



## ISSUE

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

## FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On June 5, 1979 appellant, then a 26-year-old clerk, slipped on a rubber band and struck his head on a mail tray. He stopped work on June 5, 1979 and received continuation of pay through July 20, 1979. Appellant filed a claim for wage-loss compensation (Form CA-7) for temporary total disability beginning July 20, 1979.<sup>4</sup> By decision dated January 31, 1980, OWCP accepted his traumatic injury claim (Form CA-1) for scalp contusion, but found that the June 5, 1979 work injury did not result in disability from work or a loss of wage-earning capacity. Consequently, it denied appellant's claim for wage-loss compensation.<sup>5</sup> In an August 7, 1980 decision, an OWCP hearing representative affirmed the January 31, 1980 decision.

On November 11, 1980 appellant filed a claim for recurrence of disability (Form CA-2a) beginning March 29, 1980.<sup>6</sup> At the time, OWCP had not formally adjudicated the November 11, 1980 recurrence claim.

By decision dated June 9, 1981, OWCP denied reconsideration of the January 31, 1980 decision. In an October 13, 1981 decision, the Board affirmed the August 7, 1980 and June 9, 1981 decisions.<sup>7</sup>

After more than three decades elapsed, in 2010 appellant submitted several requests for reconsideration and/or hearing requests before representatives of OWCP's Branch of Hearings and Review. In this regard, on November 29, 2010 a hearing representative informed appellant that his case was not in posture for review given that the Board had already upheld OWCP's prior determinations. In a March 1, 2011 decision, OWCP's hearing representative found that appellant's October 20, 2010 request for review of the written record was untimely filed. He advised appellant to notify the district office if he had additional evidence establishing a causal relationship between his condition and the June 5, 1979 employment injury.

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<sup>4</sup> Appellant was released to return to on January 21, 1980.

<sup>5</sup> OWCP noted that the medical evidence of record revealed a preexisting arm condition and there was no credible evidence of causal relationship between appellant's complaints of arm pain and the June 5, 1979 employment injury.

<sup>6</sup> The Form CA-2a noted that upon returning to work after the June 5, 1979 employment injury, appellant experienced severe headaches, and neck and upper back pain. He also could not work around noise or operate a letter sorting machine (LSM) because of repetitive motion. The Form CA-2a further noted that appellant had been working on the hand stamp table and complained that prolonged standing and constant hand/arm usage caused unbearable pain. Additionally, prolonged sitting on rest bars and throwing mail aggravated appellant's injury.

<sup>7</sup> Docket No. 81-1454 (issued October 13, 1981), *petition for recon. denied*, Docket No. 81-1454 (issued December 3, 1981).

In a March 23, 2011 decision, OWCP denied appellant's February 10, 2011 request for reconsideration finding that the request was untimely filed and failed to demonstrate clear evidence of error on the part of OWCP in denying wage-loss compensation on or after July 20, 1979.

By decision dated May 22, 2012, the Board affirmed the hearing representative's March 1, 2011 decision, but set aside OWCP's March 23, 2011 decision denying reconsideration, finding that absent proper notification, the one-year limitation for filing a timely request for reconsideration did not apply to OWCP decisions issued prior to June 1, 1987. Accordingly, the Board remanded the case for further consideration of appellant's request for reconsideration.<sup>8</sup>

By decision dated July 16, 2012, OWCP denied modification of its prior decision denying appellant's claim for wage-loss compensation on or after July 20, 1979 due to his accepted June 5, 1979 scalp contusion.

Appellant again requested reconsideration on September 24, 2012, which OWCP denied by decision dated December 18, 2012. In an April 17, 2014 decision, the Board affirmed OWCP's December 18, 2012 nonmerit decision denying reconsideration.<sup>9</sup>

Appellant again requested reconsideration on December 26, 2014. OWCP issued a January 16, 2015 decision finding that appellant's December 26, 2014 reconsideration request was untimely filed and failed to demonstrate clear evidence of error with respect to the July 16, 2012 merit decision.

In a January 22, 2015 letter to OWCP, appellant noted that OWCP had not yet formally adjudicated his November 1980 claim for recurrence of disability (Form CA-2a). He also resubmitted a copy of the previously filed Form CA-2a.

