



## **FACTUAL HISTORY**

This case has previously been before the Board. In a decision dated January 20, 2006, the Board set aside September 8, 2004 and August 17, 2005 OWCP decisions denying appellant's emotional condition claim as he did not establish any compensable factors of employment.<sup>3</sup> The Board found that he had established administrative error by the employing establishment in issuing him a letter of warning dated October 20, 2003 and placing him on emergency suspension on November 8, 2003. The Board remanded the case for OWCP to adjudicate whether the medical evidence established that he sustained an emotional condition as a result of the compensable work factors. The facts and circumstances as set forth in the prior decision are incorporated herein by reference.

On July 18, 2006 OWCP accepted appellant's claim for an adjustment disorder. On December 29, 2006 appellant filed a claim for disability beginning July 6, 2004. On the claim form, he listed self-employment from January 16, 2005 to the present with the Equalizer II Company.<sup>4</sup>

On July 26, 2012 OWCP determined that appellant was disabled beginning July 6, 2004 as a result of his accepted employment injury.<sup>5</sup> On August 6, 2012 appellant elected to receive FECA benefits beginning July 6, 2004.

By letter dated January 10, 2013, OWCP informed appellant that before it could pay him disability compensation, it had to review his earnings and employment activities. It requested that he submit information about his work as owner of the Equalizer II Company, including a detailed description of his work duties, his earnings, banking and billing information, permits and licenses held, the identification number of any employees, information about the leasing of the business premises, business insurance information, and tax returns for all the years in which he claimed compensation benefits as well as one year prior.

In a response dated January 22, 2013, appellant advised that on October 5, 2004 he invested \$46,310.61 into the Equalizer II Company. He maintained that the business was a hobby and not for profit. Appellant asserted that he could not provide earnings as the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) took his records. He stated, "To the best of my memory Equalizer II was in operation from 2005-2010 and during the course of [its] existence I sold 346 firearms and taught about 200 students. Each firearm sold for about \$75.00 above cost and each student paid \$100.00 for the course. Appellant estimated that he lost \$24,403.30 while running the business.

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<sup>3</sup> Docket No. 05-1843 (issued January 20, 2006). On January 27, 2004 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained stress as a result of disciplinary actions taken by management and harassment.

<sup>4</sup> In a June 21, 2012 CA-1032 report, appellant related that he worked in private employment beginning in 2011 writing proposals and pulling permits. He earned \$1,200.00.

<sup>5</sup> OWCP issued multiple decisions from 2009 through 2011 denying appellant's claim for disability; however, these decisions were set aside by OWCP hearing representatives and remanded for further development of the medical evidence.

By decision dated June 28, 2013, OWCP denied appellant's claim for disability beginning July 6, 2004. It determined that the medical evidence established that he was entitled to compensation, but found that it was not able to factually determine his wage-earning capacity, as required, in order to issue him compensation.

On July 22, 2013 appellant requested an oral hearing. At the hearing, held on November 18, 2013, an OWCP hearing representative explained that OWCP could not pay him compensation for total disability during periods when he had wages. He requested that appellant provide additional information regarding his business so that OWCP could determine the value of the work.

In a statement dated November 29, 2013, appellant indicated that he stopped selling firearms at his business location in May 2008. He performed all the duties of the business. After May 2008 appellant moved the company to his home as he was going out of business. He stated that he "was only allowed to sell the few firearms I had left by appointment only...." The ATF revoked appellant's license on May 25, 2010. Appellant would only have paid an employee \$8.00 an hour because he would not have trusted an employee to complete the paperwork.

By decision dated February 4, 2014, an OWCP hearing representative affirmed in part and vacated in part the June 28, 2013 decision. He found that appellant had not adequately described his employment activities from July 6, 2004 to May 25, 2010. The hearing representative determined, however, that appellant had established that he had no earnings from May 26, 2010 through May 11, 2011 and June 16, 2012 to the present, and thus was entitled to disability compensation for these periods. He further found that appellant had submitted sufficient evidence for OWCP to issue compensation based on his wage-earning capacity from May 12, 2011 through June 15, 2012. The hearing representative denied appellant's request to subpoena telephone conversations between himself and OWCP.

On June 13, 2014 appellant requested reconsideration of OWCP's finding that he was not entitled to wage-loss compensation from July 6, 2004 through May 25, 2010 because it was unable to determine his wage-earning capacity.<sup>6</sup> He indicated that he did not complete tax returns during that period because he had no earnings. Appellant again advised that the ATF took his business records. He maintained that he found forms showing the total number of firearms sold. Appellant asserted that he sold 346 firearms at a profit of \$75.00 and made a total of \$1,480.00 teaching and selling firearms to students.

