



## **FACTUAL HISTORY**

On November 9, 2016 appellant, then a 55-year-old heavy mobile equipment repairer, filed an occupational disease claim (Form CA-2) alleging that, as a result of his repetitive employment duties, he developed bulging discs in his back that were pinching on a nerve and causing leg pain. He related that he had worked as a heavy mobile equipment repairer for over 15 years and his work duties required walking constantly on cement, repeatedly lifting items weighing over 15 pounds, standing, bending, and twisting. Appellant did not stop work.

In an October 5, 2016 lumbar spine magnetic resonance imaging (MRI) scan report, Dr. Sandra Martin, a Board-certified diagnostic radiologist, noted multilevel degenerative changes present at the right L4-5 neural foramen.

The employing establishment controverted appellant's claim in a letter dated November 9, 2016. It alleged that he failed to provide any medical documentation to support his claim and failed to complete the Form CA-35 (Evidence Required To Support a Claim for Occupation Disease) that was provided to him.

By letter dated November 15, 2016, OWCP advised appellant that the evidence submitted was insufficient to establish an occupational disease claim. It requested that he respond to an attached development questionnaire in order to substantiate the factual element of his claim and submit additional medical evidence to establish a diagnosed condition causally related to his employment. Appellant was afforded 30 days to submit the additional evidence. A similar letter requesting additional information was sent to the employing establishment.

OWCP denied appellant's occupational disease claim in a December 20, 2016 decision because the evidence of record was insufficient to establish fact of injury. It determined that he had not provided sufficient details regarding the employment factors which he believed caused his condition. OWCP noted that appellant had not responded to questions regarding the employment-related activities he believed caused his condition, therefore the factual portion of his claim remained vague. It further found that the medical evidence failed to establish a diagnosed condition causally related to his federal employment.

On December 23, 2016 OWCP received a December 15, 2016 letter by the employing establishment, which indicated that it was challenging appellant's claim. It noted that according to the October 5, 2016 lumbar spine MRI scan report appellant had degenerative changes.

In reports dated November 22 and December 7, 2016, Dr. Zenko Hryniw, a Board-certified neurosurgeon related appellant's complaints of right lower extremity pain and numbness. He indicated that appellant worked as "a heavy motor equipment repairer which involves a lot of heavy lifting." Upon physical examination of appellant's back, Dr. Hryniw reported mild distress secondary to pain and negative straight leg raise testing bilaterally. He diagnosed lumbar radiculopathy. Dr. Hryniw provided a patient information form which appellant had completed indicating that he had lower back and right leg pain as a result of his work activity.

OWCP also received a November 23, 2016 lumbar spine computerized tomography (CT) scan report, from Dr. Rob Gish, an internist, who noted right-sided intraforaminal disc herniation at the L4-L5 level, resulting in severe neural foraminal stenosis.

On January 9, 2017 appellant requested reconsideration. He resubmitted Dr. Gish's November 23, 2016 lumbar spine CT scan report.

By decision dated January 25, 2017, OWCP denied further merit review of appellant's claim under 5 U.S.C. § 8128(a). It found that the medical evidence received after the December 20, 2016 decision was irrelevant or immaterial to the issue of fact of injury.

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

An employee seeking benefits under FECA<sup>3</sup> has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence,<sup>4</sup> including that he or she sustained an injury in the performance of duty and that any specific condition or disability for work for which he or she claims compensation is causally related to that employment injury.<sup>5</sup> In an occupational disease claim, appellant's burden requires submission of the following: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.<sup>6</sup>

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

Appellant alleged that he developed bulging discs in his back and leg pain as a result of walking constantly on cement, repeatedly lifting items weighing over 15 pounds, standing, bending, and twisting at work. OWCP denied his claim finding that he failed to establish fact of injury. The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty.

In the Form CA-2, appellant reported that he had worked as a heavy mobile equipment repairer for over 15 years. He described his work duties as walking constantly on cement, repeatedly lifting items weighing over 15 pounds, standing, bending, and twisting. Appellant did not provide any further details describing his work activities, how often he performed these activities, or for how long he performed them.

