



## **FACTUAL HISTORY**

OWCP accepted that on November 4, 1978 appellant, then a 40-year-old letter carrier, sustained cervical and low back strains when his postal vehicle was struck from behind by another vehicle.<sup>3</sup> Appellant received continuation of pay from November 7 to December 25, 1978 and disability compensation for intermittent periods between December 26, 1978 and August 29, 1979. He returned to limited-duty work on a full-time basis on August 30, 1979 without any wage loss.

Appellant resigned from the employing establishment effective September 28, 1979. He filed a claim alleging that he was entitled to disability compensation beginning September 28, 1979 due to his accepted work injuries.

In a report dated February 22, 1984, Dr. Roger L. Weir, an attending Board-certified neurologist, stated that appellant's problems with his back and neck were "caused by processes which were induced by his injuries in 1972 and 1978." He indicated that appellant's work limitations were "due to these injuries."

In a May 8, 1984 report, Dr. Weir stated that appellant was first seen in January 1981 when he presented with pain in his back, neck, and legs. Appellant reported that "his back had been going out" since the fall of 1981 and that he would fall to the ground and be unable to get up.

By decision dated January 9, 1986, OWCP denied appellant's claim. It found that he failed to submit sufficient medical evidence to establish that he was disabled on or after September 28, 1979 due to his accepted work injuries.

Appellant submitted an August 13, 1987 report in which Dr. Weir indicated that appellant's symptoms seemed to fluctuate and stated, "His symptoms may be exacerbated by returning to a job with sustained physical activities." Dr. Weir diagnosed back pain, neck pain, and muscle spasms. In a January 9, 1991 report, he indicated that appellant's symptoms would be markedly exacerbated by his prior work. Dr. Weir diagnosed back pain, neck pain, muscle spasm, hypertension, and hypercholesterolemia.

In an April 8, 2013 decision, OWCP affirmed the denial of appellant's claim. It found that he had not submitted sufficient medical evidence to establish disability on or after September 28, 1979 due to his accepted work injuries.

In an April 9, 2014 decision,<sup>4</sup> the Board affirmed OWCP's April 8, 2013 decision finding that appellant had not met his burden of proof to establish disability on or after September 28, 1979 due to his accepted work injuries. The Board determined that the medical evidence submitted by appellant, including the reports of Dr. Weir, did not contain a rationalized opinion

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<sup>3</sup> OWCP previously accepted that appellant sustained a lumbar strain on January 8, 1972.

<sup>4</sup> Docket No. 13-1910 (issued April 9, 2014).

that he sustained any disability due to his January 8, 1972 or November 4, 1978 work injuries for any specific period.

Appellant submitted a number of new medical reports after OWCP issued its April 8, 2013 decision. In a June 13, 2013 report, Dr. Allen H. Macht, an attending Board-certified general surgeon, discussed appellant's January 8, 1972 work injury, which affected his low back, and his November 4, 1978 work injury, which affected his neck and low back. He detailed the treatment of appellant's neck and low back problems after his November 4, 1978 work injury and noted that he presently continued to complain of severe constant pain in his neck and back. Dr. Macht indicated that on physical examination appellant exhibited tenderness upon palpation of his posterior neck and low back and stated that he had limited range of motion in his neck and back. He determined that appellant was unable to perform his prior position of letter carrier. Dr. Macht noted that appellant was totally and permanently disabled from work and stated, "It appears that this disability is causally related to the November 4, 1978 accident at work. There is no evidence of any other accidents or injuries in his medical records."

In a June 27, 2013 report, Dr. Macht stated that appellant "continued to suffer residual industrial loss from injuries sustained in the accidents of January 8, 1972 and November 4, 1978." He indicated that these "residual impairments" were permanent.

