

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.M., Appellant**

**and**

**DEPARTMENT OF THE AIR FORCE,  
RANDOLPH AIR FORCE BASE, CA, Employer**

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**Docket No. 16-1754  
Issued: January 10, 2018**

*Appearances:*  
*Max Gest, Esq.,* for the appellant<sup>1</sup>  
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On August 31, 2016 appellant, through counsel, filed a timely appeal from an August 2, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> As more than 180 days elapsed since the last merit decision dated February 10, 2016, to the filing of this

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> On July 14, 2017 the Board issued an order dismissing the appeal as it had not received a signed authorization form from appellant authorizing counsel to represent him. *See Order Dismissing Appeal*, Docket No. 16-1754 (issued July 14, 2017). On December 1, 2017 the Board vacated the order and reinstated the appeal as the statement of representation was submitted with appellant's petition for reconsideration. *See Order Vacating Prior Board Order & Reinstating Appeal*, Docket No. 16-1754 (issued December 1, 2017).

appeal, pursuant to the Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

### **ISSUE**

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

### **FACTUAL HISTORY**

On November 15, 2013 appellant, then a 56-year-old supervisory firefighter, filed an occupational disease claim (Form CA-2) alleging that his federal employment duties permanently aggravated his cervical degenerative disc disease and cervical spinal stenosis. He indicated that he first became aware of this condition on July 1, 2010, but did not realize the connection to his employment until March 19, 2013.

By correspondence dated November 27, 2013, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him regarding the medical and factual evidence necessary to establish his claim. Appellant was afforded 30 days to submit additional evidence.

OWCP thereafter received additional medical evidence. In a July 21, 2012 report, Dr. Laura Gridley, a treating Board-certified family practitioner, diagnosed muscle spasm and cervical disc disorder with myelopathy. She noted that appellant was seen for neck pain and that he had a cervical spinal fusion in 2005 and a history of chronic cervical pain. Physical findings included decreased neck range of motion. Dr. Gridley reported that appellant's neck pain had been aggravated the prior week when he threw a football at work.<sup>4</sup>

In an August 1, 2012 addendum to Dr. Gridley's report, Dr. Todd M. Goldenberg, a treating Board-certified neurological surgeon, related that appellant was seen in September 2001 for treatment of a C5-6 herniated nucleus pulposus with cervical myelopathy and that he had experienced continued chronic neck pain since his cervical surgery in 2005. Appellant had related that on July 17, 2012 "he tweaked his neck" when he threw a football at work. Dr. Goldenberg reviewed objective tests and conducted a physical examination. He diagnosed cervical spine stenosis with cervical myelopathy due to C5-6 herniated disc. Dr. Goldenberg recommended surgery to prevent a worsening of appellant's neurologic condition. In reports dated August 21 and September 28, 2012, he reiterated his findings and conclusions.

In a March 19, 2013 report, Dr. Jacob E. Tauber, an examining Board-certified orthopedic surgeon, noted appellant's history of injury, performed a physical examination, and reviewed medical evidence. Appellant's physical examination revealed diffuse weakness and

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> Appellant has a prior traumatic claim, assigned OWCP File No. xxxxxx425, wherein he alleged that on July 17, 2012 he sustained a shoulder injury as a result of playing and throwing a football during work hours. OWCP denied that claim and it is not presently before the Board.

sensory deficits, hyperreflexia, and positive bilateral Hoffman's signs. Under discussion, Dr. Tauber opined that appellant's firefighter duties contributed to his cervical degeneration. He also opined that appellant's throwing of a football as part of his training program in July 2012 aggravated this condition. Specifically, Dr. Tauber opined that appellant had a traumatic aggravation, but that the cervical condition itself was due in part to his employment duties as a firefighter. He opined that a cervical condition should be accepted as employment related as "[appellant's] years of work contributed to this condition and the specific incident aggravated his underlying condition."

By decision dated January 30, 2014, OWCP denied appellant's claim as it found the evidence of record insufficient to establish causal relationship between the claimed cervical condition and factors of his federal employment.

In a letter dated February 5, 2014, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. A telephonic hearing was held on September 9, 2014.

In a February 21, 2014 report, Dr. Tauber reviewed and responded to OWCP's November 30, 2014 decision. He described appellant's employment duties as a firefighter, which appellant had performed since 1981, and opined that they contributed to his cervical spinal stenosis. Dr. Tauber observed that appellant performed extensive strenuous duties which are well known to cause spinal degeneration. Furthermore, appellant's cervical condition had been aggravated by throwing a football during a training program in addition to the aggravation caused by his firefighter duties. Dr. Tauber diagnosed postsurgical cervical myelopathy, which was employment related.

By decision dated November 24, 2014 OWCP's hearing representative vacated the September 9, 2014 decision and remanded for further development of the medical opinion evidence. She found that the medical evidence of record established a *prima facie* claim and that OWCP had an obligation to either notify appellant as to additional evidence required to establish the claim or to develop the evidence to reach a determination on the claim. The hearing representative also found that there was an outstanding issue as to whether the 2012 football incident occurred in the performance of duty.

