

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

C.M., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 14-1887
Issued: May 6, 2015**

Appearances:
Neil C. Bonney, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 27, 2014 appellant, through counsel, filed a timely appeal of a July 29, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed between the issuance of the last merit decision dated February 6, 2014 and the filing of this appeal on August 27, 2014, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.²

ISSUE

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

¹ 5 U.S.C. § 8101 *et seq.*

² 20 C.F.R. § 501.3(e).

On appeal, counsel asserts that OWCP failed to properly consider the issues and evidence, specifically evidence indicating that the employing establishment unfairly blamed appellant for a coworker's death and that appellant did have oversight authority over the coworker. Therefore, OWCP erred in not accepting her claim.

FACTUAL HISTORY

On February 1, 2013 appellant, then a 38-year-old electrical/electronics supervisor/project zone manager filed an occupational disease claim alleging that factors of her federal employment caused post-traumatic stress disorder (PTSD) and chronic major depression. She specifically alleged that a coworker's death and the idea that she was somehow being blamed for it caused her emotional condition. Appellant stated that she first became aware of the illness and its relationship to her employment on February 22, 2010. In a January 28, 2013 statement, she indicated that, on February 19, 2010, while she was on temporary duty as a zone manager in San Diego, California, and assigned to the U.S.S. Ronald Reagan (CVN-76), a coworker who was an active duty Navy Chief was electrocuted. Appellant indicated that she was not present when he died, but one of the mechanics under her supervision was present. She stated that following the event and during the ensuing investigations, she was blamed for the Chief's death, but the investigations found that his death was caused by his own negligence. Appellant noted that, although no disciplinary action had been taken against her for the incident, all of her work was thereafter scrutinized and she was questioned and harassed almost daily by management. She further stated that an April 2010 "crew talk" implicated zone managers in the death. Appellant reported that she had been in counseling since July 2010, was diagnosed with PTSD, and had missed many days of work. She stated that she had been overlooked for awards and had been left in a position where no one trusted her.

In support of her claim, appellant submitted e-mails, reports, coworker statements, performance appraisals and training information. She also submitted an April 27, 2010 "Stand Down For NonNuclear Work" memorandum discussing a degrading trend in quality of work. The background for the memorandum stated that "Actions taken on April 14, 2010 to address a degrading trend in first time quality of work ... have been ineffective." A "hotwash" was announced for April 27, 2010 for selected senior managers to determine why actions taken on April 14, 2010 were not effective. Attached to the memorandum was an April 28, 2010 report of the "hotwash." This report noted, "Over the past several months there has been a trend in lack of proper planning and procedural compliance, poor workmanship, and poor decision making that have resulted in personnel injuries, a fatality, damaged ship's equipment and near misses." Listed as examples of problems on the U.S.S. Ronald Reagan (CVN-76) were "Project personnel did not stop and document problems when electrical breaker work was not in accordance with the '[tactical water distribution system] TWDs.' Proper safe guards were not used while working on energized gear thus RESULTING IN A FATALITY. Cause: Poor pre-job planning, poor supervisory over site (including ZM & APS)."

In a January 19, 2013 report, Dr. Patrick D. Thrasher, a Board-certified psychiatrist, noted her report of the coworker's death, and subsequent investigation. He began treating appellant in August 2012 and diagnosed PTSD, chronic; major depression, single episode, moderate-to-severe, status post herniated cervical disc with discectomy, and fusion; and severe job stress secondary to on-the-job death of a Chief. Dr. Thrasher found that appellant's

psychological difficulties were a direct result of her involvement in the Chief's death and the investigations into his death.

A statement of accepted facts dated June 17, 2013 stated that, as a zone manager, appellant was responsible for supervising a number of shipyard employees and working with the ship's company to supervise electrical overhaul.

By decision dated June 17, 2013, OWCP found that appellant had failed to establish a compensable factor of employment and denied her claim. It found, *inter alia*, that "the death by electrocution on the job (U.S.S. Ronald Reagan) of one of your employees Chief ..., [p]ropulsion [p]lant [e]lectrical [c]hief" had been investigated, but OWCP found no evidence from the employing establishment's management blaming appellant for the death of her employee.

Appellant, through counsel, timely requested a hearing. She resubmitted the April 27, 2010 memorandum and a June 28, 2013 memorandum in which Carol Pugh, electrical/electronics group superintendent, reported that appellant was assigned to a ship overhaul and repair project for the U.S.S. Ronald Reagan (CVN-76) from approximately November 2009 -- May 2010. Although she stated that appellant did not witness the electrocution and death of the Chief, the work being performed by him was under her area of responsibility as a second level supervisor (zone manager).

At the hearing, held on November 20, 2013, Dr. Thrasher testified about appellant's medical condition. He opined that her illness was caused by the Chief's death, who was under her supervision, and that she had been blamed for his death. Raymond Simmons, appellant's supervisor, in San Diego, also testified. He stated that appellant's emotional state had changed after the Chief's death and that she had attendance problems. Mr. Simmons indicated that four investigations were conducted, and that he felt that fingers were pointed at the civilian managers, including appellant, regarding the Chief's death. Appellant testified that the Chief was her counterpart and that she felt that she was being blamed for his death, especially by Navy military personnel, because, perhaps, correct procedures had not been followed.

In a February 6, 2014 decision, an OWCP hearing representative affirmed the June 17, 2013 decision. She found, in part, that appellant was not present or supervising the work involved when the accident occurred.