Appellant submitted ATF Form 4473, Firearms Transaction Record Part 1 -- Over-the-Counter, documenting three firearms sales in 2008. The forms indicated that the transferor's transaction serial number was 51-343, 51-345, and 51-346. On the forms, appellant circled the numbers 343, 345, and 346. He made a notation that these numbers showed the number of firearms sold.

By letter dated June 2, 2014, the ATF denied appellant's request for information under the Freedom of Information Act (FOIA).

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<sup>6</sup> In an affidavit dated July 22, 2013, received by OWCP on March 27, 2014, the president of a company related that he paid appellant a total of \$1,200.00 to write proposals in 2001 and 2012.

In a decision dated September 26, 2014, OWCP denied appellant's request for reconsideration as he did not raise an argument or submit evidence sufficient to warrant reopening his case for further merit review under section 8128.

On appeal counsel argues that he submitted evidence sufficient to warrant reopening the case for further merit review.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>7</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>8</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received within one year of the date of that decision.<sup>9</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>10</sup>

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.<sup>11</sup> The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>12</sup>

### **ANALYSIS**

OWCP found that the medical evidence supported that appellant was disabled from his usual federal employment due to his accepted condition of adjustment disorder beginning July 6, 2004. In its last merit decision dated February 4, 2014, it found that he had not submitted sufficient evidence for OWCP to determine his wage-earning capacity from July 6, 2004 to May 25, 2010, and as such it was unable to pay him compensation for that period. On June 13, 2014 appellant requested reconsideration.

As noted above, the Board does not have jurisdiction over the February 4, 2014 merit OWCP decision. 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 the

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<sup>7</sup> 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

<sup>8</sup> 20 C.F.R. § 10.606(b)(3).

<sup>9</sup> *Id.* at § 10.607(a).

<sup>10</sup> *Id.* at § 10.608(b).

<sup>11</sup> *F.R.*, 58 ECAB 607 (2007); *Arlesa Gibbs*, 53 ECAB 204 (2001).

<sup>12</sup> *P.C.*, 58 ECAB 405 (2007); *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

claim. Appellant has not shown that OWCP erroneously applied a point of law or raised a relevant legal argument. In his July 13, 2014 request for reconsideration, he maintained that he did not complete tax returns from 2004 to 2010 because he did not have earnings. The underlying issue is whether appellant has submitted sufficient evidence regarding his earnings and employment for OWCP to determine his entitlement to compensation based on his wage-earning capacity from July 6, 2004 to May 25, 2010. Appellant's assertion that he does not have tax records for this period does not demonstrate a legal error by OWCP or raise a new and relevant legal argument regarding why OWCP erred in finding that he did not submit sufficient factual evidence to determine his wage-earning capacity for this period.

Appellant also maintained that the ATF took the records from his business. OWCP, however, previously considered his allegation that the ATF took his business records. A repetitious argument does not require reopening of a claim for further merit review.<sup>13</sup>

A claimant also may be entitled to a merit review by submitting pertinent new and relevant evidence. Appellant submitted two forms documenting firearms transactions in 2008. He advised that the forms showed the number of firearms sold as 343, 345, and 346. The issue, however, is not whether appellant sold firearms but instead whether he has submitted evidence relevant to determining his employment activities from July 6, 2004 to May 25, 2010. While the forms identified the transaction serial numbers as 51-343, 51-345 and 51-346, this information, without context, and is insufficient to allow OWCP to move forward in its attempt to determine his wage-earning capacity.

Appellant also submitted a letter from the ATF generally denying his request for information under FOIA. The letter is not relevant to the issue of his wage-earning capacity from 2004 to 2010 and thus is insufficient to warrant reopening his case for further review.<sup>14</sup>

On appeal appellant's counsel contends that he submitted evidence sufficient to warrant reopening the case for merit review. As discussed, however, he 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 by OWCP, or submit relevant and pertinent new evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request to reopen his case for further review of the merits under 5 U.S.C. § 8128(a).

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<sup>13</sup> See *E.S.*, Docket No. 14-2010 (issued September 2, 2015).

<sup>14</sup> *J.P.*, 58 ECAB 289 (2007); *Freddie Mosley*, 54 ECAB 255 (2002).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 26, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 12, 2015  
Washington, DC

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

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

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