In a May 16, 2014 report, Dr. Macht discussed appellant's January 8, 1972 and November 4, 1978 work injuries and his treatment for neck and low back problems. Appellant continued to exhibit tenderness upon palpation of his posterior neck and low back and had limited range of motion in his neck and back. Dr. Macht discussed diagnostic testing of appellant's neck and back and diagnosed musculoligamentous sprain of his neck and back with mild to moderate spondylosis and left carpal tunnel syndrome with moderate arthritic changes of his left wrist. He stated that appellant was totally and permanently disabled from work due to his November 4, 1978 work injury. Dr. Macht noted that appellant's November 4, 1978 work injury required a nearly two-week hospitalization and stated:

"Even though no fractures or dislocations have been noted, he has significant disc disease, especially in the neck region. He also has left carpal tunnel syndrome. Based on medical probability, these conditions are due to the January 8, 1972 and November 4, 1978 accidents. At the time of his 1978 accident he was only 40 years old. The significant changes noted on the studies presented above are more likely accidental than age related considering his age at the time. These injuries have not 'healed on their own.'"

In a May 28, 2014 letter, counsel, on behalf of appellant, requested reconsideration of OWCP's denial of appellant's claim for disability compensation beginning September 28, 1979. He argued that the reports of Dr. Macht established that appellant had disability beginning September 28, 1979 due to his accepted work injuries.

In an August 25, 2014 decision, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a) noting that the evidence that he submitted was "cumulative and thus substantially similar to evidence or documentation that is already contained in the case file and was previously considered." It stated, "Specifically, the medical

evidence submitted is a duplicate with small inserts of medical evidence submitted prior to the [Board decision] dated April 9, 2014.”<sup>5</sup>

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>6</sup> OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>7</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>8</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>9</sup> The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>10</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>11</sup> While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.<sup>12</sup>

### **ANALYSIS**

OWCP issued a decision on April 8, 2013 denying his claim for disability compensation beginning September 28, 1979 and appellant timely requested reconsideration on May 28, 2014 of OWCP’s denial of his disability claim.<sup>13</sup> As noted above, the Board does not have jurisdiction over the April 8, 2013 OWCP decision. 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 of the claim.

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<sup>5</sup> OWCP indicated that appellant submitted a May 16, 2014 medical report in connection with his reconsideration request.

<sup>6</sup> Under section 8128 of FECA, “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> *Id.* at § 10.607(a).

<sup>9</sup> *Id.* at § 10.608(b).

<sup>10</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>11</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>12</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>13</sup> A right to reconsideration within one year accompanies any subsequent merit decision, including any merit decision by the Board. The Board’s merit decision was issued on April 9, 2014. Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

Appellant submitted several reports of Dr. Macht, an attending Board-certified general surgeon, which had not previously been submitted to OWCP. This medical evidence contained opinions that he had disability after September 28, 1979 due to his January 8, 1972 and November 4, 1978 work injuries.

In a June 13, 2013 report, Dr. Macht discussed appellant's January 8, 1972 and November 4, 1978 work injuries and reported findings on physical examination. He determined that appellant was totally and permanently disabled from work and stated, "It appears that this disability is causally related to the November 4, 1978 accident at work. There is no evidence of any other accidents or injuries in his medical records." On June 27, 2013 Dr. Macht stated that appellant "continued to suffer residual industrial loss from injuries sustained in the accidents of January 8, 1972 and November 4, 1978." In a May 16, 2014 report, he diagnosed musculoligamentous sprain of appellant's neck and back with mild to moderate spondylosis and left carpal tunnel syndrome with moderate arthritic changes of his left wrist. Dr. Macht found that appellant was totally and permanently disabled from work and indicated that his present medical condition was related to his January 8, 1972 and November 4, 1978 work injuries rather than any age-related condition.

The evidence submitted by appellant constitutes relevant and pertinent evidence which had not previously been considered by OWCP. Therefore, the submission of this new and relevant evidence requires reopening of appellant's claim for merit review.<sup>14</sup> The case shall be remanded to OWCP in order for it to conduct a merit review of appellant's claim, pursuant to 5 U.S.C. § 8128(a), and to issue an appropriate merit decision regarding his claim for disability compensation.

### **CONCLUSION**

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

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<sup>14</sup> See *D.M.*, Docket No. 10-1844 (issued May 10, 2011); *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 25, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: January 9, 2015  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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