



## ISSUE

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

## FACTUAL HISTORY

On December 10, 2016 appellant, then a 50-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that she developed a herniated disc, cervical spondylosis, and cervical radiculopathy as a result of performing repetitive work duties. She first became aware of her condition on April 16, 2016 and first realized it was causally related to factors of her federal employment on November 29, 2016. Appellant stopped work on April 29, 2016.

In a statement dated December 9, 2016, appellant indicated that she began experiencing neck pain shortly after a fall on April 16, 2016 in which she injured her right knee, wrist, and shoulder. She noted that on April 23, 2016 she used her left hand, arm, and shoulder casing mail and pulling and throwing parcels and experienced severe neck, left arm, shoulder, and hand pain with tingling in her fingers. Appellant also noted that she was treated by a physician and underwent physical therapy, but conservative measures failed and she was scheduled to undergo surgery on December 19, 2016.<sup>4</sup>

In a May 24, 2016 report, Dr. Larry S. Davidson, a Board-certified neurosurgeon, treated appellant for lumbar and cervical spine pain radiating into the right hip and leg. Appellant reported falling out of her mail truck on April 16, 2016. Dr. Davidson diagnosed cervical spondylosis, cervical radiculopathy, arthralgia of the right hip, and acute pain of the right knee. In an addendum report dated June 9, 2016, he indicated that appellant's cervical spinal pathology and symptoms were referable to her employment injury of April 16, 2016. In a November 29, 2016 report, Dr. Davidson treated her for cervical spondylosis that resulted in numbness and tingling in her left hand and arm. He indicated that a May 16, 2016 magnetic resonance imaging (MRI) scan of the cervical spine revealed significant spondylitic disease at C6-7 and bilateral neuroforaminal narrowing affecting the C7 nerve roots. Dr. Davidson again attributed appellant's cervical spinal pathology to her employment injury of April 16, 2016. He recommended an anterior cervical discectomy and fusion at C6-7.

On June 12, 2016 Dr. Susan Miranda, a Board-certified family practitioner, treated appellant for injuries sustained on April 16, 2016 when she exited a postal delivery truck and fell landing on her right side, knee, and hand. In reports dated April 18 to 28, 2016, she diagnosed right shoulder strain, right wrist strain/swelling, and right knee pain/swelling/contusion. Appellant reported returning to limited-duty work without the use of her right arm and her supervisor assigned her to case mail and throw parcels and bundles of magazines using her left hand and arm. She subsequently developed left hand and finger numbness after performing repetitive tasks with her left hand. In reports dated May 5 and 10, 2016, appellant was placed out of work and prescribed steroids and muscle relaxers. Dr. Miranda opined that appellant's injuries were work related as the initial right-sided injuries occurred from falling out of the delivery truck hitting her right knee, right side, arm, and shoulder. She further opined that appellant's left-sided neck and

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<sup>4</sup> Appellant indicated that she filed a separate traumatic injury claim resulting from the April 16, 2016 fall, which OWCP accepted on November 25, 2016 under OWCP File No. xxxxxx718.

left arm issues were work related as her symptoms began when she was instructed to use her left hand and arm to case mail, throw parcels, and bundles of magazines. Dr. Miranda indicated that the overuse injury was work related occurring after repetitive use of the left arm during her job.

In a December 20, 2016 development letter, OWCP advised appellant that the evidence submitted was insufficient to establish that she experienced the employment factors alleged to have caused the injury. It specifically noted that Dr. Davidson's November 29, 2016 treatment note attributed appellant's cervical spine pathology to her employment injury of April 16, 2016, which was a separate traumatic injury claim accepted for sprain of the right shoulder, right wrist, and contusion of the right knee under OWCP File No. xxxxxx718. OWCP also indicated that the evidence submitted was insufficient to establish how employment activities caused, contributed to, or aggravated her medical condition. It requested that appellant respond to a questionnaire to substantiate the factual elements of her claim. OWCP afforded her 30 days to submit the requested information.

In a work status report dated April 28, 2016, prepared by a health care provider whose signature was illegible, appellant was restricted from using both arms due to overuse.

On December 29, 2016 Dr. Davidson treated appellant for cervical spondylosis and cervical disc herniation that resulted in numbness to her left hand and arm. He opined that appellant's cervical spinal pathology, diagnoses, and symptoms were attributed to her work injury of April 16, 2016, which was further aggravated by use of her left hand, arm, and shoulder to case mail and throw parcels and magazines. Conservative treatment failed and he recommended surgical intervention.

In response to OWCP's development letter, appellant indicated that her condition was caused by the employment injury on April 16, 2016. After returning to limited-duty work, she was casing mail with her left hand, arm, and shoulder for approximately two weeks, for one half hour to five hours at a time, which aggravated her herniated disc. Appellant noted sustaining an injury on April 16, 2016 which was accepted by OWCP under File No. xxxxxx718. She indicated that in File No. xxxxxx718 OWCP instructed her to file a new Form CA-2 for her left-side conditions. Appellant submitted copies of light-duty request forms submitted under File No. xxxxxx718.

