2012 report from Dr. Carolyn Taylor, a Board-certified neurologist, who noted that appellant was under her care for management of postpolio syndrome. Dr. Taylor stated that appellant provided her with a job description which described the civil drafter work environment as requiring kneeling, climbing, standing and walking, and that he would be required to accompany survey crews in the field for the purpose of locating markers and collecting data. She advised that appellant's postpolio condition was severe and prevented him from standing for any period of time of walking, climbing or kneeling. Dr. Taylor advised that he was disabled to the point that he could not perform the described duties of civil drafter position. In a June 22, 2012 decision, OWCP denied merit review. On August 13, 2012 it accepted aggravation of left leg preexisting postpolio syndrome.

On August 29 and 31, 2012 appellant requested reconsideration. He argued that the physical demands for the civil drafter position were not accurately described in the job classification form used in his vocational rehabilitation plan, which invalidated the June 18, 2009 OWCP decision. Appellant specifically argued that the physical requirements for the civil drafter position listed in the *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* indicated that kneeling was to be done occasionally whereas the rehabilitation plan described kneeling as not required. He also submitted a January 23, 2012 report from Dr. James E. Clark, a Board-certified orthopedic surgeon, who described appellant's postpolio syndrome. Dr. Clark advised that appellant did not need knee replacement on the left at that time.

In an order dated September 26, 2012, the Board dismissed appellant's appeal at his request.<sup>4</sup>

On October 23, 2012 OWCP returned appellant to the periodic compensation rolls, effective February 18, 2012.

In a nonmerit decision dated November 29, 2012, OWCP denied appellant's reconsideration request. It noted that his argument had previously been addressed.

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<sup>4</sup> Docket No. 12-1733 (issued September 26, 2012).

On December 7, 2012 appellant again requested reconsideration and again asserted that the job classification data for the civil drafter position relied upon by OWCP in its June 18, 2009 decision did not correctly identify the physical demands for kneeling and climbing and were outside his restrictions.

By decision dated January 17, 2013, OWCP denied appellant's reconsideration request on the grounds that his request was untimely filed and that he failed to establish clear evidence of error on the part of OWCP. It noted that the merit issue in the case was his failure to cooperate with vocational rehabilitation services.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>5</sup> Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>6</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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>7</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP improperly denied his request for merit review pursuant to section 8128(a) of FECA. The Board's February 3, 2011 decision affirmed OWCP's determination that appellant failed without good cause to cooperate with vocational rehabilitation. It reduced his compensation effective June 17, 2009, based on his capacity to perform the duties of a civil drafter under section 8113(b). The penalty provision allows OWCP to reduce compensation based on what probably would be an employee's wage-earning capacity until good faith compliance. By order dated August 30, 2012, the Board denied appellant's petition for reconsideration.

Following the Board's February 3, 2011 decision, on February 15, 2012 OWCP further developed the claim when it referred appellant to Dr. Dinenberg, for a second-opinion evaluation. Based on Dr. Dinenberg's March 21, 2012 report, OWCP accepted a permanent aggravation of preexisting degenerative joint disease of the left knee. Based on a January 2012

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<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.608(a).

<sup>7</sup> *Id.* at § 10.608(b)(1) and (2).

<sup>8</sup> *Id.* at § 10.608(b).

report from Dr. Taylor, an attending neurologist,<sup>9</sup> OWCP also accepted left leg aggravation of preexisting postpolio syndrome. On October 23, 2012 it returned appellant to the periodic rolls, effective February 18, 2012.

After OWCP issued the June 18, 2009 reduction of compensation for failure to participate in vocational rehabilitation pursuant to section 8113(b) of FECA, it further developed the medical evidence of record and in 2012 accepted additional medical conditions relevant to appellant's left leg and work capacity.<sup>10</sup> It found him disabled as of February 18, 2012. In practical effect, OWCP accepted a material change in the accepted conditions but failed to issue a merit decision regarding appellant's eligibility for wage-loss compensation for the period of June 17, 2009 to February 18, 2012. In the November 19, 2012 decision, it did not address the new medical evidence. OWCP did not issue a merit decision addressing any material change of his condition or make any findings that monetary compensation remained reduced to zero under section 8113(b) of FECA.

The case will be remanded to OWCP to determine if appellant's eligibility for disability compensation from June 17, 2009 to February 18, 2012. After this and other development it deems necessary, OWCP shall issue a merit decision on whether appellant is entitled to wage-loss compensation for the period June 17, 2009 to February 18, 2012.<sup>11</sup>

In light of the Board's finding regarding Issue 1, Issue 2 is rendered moot.

### **CONCLUSION**

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

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<sup>9</sup> Dr. Taylor further advised that appellant could not perform the duties of the civil drafter position.

<sup>10</sup> The Board has held that, where OWCP, in its own discretion, further develops a claim by soliciting additional medical evidence, it must conduct an appropriate merit review under 5 U.S.C. § 8128(a). *See C.S.*, Docket No. 07-669 (issued November 7, 2007); *see also Joyce A. Fasanello*, 49 ECAB 490 (1998); *David F. Garner*, 43 ECAB 459 (1992).

<sup>11</sup> The Board notes that on December 8, 2012 appellant filed a claim for compensation for the period June 19, 2009 to February 17, 2012.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 17, 2013 and November 29, 2012 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: September 5, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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