

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

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**W.D., Appellant** )

**and** )

**DEPARTMENT OF HEALTH & HUMAN  
SERVICES, CENTERS FOR DISEASE  
CONTROL & PREVENTION, Atlanta, GA,  
Employer** )

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**Docket No. 14-1196  
Issued: May 6, 2015**

*Appearances:*  
*Patricia Champion, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 29, 2014 appellant, through her representative, filed a timely appeal of an April 10, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for reconsideration of the merits of her claim. As more than 180 days elapsed from issuance of the last merit decision of OWCP to the filing of this appeal, the Board has no jurisdiction over the merits of the case. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board will review the April 10, 2014 nonmerit decision.

**ISSUE**

The issue is whether OWCP properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

On appeal, appellant asserts that OWCP erred in denying merit review because she submitted evidence establishing that the employing establishment committed error and abuse in failing to process her applications for promotion appropriately.

### **FACTUAL HISTORY**

This case has previously been before the Board. In a November 17, 2005 decision, the Board found that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).<sup>2</sup> In a January 14, 2008 decision, the Board found that, as her March 2, 2007 reconsideration request was not timely filed and she failed to establish clear evidence of error, OWCP properly denied a merit review of her claim in its May 3, 2007 decision.<sup>3</sup> In a December 5, 2012 decision, the Board found that appellant did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty because she did not establish a compensable factor of employment and affirmed a January 12, 2012 OWCP decision.<sup>4</sup> In a November 14, 2013 decision, the Board found that she did not meet her burden of proof to establish that she sustained an emotional condition in the performance of duty causally related to factors of her federal employment and affirmed an April 25, 2013 OWCP decision.<sup>5</sup> The facts of the case as set forth in the prior Board decisions are incorporated herein by reference.

On December 19, 2013 appellant requested reconsideration and asserted that the employing establishment committed error when she was not considered for promotion. She submitted correspondence dated August 22, 2002, addressed to her by the employing establishment. The correspondence stated:

“This correspondence is to advise [appellant] that you have been authorized to receive priority consideration for the position of Human Resources Assistant, GS-203-07, Atlanta or next substantially similar position. This consideration has been authorized due to an administrative error that was made in association with announcement number MP2-01-164. Specifically, an error was made in

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<sup>2</sup> Docket No. 05-754 (issued November 17, 2005). On February 25, 2002 appellant, a health communications specialist who last worked on January 16, 2002, filed an occupational disease claim, alleging that factors of her federal employment caused an emotional condition. The claim was adjudicated by OWCP under file number xxxxxx622. In a September 26, 2002 decision, OWCP denied the claim, finding that appellant did not establish that she sustained an emotional condition in the performance of duty. Appellant retired in 2003. By decision dated October 21, 2003, an OWCP hearing representative found that appellant established one factor as compensable, that from March 24 to 26, 1999, she and other workers were required to put together approximately 80 two-inch binders in a short turnaround time and was not provided adequate instruction. The hearing representative, however, found that the medical evidence of record did not support that her condition was caused by the one accepted employment factor. In a nonmerit decision dated November 9, 2004, OWCP denied appellant's reconsideration request. This was affirmed by the Board in its November 17, 2005 decision, Docket No. 05-754.

<sup>3</sup> Docket No. 07-2002 (issued January 14, 2008).

<sup>4</sup> Docket No. 12-860 (issued November 5, 2012).

<sup>5</sup> Docket No. 13-1522 (issued November 14, 2013). The Board found that appellant submitted insufficient evidence to show that the employing establishment committed error when she was not considered for a promotion.

evaluating [appellant's] basic qualifications and you were inappropriately rated as not qualified.”

The August 22, 2002 letter described the applications procedures for prior consideration and concluded with the statement:

“I sincerely regret that this error occurred and I apologize for any inconvenience and disappointment that has been caused.”

In a nonmerit decision dated April 10, 2014, OWCP denied appellant's reconsideration request. It found that the evidence submitted did not contain a relevant legal argument not previously considered. OWCP related that in its April 25, 2013 decision it advised appellant “even if it did happen, it is not compensable since the desire to work in a particular position is a self-generated reaction and it is not compensable.”

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.<sup>6</sup> Section 10.608(a) of the Code of Federal Regulations provide that a timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>7</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (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>8</sup> Section 10.608(b) provides that, when a request for reconsideration is timely but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>9</sup>

### **ANALYSIS**

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated April 10, 2014 denying appellant's application for review. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of her claim.<sup>10</sup>

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.608(a).

<sup>8</sup> *Id.* at § 10.608(b)(1) and (2).

<sup>9</sup> *Id.* at § 10.608(b).

<sup>10</sup> *Supra* note 1.

The Board finds that the August 22, 2002 correspondence from the employing establishment is pertinent evidence not previously considered by OWCP. The correspondence acknowledged that the employing establishment made an “administrative error” with regard to whether appellant was qualified for a job. The underlying merit issue in this case is whether appellant established that she sustained an emotional condition causally related to factors of employment. In the April 10, 2014 decision, OWCP related that the April 25, 2013 decision advised her “even if it did happen, it is not compensable since the desire to work in a particular position is a self-generated reaction and it is not compensable.” A reading of the April 25, 2013 decision indicates that, in that decision, OWCP indicated that it found a statement by appellant’s attending psychiatrist, Dr. A. Benjamin Eubanks, who indicated that the employing establishment made an error, of no probative value. The correspondence dated August 22, 2002, is relevant and pertinent new evidence regarding whether the employing establishment committed error or abuse in an administrative matter, eligibility for a promotion, an assertion appellant made in her claim.<sup>11</sup>

As appellant has submitted evidence that is pertinent to the merit issue in this case that was not previously considered by OWCP, she is entitled to a review of the merits of her claim under section 10.606(b)(2) of OWCP’s regulations.<sup>12</sup> The case shall therefore be remanded to OWCP to consider whether the August 22, 2002 correspondence from the employing establishment is sufficient to establish an employment factor which may give rise to a compensable disability under FECA. The Board will therefore set aside OWCP’s April 10, 2014 decision. After this and such further development deemed necessary, OWCP shall issue an appropriate merit decision.

### CONCLUSION

The Board finds that OWCP improperly denied appellant’s request for a merit review pursuant to section 8128(a) of FECA.

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<sup>11</sup> Administrative and personnel matters, although generally related to the employing establishment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA. *Charles D. Edwards*, 55 ECAB 258 (2004). Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor. *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>12</sup> 20 C.F.R. § 10.606(b)(2); *see T.F.*, Docket No. 10-1701 (issued May 3, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 10, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this decision of the Board.<sup>13</sup>

Issued: May 6, 2015  
Washington, DC

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.