



## **FACTUAL HISTORY**

On September 21, 2002 appellant, then a 28-year-old mail processor, filed a traumatic injury claim (Form CA-1) alleging that on September 1, 2000 she sustained bilateral carpal tunnel syndrome as a result of repetitively processing mail through a machine. She stopped work and returned to part-time modified-duty work on September 24, 2002. OWCP assigned File No. xxxxxx098 and converted appellant's traumatic injury claim to an occupational disease claim. It subsequently accepted the claim for bilateral carpal tunnel syndrome, bilateral shoulder strain, bilateral de Quervain's syndrome, and bilateral lateral epicondylitis. OWCP initially paid wage-loss compensation benefits for partial disability on the daily rolls. The record reveals that it combined this claim with a previous claim with the present claim serving as the master file.<sup>2</sup>

Appellant was terminated from employment, effective December 27, 2002. On January 23, 2005 OWCP placed her on the periodic compensation rolls.

On March 16, 2015 OWCP received evidence that on March 10, 2015 the Superior Court of California, County of Los Angeles accepted appellant's guilty plea to one count of insurance fraud under Section 550(B)(3) of the California Penal Code in relation to her FECA benefits. Appellant was sentenced to three years of summary probation and ordered to pay restitution and a fine.

By decision dated April 27, 2015, OWCP determined that appellant had forfeited her entitlement to compensation, effective March 10, 2015, pursuant to 5 U.S.C. § 8148(a), and thus, was not entitled to receive further benefits. It noted that she had plead guilty to insurance fraud in relation to her application for or receipt of FECA benefits. OWCP related that it would pay for authorized medical treatment she received prior to March 10, 2015, but would pay no further medical treatment costs beyond that date.

On May 27, 2015 appellant filed a petition to withdraw her guilty plea with the Los Angeles County Superior Court.

In an Order for Dismissal dated August 4, 2015 a judge set aside and vacated appellant's guilty plea to one count of insurance fraud under Section 550(B)(3) of the California Penal Code and entered a plea of not guilty. Appellant's case was dismissed and an expungement order was signed.

On February 23, 2016 appellant requested reconsideration of the April 27, 2015 decision. She requested that her wage-loss compensation and medical benefits be reinstated, as her criminal charges relating to FECA benefits had been dismissed.

By decision dated May 23, 2016, OWCP vacated the April 27, 2015 termination decision and reinstated appellant's wage-loss compensation and medical benefits. It noted that the California Superior Court had dismissed the conviction of insurance fraud against her, and thus,

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<sup>2</sup> Under OWCP File No. xxxxxx399, OWCP accepted that appellant sustained cervical and lumbosacral strains, cervical radiculopathy, and lumbosacral radiculopathy as a result of her employment duties.

OWCP had no basis to terminate her wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8148(a).

On August 15, 2016 OWCP issued a decision rescinding the May 23, 2016 decision. It explained that an Order for Dismissal under the California Penal Code did not nullify or expunge appellant's criminal conviction of fraud under FECA. OWCP noted that under the California Penal Code a defendant may request a withdrawal of a guilty plea after he or she has fulfilled the conditions of probation. It concluded that the August 4, 2015 Order for Dismissal was merely an acknowledgement by the court that appellant had successfully completed her probation. Accordingly, OWCP determined that OWCP had properly terminated her wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8148(a) and reinstated the April 27, 2015 termination decision.

On August 4, 2017 appellant requested reconsideration of the August 15, 2016 decision. She resubmitted the August 4, 2015 Order for Dismissal and copies of court records dated November 2014 to August 2015, including a notice of scheduling of an August 4, 2015 hearing on motion for modification of sentence/early termination.