On October 9, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Michal J. Einbund, a Board-certified orthopedic surgeon, for an opinion as to whether appellant's cervical condition had been caused or aggravated by his firefighter duties. It provided a February 27, 2015 statement of accepted facts (SOAF) which listed appellant's accepted factors of federal employment and his medical history. OWCP noted that he had filed a separate claim for the July 17, 2012 incident, and that claim had been denied. The SOAF noted that appellant was currently employed as a supervisory firefighter by the employing establishment.

In an October 29, 2015 report, Dr. Einbund, based upon a review of the medical evidence, SOAF, and physical examination, diagnosed cervical spine intervertebral disc disorder with myelopathy and status post cervical fusion. He concluded, based on the periodic diagnostic testing, that the cervical changes appellant experienced since the September 2001 cervical spinal fusion were a natural progression of the condition and were age related. Dr. Einbund opined that

appellant's work duties did not aggravate the underlying cervical condition as the changes were progressive in nature. He concluded that the medical evidence he reviewed was insufficient to support a work injury and also concluded that there was no relationship directly correlating appellant's cervical condition to the identified work activities.

In a November 12, 2015 letter, counsel informed OWCP that the SOAF was inaccurate. He stated that appellant was no longer employed by the employing establishment as he had retired.

By decision dated February 10, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the accepted employment factors caused or aggravated the diagnosed cervical conditions. It found that the weight of the medical opinion evidence rested with Dr. Einbund's well-rationalized opinion which found no causal relationship.

On April 16, 2016 Dr. Tauber reviewed Dr. Einbund's second opinion examination report and disagreed with his opinion that appellant's cervical condition had not been aggravated by his employment duties. He noted that both he and Dr. Einbund described the same employment duties, but reached different conclusions as to whether appellant's cervical condition had been aggravated by those duties. Dr. Tauber reiterated his opinion that appellant's employment duties aggravated appellant's cervical condition observing that it was inconceivable not to reach this conclusion.

In a letter dated May 9, 2016 appellant, through counsel, requested reconsideration. Counsel noted that the February 27, 2015 SOAF was inaccurate as it indicated that appellant was employed by the employing establishment as a firefighter, but appellant had retired. Further, he noted that the hearing representative had previously found that Dr. Tauber's report established a *prima facie* claim in her November 24, 2014 decision. Counsel argued that there was an unresolved conflict in the medical opinion evidence between Dr. Tauber and Dr. Einbund on the issue of causal relationship.

By decision dated August 2, 2016, OWCP denied appellant's request for reconsideration. It found that the reports from Dr. Tauber were cumulative and substantially similar to his prior reports.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>5</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>6</sup> To be entitled to a merit review of an OWCP decision denying or

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<sup>5</sup> *Supra* note 3. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

<sup>6</sup> 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-0218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

terminating a benefit, a claimant's application for review must be received by OWCP within one year of the date of that decision.<sup>7</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>8</sup>

### ANALYSIS

The Board finds that OWCP erroneously denied reconsideration of the merits of appellant's claim. As previously noted, in order to require OWCP to open a case for merit review, appellant must show that OWCP erroneously applied or interpreted a specific point of law; advance a new relevant legal argument not previously considered by OWCP; or submit relevant and pertinent new evidence not previously considered by OWCP.<sup>9</sup> The Board finds that counsel has advanced a new legal argument that warrants further merit review under 5 U.S.C. § 8128(a).

In support of his reconsideration request, counsel argued that the opinion of OWCP's referral physician was based on an inaccurate SOAF, which incorrectly noted that appellant continued to be employed by the employing establishment as a firefighter when he had retired. He had previously raised the issue that the SOAF was inaccurate. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>10</sup>

Counsel further argued on reconsideration that there was an unresolved conflict in the medical opinion evidence between Dr. Tauber and Dr. Einbund. This argument relates to the underlying issue of causal relationship between the claimed cervical conditions and the accepted factors of federal employment. As this is a relevant legal argument not previously considered by OWCP, the Board finds that OWCP improperly denied merit review its August 2, 2016 decision.<sup>11</sup> The case will be remanded to OWCP for further consideration of the merits of appellant's claim, to be followed by the issuance of an appropriate merit decision.

### CONCLUSION

The Board finds that OWCP improperly denied appellant's May 9, 2016 request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>7</sup> *Id.* at 10.607(a).

<sup>8</sup> *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-0440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

<sup>9</sup> *Supra* note 6.

<sup>10</sup> *Richard Yadron*, 57 ECAB 207 (2005); *Eugene Butler*, 36 ECAB 393 (1984).

<sup>11</sup> *Supra* note 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated August 2, 2016 is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: January 10, 2018  
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