The Board finds that the evidence of record does not contain any evidence to substantiate appellant's described employment factors as a heavy mobile equipment repairer. To establish a

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

<sup>5</sup> *G.T.*, 59 ECAB 447 (2008); *M.M.*, Docket No. 08-1510 (issued November 25, 2010).

<sup>6</sup> *R.H.*, 59 ECAB 382 (2008); *Ernest St. Pierre*, 51 ECAB 623 (2000).

claim for compensation, an employee must submit a statement which identifies the factors of employment believed to have caused his or her condition and submit medical evidence to establish causal relation.<sup>7</sup> Appellant has not provided sufficient detail to establish that an occupational exposure occurred as alleged. He did not adequately describe the circumstances of his injury, what his injury was, how he injured his back, and the duties he was performing which caused his injury.<sup>8</sup> The Board therefore concludes that appellant's description of his employment factors that allegedly caused injury was vague.<sup>9</sup> Appellant has also not submitted probative evidence that his position as a heavy mobile equipment repairer required constant walking, lifting over 15 pounds, standing, bending, and twisting.<sup>10</sup> The Board, therefore, finds that appellant has failed to substantiate the employment factors alleged.<sup>11</sup>

As appellant has not established the factual component of his claim, the Board will not address the medical evidence with respect to causal relationship.<sup>12</sup>

On appeal appellant explained that in March 2016 he notified his supervisor of a work-related injury and sought medical treatment. He also described an August 2016 incident when he felt extreme pain in his back while at work. Appellant explained that, after receiving additional medical treatment, he learned that his back pain was caused by constant and repeated lifting, bending, and twisting in the performance of duty. As explained above, however, the Board cannot review new evidence and based on the evidence of record, he has failed to provide the necessary description of his employment factors alleged to have caused or contributed to his claimed back condition.<sup>13</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>14</sup>

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<sup>7</sup> *Donald W. Wenzel*, 56 ECAB 390 (2005); *Richard H. Weiss*, 47 ECAB 182 (1995).

<sup>8</sup> *See A.R.*, Docket No. 15-1716 (issued November 17, 2015).

<sup>9</sup> *See C.M.*, Docket No. 17-0627 (issued June 25, 2017).

<sup>10</sup> *See A.S.*, Docket No. 16-0944 (issued November 2, 2016).

<sup>11</sup> *See P.S.*, Docket No. 17-0194 (issued July 24, 2017); *see also B.J.*, Docket No. 14-1028 (issued September 17, 2014).

<sup>12</sup> *See B.G.*, Docket No. 16-1454 (issued November 22, 2016).

<sup>13</sup> *Supra* note 2.

<sup>14</sup> 5 U.S.C. § 8128(a); *see also D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an 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>15</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>16</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>17</sup> If the request is timely but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

In its December 20, 2016 merit decision, OWCP denied appellant's occupational disease claim, finding that the evidence of record failed to establish fact of injury. Appellant subsequently requested reconsideration and submitted additional medical evidence.

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

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; appellant has not advanced a relevant legal argument not previously considered by OWCP; and appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP.

The underlying issue in this case was whether appellant had submitted sufficient factual evidence to establish compensable factors of employment. Following OWCP's December 15, 2016 decision it received Dr. Hrynkiw's November 22 and December 7, 2016 reports. While this evidence was new to the record, it was not relevant to the underlying issue. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>19</sup>

In support of his reconsideration request, appellant resubmitted Dr. Gish's November 23, 2016 lumbar spine CT scan report, which had previously been considered. The submission of evidence which repeats or duplicates evidence already in the case record does not constitute a

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<sup>15</sup> 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>16</sup> *Id.* at § 10.607(a).

<sup>17</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>18</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>19</sup> *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

basis for reopening a case.<sup>20</sup> Furthermore, this medical report was also irrelevant to appellant's claim as it fails to address fact of injury.

The Board finds, therefore, that appellant has not met any of the regulatory requirements and OWCP properly declined his request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).<sup>21</sup>

### CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty. The Board also finds that OWCP properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### ORDER

**IT IS HEREBY ORDERED THAT** the January 25, 2017 and December 20, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 17, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>20</sup> *E.M.*, Docket No. 09-39 (issued March 3, 2009); *D.K.*, 59 ECAB 141 (2007).

<sup>21</sup> *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).