By letter dated February 10, 2015, OWCP acknowledged receipt of appellant's November 11, 1980 Form CA-2a. It also advised that appellant's claim had been accepted for scalp contusion, and that it appeared he was claiming disability due to a consequential condition including severe headaches, and neck and upper back pain. OWCP informed appellant of the legal, factual, and medical criteria for establishing a recurrence of disability. It further advised that the then-current record was insufficient to establish his claimed recurrence of disability beginning March 29, 1980. OWCP afforded appellant at least 30 days to submit additional factual and medical evidence in support of his recurrence claim.

In a March 4, 2015 narrative statement, appellant indicated that he sustained a mild cerebral concussion and cervical strain. He also allegedly developed tendinitis and carpal tunnel syndrome as a result of his repetitive duties as a multi-position LSM (MPLSM) clerk/operator. Appellant stated that he was performing light-duty work due to his arm condition at the time of the June 5, 1979 employment injury. He argued that he had been denied due process with

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<sup>8</sup> Docket No. 11-1689 (issued May 22, 2012).

<sup>9</sup> Docket No. 13-0719 (issued April 17, 2014). The Board also separately addressed OWCP's November 5, 2012 nonmerit decision issued under File No. xxxxxx367.

respect to his arm injury.<sup>10</sup> Appellant further noted that the employing establishment determined that he could not perform his duties, and the Social Security Administration (SSA) declared him totally disabled due to carpal tunnel syndrome, depression, and a bulging lumbar disc (L4).<sup>11</sup>

Appellant also provided several previously submitted medical reports. In a September 10, 1979 report, Dr. Charles Usher Jr., a Board-certified surgeon, noted chief complaints of headache and neck pain. Dr. Usher also noted that on June 5, 1979, while at work, appellant slipped on some rubber bands on the floor and struck the top of his head on a heavy plastic tray used to sort mail. He diagnosed mild cerebral concussion and cervical sprain. Dr. Usher referred appellant for physical therapy and an electroencephalogram (EEG).

In a January 21, 1980 report, Dr. H.M. Collier, Jr., a surgeon, noted that appellant had periodic frontal headaches, which were aggravated by prolonged mental exertion. He recommended that appellant be changed from a clerk to a carrier. Dr. Collier further noted that appellant had recovered sufficiently from his June 1979 injuries to resume regular work. However, appellant remained under his care for headaches.

In a March 31, 1980 report, Dr. Robert D. Willis, a chiropractor, noted that he was treating appellant for spinal injuries appellant related to a June 5, 1979 employment injury. He indicated that appellant could not perform duties requiring excessive upper extremity motion or stand for any length of time. Dr. Willis further advised that appellant should work in an area with a reduced noise level so as not to aggravate his headache symptoms.

In a January 16, 1981 report, Dr. Pierre L. LeRoy, a neurosurgeon, diagnosed cervical myositis with bilateral radiculopathy, reflex cephalalgia, and rule out (R/O) spondylolisthesis. He noted that appellant had a fall at work on “June 5, 1977” and struck his head, and since then had been experiencing cervical pain with radicular symptoms in both upper extremities. Dr. LeRoy further noted that appellant had occasional headaches associated with cervical pain.

By decision dated March 31, 2015, OWCP denied appellant’s recurrence claim. It found that the evidence of record did not establish that the claimed severe headaches and neck and upper back pain were due to a worsening of appellant’s accepted work-related condition.

Appellant timely requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review, which was held on December 15, 2015. His argument at the hearing pertained to whether the employing establishment and/or OWCP received timely notification of his right upper extremity condition under OWCP File No. xxxxxx367.<sup>12</sup>

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<sup>10</sup> As noted, appellant’s claimed upper extremity condition is the subject of the Board’s decision under File No. xxxxxx367. Docket No. 16-0052 (issued October 6, 2017).

<sup>11</sup> Appellant provided a copy of a January 30, 1998 SSA determination finding him disabled as of February 3, 1995.

<sup>12</sup> Appellant subsequently submitted medical evidence regarding his right upper extremity condition, which included a June 12, 1979 physician’s note that indicated he was being treated for right forearm pain, a February 1996 diagnosis of tendinitis, and a November 2006 diagnosis of right carpal tunnel syndrome.

