



## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of the claim pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On November 14, 1996 appellant, then a 43-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he tripped and fell onto his face on a concrete floor and twisted his back. OWCP accepted the claim for lumbar sprain and L5-S1 disc herniation and authorized L5-S1 microdiscectomy surgery, which occurred on March 31, 1997.<sup>4</sup> Appellant was paid wage-loss compensation for periods of permanent and partial disability. He accepted an offer of modified work and returned to full-time modified work on October 20, 1998.

On December 8, 2000 appellant filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained lower back and left leg injuries in the performance of duty. He stopped work on December 9, 2000. OWCP accepted the claim for a lumbar strain.<sup>5</sup> It also accepted appellant's claim for a recurrence of disability beginning April 12, 2001 under this claim.

On January 3, 2005 OWCP accepted appellant's claim for a recurrence of disability beginning August 19, 2004 under OWCP File No. xxxxxx808. Appellant accepted modified job offers on June 17, 2009 and January 6, 2011.

In a July 13, 2013 facsimile, appellant requested OWCP retrieve and reopen his claim under OWCP File No. xxxxxx808 as the employing establishment was closing the facility where he had been working. He noted that the modified job that was created for him on July 24, 1998 no longer existed.

On November 8, 2013 appellant filed a claim for a recurrence of disability due to the withdrawal of his light-duty job beginning October 29, 2013. He noted that his medical condition had not changed, but the job changed due to closure of the facility. Appellant alleged that the employing establishment was unable to provide a job to accommodate his permanent work restrictions.

By letter dated November 1, 2013, OWCP advised appellant as to the definition of a recurrence and the evidence required to support a claim for a recurrence. It afforded him 30 days to provide the requested information. OWCP noted that withdrawal of a modified job due to a reduction-in-force, misconduct, or nonperformance of job duties did not constitute a recurrence of disability.

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<sup>4</sup> On December 19, 1996 OWCP combined OWCP File Nos. xxxxxx804 with xxxxxx808, with the latter as the master file number. In a March 1, 1997 memorandum to file, it noted that OWCP File Nos. xxxxxx296 and xxxxxx113 were combined as subsidiary files of OWCP File No. xxxxxx808.

<sup>5</sup> On January 23, 2000 OWCP combined OWCP File No. xxxxxx697 with OWCP File No. xxxxxx808, with the former as the master file.

By decision dated January 3, 2014, OWCP denied appellant's recurrence claim as he had not submitted the evidence requested in OWCP's November 1, 2013 letter.

On January 24, 2014 counsel requested an oral hearing before an OWCP hearing representative, which was held on June 27, 2014. At the hearing, appellant testified that his recurrence was based on the employing establishment's withdrawal of his modified job. He related that the plant where he worked had not closed, but the duties he performed had been moved to another location. Appellant testified that he had bid on another position, but that his bid was denied.

In a letter dated April 24, 2014,<sup>6</sup> the employing establishment informed appellant that effective April 25,<sup>7</sup> 2014 he was being placed on enforced leave as there was no work available within his work restrictions and as he was unable to perform the essential duties of his job position. It informed appellant that there was no longer any work for him within his restrictions.

In a July 31, 2014 letter, K.N, a hub manager, responded to appellant's testimony at the June 27, 2014 hearing. She stated that the facility was no longer a processing facility, but was a dock transferring mail or hub. At the current time, K.N. had no work available within appellant's restrictions.

By decision dated September 11, 2014, an OWCP hearing representative affirmed the denial of appellant's recurrence claim. She found that the employing establishment's withdrawal of the modified job could not be considered a recurrence as the facility where appellant worked had closed. OWCP's hearing representative also found that appellant failed to submit any medical evidence establishing continued work restrictions due to the accepted employment injury.

In a letter dated December 4, 2014, counsel requested reconsideration and submitted additional medical evidence.

In a December 4, 2014 letter, appellant disputed the finding that the facility where he worked had closed. He noted that the facility transitioned from a processing and distribution center to a hub.

On December 15, 2014 OWCP received an undated letter from D.B., chief steward, regarding the downsizing of the Olympia facility. D.B. stated that the facility had not actually closed, but had transitioned from a processing and distribution center to a mail transfer station or hub. Both operation and personnel in the facility had been downsized as the result of the consolidation announced on May 17, 2012. Since appellant was the most senior mail handler at the establishment, he remained at the facility.

