

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

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F.K., Appellant )  
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 )  
and )  
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DEPARTMENT OF TRANSPORTATION, )  
FEDERAL AVIATION ADMINISTRATION, )  
Ronkonkoma, NY, Employer )  
\_\_\_\_\_ )

**Docket No. 21-0998**  
**Issued: December 29, 2021**

*Appearances:*  
*Michael Cseri, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On April 12, 2021 appellant, through her representative, filed a timely appeal from a January 22, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated December 6, 2019 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</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 her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On May 16, 2019 appellant, then a 39-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that on April 26, 2019 she experienced stress and anxiety due to witnessing a near mid-air collision while in the performance of duty. She stopped work on April 27, 2019.

In a development letter dated May 30, 2019, OWCP informed appellant that it had not received any evidence in support of her claim. It advised her of the type of medical and factual evidence needed, and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In an April 29, 2019 report, Dr. Bruce S. Herman, a licensed clinical psychologist, noted that appellant related feelings of anxiety and depression, which she attributed to an incident on April 26, 2019 when two planes lost separation and nearly collided. He performed a mental status examination and noted that she described ruminative thoughts about the incident, was unable to concentrate, and was having marked difficulty sleeping. Dr. Bruce also administered the Modified Post-traumatic Stress Disorder (PTSD) Symptom Scale and Beck Depression Inventory, detailing appellant's description of frequent intrusive thoughts, recurrent nightmares, frequent crying, disappointment, being critical of herself, and significant depression. He diagnosed acute stress disorder and opined that she was experiencing marked feelings of anxiety and depression as a direct result of the April 26, 2019 employment incident.

In a statement dated June 11, 2019, appellant related that on April 26, 2019 three aircraft were involved in multiple near collisions while attempting to avoid weather issues, and she was unable to communicate with one of the aircraft. She asserted that the events were uncontrolled and gravely dangerous and that she was constantly second guessing herself, became disoriented, and was unable to concentrate. After the incident, appellant was very shaken and sought psychological care with Dr. Herman.

In Part B of an authorization for examination and/or treatment (Form CA-16) dated June 29, 2019, Dr. Herman noted a diagnosis of acute stress disorder due to an incident on April 26, 2019 when two aircraft lost separation.

By decision dated July 9, 2019, OWCP accepted that the April 26, 2019 employment incident occurred as alleged. However, it denied appellant's claim, finding that the medical evidence submitted was insufficient to establish a medical diagnosis in connection with the accepted April 26, 2019 employment incident. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence including a duty status report (Form CA-17) dated June 11, 2019 by Dr. Herman, which advised that appellant was able to return to full-duty work.

On July 26, 2019 appellant, through her representative, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held on October 22, 2019.

By decision dated December 6, 2019, the hearing representative affirmed OWCP's July 9, 2019 decision.

On November 17, 2020 appellant, through her representative, requested reconsideration. In support of her request, she argued that Dr. Herman’s original April 29, 2019 narrative report contained a diagnosis of acute stress disorder in connection with the accepted employment incident. Appellant also submitted an amended version of the narrative report, where Dr. Herman opined that, “as a direct result of her experience on April 26, 2019, [appellant] was diagnosed with DSM-5 F43.0, Acute Stress Disorder.”

By decision dated January 22, 2021, OWCP denied appellant’s request for reconsideration.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>2</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (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>3</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP’s decision for which review is sought.<sup>4</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>5</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>6</sup>

### **ANALYSIS**

The Board finds that OWCP improperly denied appellant’s request for reconsideration of the merits of her claim.

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<sup>2</sup> 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

<sup>3</sup> 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.*; *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

<sup>4</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. 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 (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>5</sup> *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

<sup>6</sup> *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

Along with the November 17, 2020 reconsideration request, appellant submitted Dr. Herman's amended April 29, 2019 narrative report, which included his opinion that her diagnosed condition of acute stress disorder was a direct result of the accepted April 26, 2019 employment incident. As his amended report addressed the underlying issue of whether a medical condition had been diagnosed in connection with the accepted employment incident, the report constitutes relevant and pertinent new evidence that was not previously considered. Therefore, the Board finds that the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).<sup>7</sup>

Consequently, the Board will set aside OWCP's January 22, 2021 decision and remand the case for an appropriate merit decision on appellant's claim.<sup>8</sup>

### **CONCLUSION**

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

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<sup>7</sup> *Supra* note 3; *see also J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).

<sup>8</sup> The Board notes that the employing establishment issued a Form CA-16. A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 22, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 29, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board