



## ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an emotional condition in the performance of duty; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision and a prior order are incorporated herein by reference. The relevant facts are set forth below.

On June 24, 2015 appellant, then a 55-year-old bankruptcy specialist, filed a notice of recurrence (Form CA-2a) under OWCP File No. xxxxxx575.<sup>4</sup> OWCP converted the recurrence claim to a new occupational disease claim, adjudicated under OWCP File No. xxxxxx163.<sup>5</sup>

By decision dated December 4, 2015, OWCP denied the new occupational disease claim, finding that appellant had not identified any compensable factors of employment and, thus, had not established an emotional condition in the performance of duty. Following a December 21, 2015 request for reconsideration, by decision dated March 25, 2016, OWCP denied modification of its December 4, 2015 decision.

On May 16, 2016 appellant filed an appeal with the Board from OWCP's December 4, 2015 and March 25, 2016 merit decisions. By order dated December 22, 2016, the Board remanded the case to OWCP for further development, to be followed by a *de novo* decision.<sup>6</sup> The Board explained that on remand OWCP shall obtain a statement from appellant in which she described in detail the employment conditions or incidents she believed caused or contributed to her emotional condition claimed in 2015.

On November 2, 2017 OWCP accepted the claim in OWCP File No. xxxxxx163 for major depressive disorder, recurrent, moderate, and generalized anxiety disorder. Included was a notice to the employing establishment explaining the basis for the acceptance. OWCP noted that an October 8, 2015 Equal Employment Opportunity Commission (EEOC) decision of record ruled in appellant's favor regarding her claim of harassment.

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<sup>3</sup> *Order Remanding Case*, Docket No. 16-1167 (issued December 11, 2016); Docket No. 18-1179 (issued June 11, 2019).

<sup>4</sup> Appellant's December 2, 2008 occupational disease claim under OWCP File No. xxxxxx575 was accepted for major depression, recurrent episode, moderate, and generalized anxiety disorder. Appellant stopped work on November 7, 2008 and returned to full-duty work on October 7, 2010.

<sup>5</sup> OWCP administratively combined OWCP File Nos. xxxxxx163 and xxxxxx575, with OWCP File No. xxxxxx575 serving as the master file.

<sup>6</sup> Docket No. 16-1167, *id.*

In correspondence dated December 5, 2017, the employing establishment notified OWCP that the November 2, 2017 decision in which appellant's claim was accepted was incorrectly based on a nonexistent judicial finding in appellant's favor by the EEOC.

By letter dated December 28, 2017, OWCP advised appellant that it proposed to rescind its November 2, 2017 acceptance for generalized anxiety disorder and major depressive disorder, recurrent, moderate. It discussed appellant's claimed factors of employment and found that none were compensable. OWCP further noted that it had erred because the EEOC document relied on in its acceptance was not a final decision.

By decision dated February 12, 2018, OWCP rescinded the acceptance of appellant's claim for major depressive disorder, recurrent, moderate, and generalized anxiety disorder, effective December 28, 2017. It found that she had not established a compensable factor of employment and that it had erred in its November 2, 2017 decision, noting new evidence had been received on December 5, 2017 indicating that there was no final EEOC decision dated October 18, 2015.

On February 26, 2018 appellant requested reconsideration. By decision dated May 10, 2018, OWCP denied modification of the February 12, 2018 decision.

Appellant filed an appeal with the Board on May 18, 2018 from the February 12 and May 10, 2018 merit decisions. By decision dated June 11, 2019, the Board affirmed those decisions, finding that OWCP had met its burden of proof to rescind its November 2, 2017 acceptance of appellant's emotional condition claim and that she had not met her burden of proof to establish an emotional condition in the performance of duty.<sup>7</sup>

Evidence submitted during the pendency of appellant's appeal to the Board included February 21, 2017 and September 11, 2018 employing establishment denials of appellant's reasonable accommodation requests, a December 18, 2017 decision regarding an EEOC claim that found no substantiated factors, a July 6, 2018 EEOC decision that affirmed the dismissal of her complaint regarding alleged unlawful employment discrimination in reprisal of prior protected EEOC activity, other information regarding her EEOC claim, August 15, 2018 and May 28, 2019 employing establishment responses to appellant's grievances regarding a reduction in her workload, and other information regarding grievances, and medical evidence previously of record.

OWCP also received a leave bank application dated April 11, 2019 in which Dr. Harish N. Thankur, a Board-certified internist, provided diagnoses including depression and anxiety, and e-mails regarding a 2018 request for reasonable accommodation.