On May 4, 2015 OWCP received an April 30, 2015 letter from C.E., a plant manager. C.E. noted that appellant performed light-duty work when C.E. was the plant manager from

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<sup>6</sup> The date "April 23" was handwritten above a crossed out April 24, 2014 date.

<sup>7</sup> The typed 25 was crossed out and 24 was handwritten in below.

August 2012 to September 2013. He explained that the employing establishment consolidated the Olympia facility, where appellant performed light-duty/modified work, with the Tacoma facility. The Olympia facility did not close, but did change operations. Appellant had been told to contact the new facility manager who would determine whether there were any jobs within his work restrictions.

By decision dated May 5, 2015, OWCP denied modification. It found that the Olympia facility which was used for mail processing and distribution, at which appellant was provided light duty, had ceased to exist, and the facility was now used as a hub. The fact that the plant remains “open” in the sense that it is now used for a different purpose was immaterial. Per Part 2.1500.3c of the FECA Procedure Manual, withdrawal of light duty due to a facility closure is not considered a recurrence of disability.

In a letter dated July 20, 2015, appellant noted that on November 14, 1996 he was injured at the Seattle Bulk Mail Center and that on October 10, 1998 he returned to light-duty work at the Olympia facility.

In a letter dated October 28, 2015, counsel requested reconsideration. He noted the facility from the date of injury had not closed and that appellant’s light-duty job had been taken away when operations changed at the Olympia facility.

By decision dated January 26, 2016, OWCP denied reconsideration. It found that appellant had failed to submit relevant and pertinent new evidence or raise a substantive legal argument and, thus, a merit review was not warranted.

In a letter dated February 22, 2016, appellant requested reconsideration and resubmitted an April 30, 2015 letter from the plant manager. He argued that the procedure manual provision regarding closure of a facility was only pertinent to the facility where the injury occurred and not the facility wherein the modified job was performed. Appellant stated that the Olympia facility had not closed, but its duties were changed.

By decision dated June 2, 2016, OWCP denied reconsideration. In notice of decision, it explained the reasons for its decision. OWCP found appellant’s arguments in his reconsideration requests were cumulative and insufficient to warrant a merit review.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>8</sup> OWCP’s regulations provide that 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>9</sup> To be entitled to a merit review of an OWCP decision denying or

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<sup>8</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>9</sup> 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

terminating a benefit, a claimant's application for review must be received by OWCP within one year of the date of that decision.<sup>10</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>11</sup>

### ANALYSIS

OWCP denied appellant's claim for a recurrence of disability due to a withdrawal of his light-duty job in merit decisions dated January 3 and September 11, 2014 and May 5, 2015. It denied his request for reconsideration in nonmerit decisions dated January 26 and June 2, 2016.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3) requiring OWCP to reopen the case for review of the merits of his claim. In his February 22, 2016 request for reconsideration, appellant did not identify or show that OWCP erroneously applied or interpreted a specific point of law.

Counsel attempted to advance a new and relevant legal argument in both his October 28, 2015 and February 22, 2016 requests for reconsideration. He argued that the Seattle facility where appellant was first injured in 1996 had not closed, and OWCP had erred in denying his recurrence claim based on the operations change at the Olympia facility. The Board finds that counsel's argument has no reasonable color of validity. OWCP previously reviewed the definition of recurrence of disability, pursuant to its procedures in the merit decision dated May 5, 2015. Counsel, on reconsideration, offers an unsubstantiated allegation, that the facility in which appellant first sustained injury, rather than the facility in which he sustained his subsequent injuries, had not closed and therefore he sustained a compensable recurrence of disability. He, however, did not offer a legal basis for his argument.<sup>12</sup>

A claimant may also be entitled to a merit review by submitting pertinent and relevant new evidence, but appellant failed to submit any evidence with his February 22, 2016 reconsideration request.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered or constitute relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal counsel argues that OWCP failed to provide appellant with an appropriate explanation for denying his reconsideration requests and failed to provide findings of fact and clear rationale for the denial of reconsideration. Contrary to counsel's contention, the record

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<sup>10</sup> *Id.* at 10.607(a).

<sup>11</sup> *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440, issued March 16, 2009; *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

<sup>12</sup> See *D.L.*, Docket No. 16-0342 (issued July 26, 2016).

shows that OWCP provided appellant with an explanation for the denial of his reconsideration requests.

**CONCLUSION**

The Board finds that OWCP properly denied appellant's requests for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 2 and January 26, 2016 are affirmed.

Issued: June 1, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board