



## ISSUE

The issue is whether OWCP properly determined that appellant's request for reconsideration was insufficient to warrant merit review of her claim, pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

The case has previously been before the Board.<sup>3</sup> The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are set forth below.

Appellant filed two traumatic injury claims in 1989 that have since been administratively combined. The initial claim was for a back injury sustained on November 7, 1989 when she stumbled while walking up steps. Appellant also filed a claim alleging that she injured her back on December 19, 1989 while delivering parcels. OWCP accepted that she sustained a lumbosacral strain and a herniated L4-5 disc with subsequent urinary incontinence. Appellant underwent lumbar surgery on February 3, 1992, returned to work intermittently, and began receiving wage-loss compensation on the periodic rolls as of May 14, 2006.

By decision dated June 30, 2010, OWCP terminated appellant's wage-loss compensation benefits, effective July 3, 2010. Appellant subsequently submitted multiple requests for reconsideration. In decisions dated January 13 and June 2, 2011, July 9, 2012, and October 16, 2013, OWCP denied modification of its prior decision. On January 3, 2014 appellant appealed the October 16, 2013 decision to the Board.

While appeal was pending before the Board, appellant continued to submit medical evidence to OWCP. The record contains, for example, reports dated February 19 and May 14, 2014 from Dr. Samuel Ohlander, a surgeon, a March 3, 2014 report from Dr. Konstantin Slavin, a Board-certified neurosurgeon, and a May 22, 2014 report from Dr. Darrel Saldanha, a Board-certified anesthesiologist.

On June 25, 2014 appellant, through counsel, submitted a brief dated June 17, 2014, which contained arguments regarding her claim for compensation.<sup>4</sup> The brief reviewed the evidence of record, citing to Board case law and OWCP procedures.

By decision dated July 7, 2014, the Board affirmed the October 16, 2013 decision.<sup>5</sup> The Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective July 3, 2010. In addition, the Board found that she had not established continuing employment-related disability on or after July 3, 2010.

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<sup>3</sup> Docket No. 14-526 (issued July 7, 2014).

<sup>4</sup> The first page of the brief notes the Board's mailing address and the title "ECAB brief," but it was received by OWCP on June 25, 2014.

<sup>5</sup> *Id.*

On July 21, 2014 appellant, through counsel, requested reconsideration of the Board's July 7, 2014 decision. With the reconsideration request, counsel submitted a copy of the June 17, 2014 brief. Counsel contended that OWCP did not follow its procedures and that the case required further development.

By decision dated October 15, 2014, OWCP found that the July 21, 2014 request for reconsideration was insufficient to warrant merit review of the claim. It found that the brief submitted was "repetitious, a copy of documentation that was previously of file and considered in the contested decision." As to medical evidence, OWCP referred to a May 22, 2014 report that was "a duplication of medical evidence" already of record.

### **LEGAL PRECEDENT**

Section 8128 of FECA vests OWCP with a 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>6</sup> Section 10.608(a) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).<sup>7</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; (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>8</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>9</sup>

### **ANALYSIS**

On July 21, 2014 appellant requested reconsideration. Both counsel and OWCP referred to the July 21, 2014 letter as a request for reconsideration of the July 7, 2014 Board decision. However, OWCP is not authorized to review Board decisions. Although the July 7, 2014 Board decision was the last merit decision, the October 16, 2013 decision is the appropriate subject of possible modification by OWCP.<sup>10</sup> The October 16, 2013 decision denied modification of a prior decision, which terminated appellant's wage-loss compensation benefits, effective July 3, 2010. On January 3, 2014 appellant appealed the October 16, 2013 decision to the Board. On June 25, 2014 counsel submitted the June 17, 2014 brief to OWCP. The Board issued its decision on July 7, 2014, affirming the October 16, 2013 decision. On July 25, 2014 counsel submitted a request for reconsideration along with a copy of the June 17, 2014 brief. In denying

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.608(a).

<sup>8</sup> *Id.* at § 10.606(b)(3).

<sup>9</sup> *Id.* at § 10.608.

<sup>10</sup> *Id.* at § 501.6(d).

the request for reconsideration, OWCP found that the brief was “repetitious, a copy of documentation that was previously of file, and considered in the contested decision.”

The Board finds that the June 17, 2015 brief, which contains relevant legal arguments with regard to the matter of whether OWCP properly terminated appellant’s benefits and whether she has any residuals or continuing disability, was not previously considered by OWCP. The record indicates that the brief was initially submitted to OWCP on June 25, 2014, but this was after OWCP’s October 16, 2013 decision and the Board in its July 7, 2014 decision only reviewed evidence that was before OWCP at the time of the October 16, 2013 decision. Moreover, there is no evidence that appellant timely submitted the brief to the Board or that it was considered in the July 7, 2014 decision. The Board did not review any specific arguments or indicate that she had raised arguments on appeal.

As appellant has advanced a new and relevant legal argument not previously considered by OWCP, she is entitled to a review of the merits of her claim under section 10.606(b)(3) of OWCP’s regulations.<sup>11</sup> The case shall therefore be remanded to OWCP for a proper review of the evidence submitted to OWCP following its October 16, 2013 decision and the decision on the issue presented. After this and other further development as warranted, OWCP shall issue an appropriate decision.

### **CONCLUSION**

The Board finds that OWCP improperly determined that appellant’s request for reconsideration was insufficient to warrant merit review of her claim, pursuant to 5 U.S.C. § 8128(a).

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<sup>11</sup> *Supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 15, 2014 is set aside and the case is remanded for further action consistent with this decision of the Board.<sup>12</sup>

Issued: September 15, 2016  
Washington, DC

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

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

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<sup>12</sup> James A. Haynes, Alternate Judge, participated in the original decision, but was no longer a member of the Board effective November 16, 2015.