OWCP received a September 6, 2016 report from Dr. Christopher P. DeCarlo, who specializes in physical medicine and rehabilitation. Dr. DeCarlo related appellant's complaints of continued pain in her bilateral biceps, wrists, and thumbs. Upon physical examination, he observed tenderness over the medial and lateral epicondyles of the right elbow and mildly over the left elbow and tenderness over the biceps tendon. Tinel's sign was positive for the bilateral wrists. Dr. DeCarlo diagnosed bilateral bicipital tendinitis and impingement syndrome, flare-up of right medial epicondylitis with bilateral medial and lateral epicondylitis, bilateral carpal tunnel syndrome, and bilateral de Quervain's syndrome.

In a June 23, 2017 statement, appellant related that she was presenting new legal arguments to support her reconsideration request. Initially, she asserted that OWCP violated the Full Faith and Credit clause of the Constitution by ignoring the clear language of the August 4, 2015 Order for Dismissal, which explicitly noted that all charges had been dismissed, vacated, and expunged. Secondly, appellant disagreed with OWCP's characterization that the August 4, 2015 Order for Dismissal was merely an acknowledgement of the end of her probation. She cited to Section 1203.4 of the California Penal Code or the "Felony Realignment Expungement Law" and indicated that the law was meant to release convicted persons from all penalties resulting from the offense of which he or she was convicted. Third, appellant contended that the cases OWCP cited were misleading and irrelevant to her case. She specifically addressed each case cited. Fourth, appellant noted that, in its May 23, 2016 decision, OWCP did not cite to any Board cases to support its arguments. Appellant cited to several Board cases and alleged that Board case law showed a "definitive pattern" which required a reversal of her termination. She listed several cases which implied that the only evidence to reverse a termination of benefits under 5 U.S.C. § 8148(a) would be to show that a conviction was set aside, vacated, or expunged.

By decision dated November 1, 2017, OWCP denied reconsideration of the merits of appellant's claim. It found that she had not met any of the requirements of 5 U.S.C. § 8128(a) sufficient to warrant merit review. OWCP found that appellant had not asserted any legal argument

which had a reasonable color of validity and that the evidence submitted did not constitute relevant or pertinent new evidence.

### **LEGAL PRECEDENT**

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 payment of compensation at any time on his or her own motion or on application.<sup>3</sup>

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>4</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>6</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>7</sup>

### **ANALYSIS**

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

In support of her reconsideration request, appellant submitted a 24-page brief expressing several points of disagreement with OWCP's August 15, 2016 decision. The Board initially notes that, in its August 15, 2016 decision, OWCP provided several reasons for its determination to rescind the May 23, 2016 decision and reinstate the April 27, 2015 termination decision that were not previously discussed. Accordingly, appellant's first opportunity to address OWCP's reasoning was in her August 4, 2017 reconsideration request.

One of the arguments that appellant set forth was that OWCP violated the Full Faith and Credit clause of the Constitution by ignoring the clear language of the August 4, 2015 Order for Dismissal, which explicitly noted that all charges had been dismissed, vacated, and expunged. The Board finds that this argument relates to the underlying issue of whether OWCP properly terminated appellant's wage-loss compensation and medical benefits pursuant to 5 U.S.C. § 8148(a) based on her March 10, 2015 guilty plea, which was later overturned and dismissed on

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</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>5</sup> *Id.* at § 10.607(a).

<sup>6</sup> *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

<sup>7</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

August 4, 2015. The Board finds that this is a relevant legal argument made for the first time on reconsideration. Appellant also contended that the Felony Realignment Expungement Law was meant to release convicted persons from all penalties resulting from the offense of which he or she was previously convicted. This argument was also not previously considered by OWCP. As appellant advanced legal arguments relevant to her claim which had not previously been considered by OWCP, such arguments warrant further merit review of her claim.<sup>8</sup>

Thus, the Board will remand the case to OWCP to properly consider appellant's claim and issue an appropriate merit decision.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 1, 2017 decision of the Office of Workers' Compensation Programs is set aside, and this case is remanded for further consideration consistent with this opinion.

Issued: May 17, 2019  
Washington, DC

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

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

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

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<sup>8</sup> See *D.M.*, Docket No. 16-1754 (issued January 10, 2018).