On June 20, 2019 appellant requested reconsideration. In support thereof, she submitted a July 17, 2018 letter in which an employing establishment physician discussed her reasonable accommodation request and suggested alternatives.

Medical evidence submitted included laboratory and diagnostic study results from a September 28, 2019 emergency department visit and medical literature concerning different types

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<sup>7</sup> Docket No. 18-1179, *supra* note 3.

of headaches and tachycardia. Appellant additionally submitted reports from Dr. Shannon Payne, a chiropractor, regarding a back condition.

By decision dated October 31, 2019, OWCP denied modification.<sup>8</sup>

On December 16, 2019 appellant again requested reconsideration. She asserted that the employing establishment committed error by denying her reasonable accommodation and submitted evidence previously of record.

In an undated report, Dr. Jonathan Morris, an attending licensed clinical psychologist, who began treating appellant in June 2015, maintained that in recent years appellant had developed stress-based psychophysiological health problems that were likely psychoneuroimmunological sequelae of a work environment, where, reportedly, she was subject to harassment and onerous demands made by specific supervisors and managers. He maintained that the employing establishment's denial of appellant's reasonable accommodations were based on flawed logic, rendering them nonsensical and advised that objective clinical indicators suggested a recent exacerbation of appellant's symptom complex since the denial of reasonable accommodation.

In a January 8, 2019 report, Dr. Charles E, Willis, II, a Board-certified anesthesiologist and pain management specialist, noted seeing appellant that day for an initial visit and that she was working full duty. He reported a history that on or about June 28, 2015 she began experiencing symptoms of pain and discomfort in her neck, bilateral shoulders, and low back, headaches, and that she attributed her symptoms to an increasingly stressful work environment. Dr. Willis described current complaints and examination findings. His diagnoses included recurrent major depressive disorder and generalized anxiety disorder. Dr. Willis opined, with reasonable medical certainty that the constant stress of appellant's job had contributed to her diagnoses.

By decision dated January 31, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim.

### **LEGAL PRECEDENT -- ISSUE 1**

It is well established that once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>9</sup> After OWCP properly discharges its burden of proof to justify rescinding its acceptance of a claim, the burden of proof shifts back to the employee to establish that he sustained an injury while in the performance of duty and is therefore entitled to compensation benefits.<sup>10</sup>

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<sup>8</sup> OWCP noted that it was denying modifying modification of the Board's June 11, 2019 decision. OWCP, however, has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. See 20 C.F.R. § 501.6(d). Appellant had 30 days from the date of the Board's June 11, 2019 decision to file a petition for reconsideration with this Board of its decision. *Id.* at § 501.7; see also *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *B.B.*, Docket No. 14-0464 (issued June 4, 2014).

<sup>9</sup> See *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>10</sup> *Kathleen M. Fava (John F. Malley)*, 49 ECAB 519 (1998).

An employee seeking benefits under FECA<sup>11</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>12</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>13</sup>

To establish a claim for an emotional condition in the performance of duty, an employee must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his or her condition; (2) medical evidence establishing that he has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.<sup>14</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>15</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within coverage under FECA.<sup>16</sup> When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.<sup>17</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.<sup>18</sup> Where, however, 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.<sup>19</sup>

For harassment or discrimination to give rise to a compensable disability under FECA, there must be probative and reliable evidence that harassment or discrimination did in fact occur.

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<sup>11</sup> *Supra* note 1.

<sup>12</sup> *S.Z.*, Docket No. 20-0106 (issued July 9, 2020); *R.C.*, 59 ECAB 427 (2008).

<sup>13</sup> *Id.*

<sup>14</sup> *R.B.*, Docket No. 19-0343 (issued February 14, 2020).

<sup>15</sup> 28 ECAB 125 (1976).

<sup>16</sup> *M.A.*, Docket No. 19-1017 (issued December 4, 2019); *Robert W. Johns*, 51 ECAB 137 (1999).

<sup>17</sup> *R.B.*, *supra* note 14; *Pamela D. Casey*, 57 ECAB 160 (2005); *Lillian Cutler*, *supra* note 24.

<sup>18</sup> *D.T.*, Docket No. 19-1270 (issued February 4, 2020); *Thomas D. McEuen*, 41 ECAB 387 (1990).

<sup>19</sup> *M.A.*, *supra* note 16.