The employing establishment challenged appellant's claim. In a January 12, 2017 statement, R.H., appellant's supervisor, noted that she had accepted a modified job offer on April 20, 2016, which conformed to her physician assigned restrictions. He instructed her not to exceed her restrictions. R.H. noted that appellant had not complained of pain or discomfort during the eight partial days she worked or asserted that she was working outside her restrictions. He indicated that appellant worked an hour or two at most each of the eight days.

A January 13, 2017 statement from a human resource specialist for the employing establishment noted that appellant worked only 17.97 hours over the course of eight partial days. The specialist further noted there was no medical evidence which supported a diagnosis related to the activity at work.

By decision dated January 23, 2017, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that the events occurred as described. It further indicated that appellant had not submitted medical evidence containing a medical diagnoses in connection with the injury or event, or evidence that she developed a condition due to repetitive

work factors “(an occupational disease injury).” OWCP noted that the medical evidence only contained a diagnosis of “pain” which was a symptom and not a diagnoses of a medical condition. It noted that the evidence supported that she sustained a traumatic injury on April 16, 2016 when she fell from her postal truck. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant submitted medical records dated January 30 and February 1, 2006 from a healthcare provider whose signature was illegible who advised that appellant injured her left shoulder while playing basketball. A February 1, 2006 x-ray of the left shoulder revealed no abnormalities.

A left shoulder and scapular region MRI scan dated February 2, 2006 was normal. A left shoulder MRI scan of even date revealed an abnormal signal of the posterior inferior labral interface, which could represent a minor tear with no evidence of a rotator cuff tear or significant acromioclavicular joint disease.

On January 5, 2018 Dr. Davidson indicated that appellant sustained an employment injury on April 16, 2016 when she fell from her postal vehicle and injured her right shoulder, wrist, and cervical spine. He noted that appellant subsequently used her left hand to perform her letter carrier duties and experienced pain in the cervical spine, spondylosis, and a herniated disc at C6-7 as confirmed by the MRI scan. Dr. Davidson opined that appellant’s cervical spinal pathology at C6-7, disc herniation, cervical spondylosis, and numbness in her left hand with tingling was due to her employment injury on April 16, 2016. He opined that her condition was not preexisting.

On January 8, 2018 appellant requested reconsideration. She indicated that on April 16, 2016 she was injured while performing her letter carrier duties under OWCP File No. xxxxxx718, which was accepted for sprain of the right shoulder, right wrist, and contusion of the right knee. Appellant asserted that OWCP’s decision dated November 25, 2016, under File No. xxxxxx718, instructed her to file a new occupational disease claim for her left neck and arm conditions because she described new work factors that contributed to the development of these conditions. She indicated that on December 10, 2016 she filed the current claim. Appellant requested that the current claim be doubled with her existing claim File No. xxxxxx718 based on OWCP regulations as the claims are for the same work injury, which occurred on the same date, and are related to the same body parts.

By decision dated January 24, 2018, OWCP denied appellant’s January 8, 2018 request for reconsideration finding that the evidence submitted was insufficient to warrant reconsideration of the merits of her claim.

### **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 compensation, at any time, on his or her own motion or on application.<sup>5</sup>

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<sup>5</sup> 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *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 which: (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>6</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>7</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>8</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>9</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 her January 8, 2018 reconsideration request, appellant noted that OWCP instructed her to file a new occupational disease claim following her April 16, 2016 injury, which was accepted under File No. xxxxxx718 for sprain of the right shoulder, right wrist, and contusion of the right knee. OWCP noted that she had described new employment factors. Appellant indicated that she complied with OWCP's instructions by filing an occupational disease claim for left neck and arm conditions, to which OWCP assigned File No. xxxxxx256, the claim currently before the Board on appeal. However, she requested that, pursuant to its procedures, that OWCP combine both claims as all of her work conditions resulted from the same injury, which occurred on the same date. The Board finds that this is a relevant legal argument made for the first time on reconsideration, under criteria number two under 20 C.F.R. § 10.606(b)(3). Appellant requested that OWCP combine File Nos. xxxxxx718 and xxxxxx256, claiming that all claimed conditions arose from the same set of employment factors on April 16, 2016. As she advanced a legal argument relevant to her claim which had not previously been considered by OWCP, such argument warrants further consideration by a merit review of appellant's claim.<sup>10</sup>

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

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<sup>6</sup> 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>7</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>8</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>9</sup> *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

<sup>10</sup> *See Q.M.*, Docket No. 18-0345 (issued May 17, 2019); *D.M.*, Docket No. 16-1754 (issued January 10, 2018).

**CONCLUSION**

The Board finds that this case is not in posture for decision.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 24, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: November 19, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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