On April 17, 2014 appellant, through counsel, requested reconsideration. Counsel disputed the hearing representative's factual finding that: "[appellant] was not present or supervising the work involved when the accident occurred. Further, although she worked with him, he was not [appellant's] employee." Counsel asserted that appellant had oversight responsibilities over the Chief and thus over the project that led to his death. He attached two Navy documents in support of his argument. He stated that the first document, an excerpt from a document entitled "integrated project teams for aircraft carrier maintenance" explained the function of the organization's naval supervising activity (NSA). Counsel noted that "[w]hile working the [p]lanned [i]ncremental [a]vailibility in ... San Diego on the U.S.S. Ronald Reagan, [the employing establishment] was the NSA."

The second document, dated November 30, 2011, was a “memorandum of agreement between Puget sound naval shipyard and intermediate maintenance facility [the employing establishment] and COMNAVAIRFOR C/O CVN 68 CL.” Counsel explained that this document “establishes Norfolk Naval Shipyard’s requirements to perform breaker work and specifically covers what is expected of naval shipyard personnel. Pursuant to paragraph 3, it specifically required the shipyard to provide, “direction and oversight” when the Ship’s force accomplishes work supporting shipyard assigned tasks.” He further argues that in paragraph 5, it “explicitly provides NSA with oversight responsibilities while working circuit breakers.” Counsel notes that appellant specifically supervised this area of work and referred to the statement of Ms. Pugh, already in the record, which noted that the deceased Navy Chief was under the control of appellant as a second level supervisor (zone manager).

By decision dated July 29, 2014, OWCP denied appellant’s request for reconsideration.³ It noted that the submitted evidence did not contain a relevant legal argument not previously considered by OWCP. Specifically, OWCP found there was no evidence that the Chief’s death occurred due to appellant’s actions or supervisions. “There is no proof that you were present or supervising the work involved when the accident occurred.” Further, OWCP found the evidence was immaterial or irrelevant and had no bearing on the issue or was inconsequential to the issue. It noted, “Specifically, you have not established that you were in fact blamed for the death of [the] Chief ... at this standup, as the standup document concludes that multiple personnel were involved in errors involving multiple events.”

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.⁴ 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).⁵ 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; or (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶ 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.⁷

³ The decision was initially issued on July 24, 2014 but was subsequently reissued because a copy had not been sent to counsel.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.608(a).

⁶ *Id.* at § 10.608(b)(1) and (2).

⁷ *Id.* at § 10.608(b).

ANALYSIS

The only decision before the Board in this appeal is the nonmerit decision of OWCP dated July 29, 2014 denying appellant's request for reconsideration. Because there is no OWCP merit decision within the Board's jurisdiction, the Board lacks jurisdiction to review the merits of appellant's claim.⁸

In merit decisions dated June 17, 2013 and February 6, 2014, OWCP denied appellant's emotional condition claim because she had failed to establish a compensable factor of employment. Counsel requested reconsideration on April 17, 2014 asserting that, as a zone manager, appellant had oversight over the project during which the Chief died.

Appellant first asserted in her January 28, 2013 statement that, as zone manager, she felt responsible for the Chief's death. Her position as zone manager was acknowledged by OWCP in its June 17, 2013 statement of accepted facts which stated that as a zone manager she was responsible for supervising a number of shipyard employees and working with the ship's company to supervise electrical overhaul. Appellant testified at the November 20, 2013 hearing that the Chief was her military counterpart, and this was discussed by the hearing representative in the February 6, 2014 decision. Thus, she did not allege or demonstrate that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).⁹

With respect to the third above-noted requirement under section 10.606(b)(2), appellant submitted new evidence which was intended to specifically rebut the hearing representative's factual finding that she was not present or supervising the work involved when the accident occurred. Attached to her request for reconsideration were two Navy documents in support of the hearing representative's assertion that she had oversight responsibilities over the Chief and thus over the project that led to his death. The first document entitled "integrated project teams for aircraft carrier maintenance," explained the function of the organization's NSA. The second document, dated November 30, 2011, was a "Memorandum of Agreement between Puget Sound Naval Shipyard and Intermediate Maintenance Facility [of the employing establishment] Shipyard and COMNAVAIRFOR C/O CVN 68 CL." Counsel explained that this document "establishes [that the employing establishment]'s requirements to perform breaker work and specifically covers what is expected of naval shipyard personnel." Pursuant to paragraph 3, it specifically requires the shipyard to provide "direction and oversight" when the Ship's force accomplishes work supporting shipyard assigned tasks. Counsel further argued that in paragraph 5, it "explicitly provides NSA with oversight responsibilities while working circuit breakers." He noted that appellant specifically supervised this area of work and referred to the statement of Ms. Pugh, already in the record, which noted that the deceased Navy Chief was under the control of appellant as a second level supervisor (zone manager). The Board finds that this evidence is

⁸ *Supra* note 1.

⁹ 20 C.F.R. § 10.606(b)(2).

new, relevant, and pertinent to the matter of whether appellant had oversight responsibility over the Chief at the time of his death.

The underlying merit issue is whether appellant met her burden of proof to establish a compensable employment factor causing her emotional condition in the performance of duty causally. As appellant has submitted relevant, and pertinent evidence on reconsideration that had not been 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.¹⁰

To obtain a merit review, a claimant is not required to submit all evidence that may be necessary to discharge his or her burden of proof. The requirement only specifies that the evidence be relevant and pertinent and not previously considered by OWCP. If OWCP should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹¹

The Board finds that appellant's submission of new and relevant evidence on reconsideration entitles her to a merit review under 5 U.S.C. § 8128(a). The July 29, 2014 decision of the Office of Workers' Compensation Programs is hereby set aside. After this and such further development deemed necessary, OWCP shall issue a *de novo* decision.

¹⁰ *Id.* at § 10.606(b)(2); *see T.F.*, Docket No. 10-1701 (issued May 3, 2011).

¹¹ *Paul Kovash*, 49 ECAB 350 (1998); *Joseph L. Cabral*, 44 ECAB 152 (1992).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 29, 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.

Issued: May 6, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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