By decision dated February 25, 2016, an OWCP hearing representative affirmed the March 31, 2015 decision. She determined that the evidence was insufficient to establish that appellant sustained a recurrence of disability as of March 29, 1980, due to a spontaneous change or material worsening of the accepted June 5, 1979 work injury. OWCP's hearing representative found that the medical evidence contemporaneous to the claimed March 29, 1980 recurrence did not establish that appellant stopped work as a result of the accepted scalp contusion. She also found that apart from noting his disability, none of appellant's physicians sufficiently explained why he was no longer able to work as of March 29, 1980. Moreover, the hearing representative found that the medical evidence did not establish that the additional diagnosed conditions including migraine headaches, cerebral concussion, and cervical strain -- were causally related to the June 5, 1979 employment injury. Lastly, she noted that appellant's right arm condition had not been accepted under the current claim, and the arguments he raised regarding the timeliness of his right upper extremity occupational disease claim under File No. xxxxxx367 were separate and distinct from the current recurrence claim under File No. xxxxxx170.

On July 8, 2016 appellant requested reconsideration. He continued to argue that his carpal tunnel syndrome was employment related. Appellant did not submit additional evidence with his July 8, 2016 request for reconsideration.

In a July 20, 2016 decision, OWCP denied appellant's request for reconsideration.

On September 16, 2016 appellant again requested reconsideration. In subsequent correspondence appellant continued to argue that his right upper extremity pain, which dated back to May 1979, was employment related. He explained that his pain was not psychogenic, as previously characterized, but rather due to nerve entrapment/carpal tunnel syndrome.<sup>13</sup> Appellant reiterated that OWCP should not have found his December 1986 upper extremity occupational disease claim untimely filed. He did not submit additional evidence with his latest request for reconsideration.

By decision dated October 19, 2016, OWCP denied appellant's request for reconsideration as it did not meet the requirements for merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>14</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>15</sup> One such limitation is that the request for

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<sup>13</sup> In a July 10, 1979 report, Dr. Thomas M. Stanley, a neurologist, saw appellant with respect to his reported right arm pain. His assessment at the time was "[s]uspect psychogenic arm pain." Dr. Stanley advised that he had nothing further to offer appellant from a neurological standpoint, and recommended that appellant be evaluated by a psychiatrist. He initially examined appellant on May 7, 1979, and interpreted a May 8, 1979 bilateral upper extremity electromyography and nerve conduction velocity (EMG/NCV) study as normal.

<sup>14</sup> This section provides in pertinent part: "[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." 5 U.S.C. § 8128(a).

<sup>15</sup> 20 C.F.R. § 10.607.

reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>16</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>17</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>18</sup>

### ANALYSIS

The last merit decision, dated February 25, 2016, denied appellant's claim for recurrence of disability beginning March 29, 1980. The issue on reconsideration was whether appellant submitted sufficient evidence and/or argument to warrant merit review of OWCP's determination regarding the claimed recurrence under File No. xxxxxx170. Appellant's June 5, 1979 traumatic injury claim has been accepted for scalp contusion only. In his September 16, 2016 request for reconsideration, he reiterated previous arguments regarding the status of his arm injury (OWCP File No. xxxxxx367), and how OWCP had purportedly denied him due process. Appellant also took issue with OWCP's alleged mischaracterization of his arm pain as "psychogenic."<sup>19</sup> As OWCP has repeatedly advised appellant, his right upper extremity condition is not part of the current traumatic injury claim under File No. xxxxxx170. Appellant's September 16, 2016 request for reconsideration was timely, but he neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance any relevant legal arguments not previously considered by OWCP. The Board finds that appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(3).<sup>20</sup>

Appellant also failed to submit any relevant and pertinent new evidence with his September 16, 2016 request for reconsideration. OWCP did not receive any new evidence with respect to his claimed recurrence of disability beginning March 29, 1980. Because appellant did not provide any relevant and pertinent new evidence, he is not entitled to a review of the merits

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<sup>16</sup> *Id.* at § 10.607(a). 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. *See* Chapter 2.1602.4b.

<sup>17</sup> 20 C.F.R. § 10.606(b)(3).

<sup>18</sup> *Id.* at § 10.608(a), (b).

<sup>19</sup> As noted, in a July 10, 1979 report Dr. Stanley indicated that he suspected "psychogenic arm pain," and he referred appellant to a psychiatrist for further evaluation. *See supra* note 13.

<sup>20</sup> 20 C.F.R. § 10.606(b)(3)(i) and (ii).

based on the third requirement under section 10.606(b)(3).<sup>21</sup> Accordingly, OWCP properly declined to reopen appellant's case under 5 U.S.C. § 8128(a).

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** that the October 19, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 26, 2017  
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>21</sup> *Id.* at § 10.606(b)(3)(iii).