Mere perceptions of harassment, retaliation, or discrimination are not compensable under FECA.<sup>20</sup> As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim. The claim must be supported by probative evidence.<sup>21</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed compensable factors of employment and may not be considered.<sup>22</sup> If an employee does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. If a compensable factor of employment is substantiated, OWCP must base its decision on an analysis of the medical evidence that has been submitted.<sup>23</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its June 11, 2019 decision which found that OWCP properly rescinded the acceptance of the emotional condition claim.<sup>24</sup> Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.<sup>25</sup> As the Board previously found that OWCP met its burden of proof to justify rescinding its acceptance of appellant's emotional condition claim, the burden of proof shifts back to appellant to establish that she sustained an injury while in the performance of duty and is therefore entitled to compensation benefits.<sup>26</sup> The newly submitted evidence regarding grievances and EEOC claims does not establish error or abuse on the part of the employing establishment. The filing of grievances and EEOC complaints are administrative or personnel matters which, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA, absent evidence of error or abuse on behalf of the employing establishment.<sup>27</sup>

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<sup>20</sup> *C.R.*, Docket No. 19-1721 (issued June 17, 2020); *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>21</sup> *L.S.*, Docket No. 18-1471 (issued February 26, 2020).

<sup>22</sup> *Y.W.*, Docket No. 19-1877 (issued April 30, 2020); *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>23</sup> *S.Z.*, *supra* note 12; *J.F.*, 59 ECAB 331 (2008).

<sup>24</sup> Docket No. 18-1179, *supra* note 3.

<sup>25</sup> *G.B.*, Docket No. 19-1448 (issued August 21, 2020); *S.Y.*, Docket No. 20-2020 (issued July 15, 2020); *Robert G. Burns*, 57 ECAB 657 (2006); *Clinton E. Anthony, Jr.* 49 ECAB 476 (1998) .

<sup>26</sup> *Supra* note 10.

<sup>27</sup> *A.B.*, Docket No. 18-0635 (issued August 14, 2020).

Appellant has submitted allegations regarding her claims of discrimination, but has not submitted corroborating evidence of error or abuse in these administrative matters by the employing establishment, such as a final EEOC decision or grievance determination in her favor. The Board thus finds that she has not established a compensable employment factor.<sup>28</sup>

As the Board finds that appellant has not established a compensable employment factor, it is not necessary to consider the medical evidence of record.<sup>29</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA does not entitle a claimant the review of an OWCP decision as a matter of right.<sup>30</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>31</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>32</sup>

A timely request for reconsideration, including all supporting documents, must 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>33</sup> When a timely request for reconsideration does not meet at least one of

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<sup>28</sup> Regarding appellant's allegation that the employing establishment improperly denied her 2018 request for reasonable accommodation, the instant claim pertains to the occupational disease claim appellant filed on June 24, 2015 under OWCP File No. xxxxxx163. As the Board noted in its December 16, 2016 order, appellant's current claim pertains to employment conditions or incidents she believed contributed to her 2015 emotional condition. Appellant's current allegation that the employing establishment committed error by denying her request for reasonable accommodation in 2018 is outside of the Board's jurisdiction. She may file a new claim with OWCP regarding this additional alleged factor. *See V.H.*, Docket No. 18-0456 (issued August 9, 2019); *Theresa L. Andrews*, 55 ECAB 719 (2004).

<sup>29</sup> *Margaret S. Krzycki*, 43 ECAB 496 (1992).

<sup>30</sup> 5 U.S.C. § 8128(a).

<sup>31</sup> 20 C.F.R. § 10.607.

<sup>32</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 (iFECS). Chapter 2.1602.4b.

<sup>33</sup> 20 C.F.R. § 10.606(b)(3); *see B.R.*, Docket No. 19-0372 (issued February 20, 2020).

the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>34</sup>

### **ANALYSIS -- ISSUE 2**

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

With her December 13, 2019 reconsideration, appellant merely reiterated that the employing establishment committed error with regard to her reasonable accommodation requests. As noted, that alleged factor is not within the Board's jurisdiction and is therefore irrelevant. Appellant thus did not show that OWCP erroneously applied or interpreted a specific point of law and did not advance a new and relevant legal argument not previously considered. Consequently, she was not entitled to a review of the merits based on the first and second above-noted requirements.<sup>35</sup>

Moreover, appellant's request for reconsideration did not include relevant and pertinent new evidence in support of her request for reconsideration. While appellant submitted medical evidence, the underlying issue in this case is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty. This is a factual issue which must be addressed by relevant new factual evidence.<sup>36</sup> This medical evidence is therefore irrelevant and insufficient to warrant merit review. Consequently, appellant was not entitled to a review of the merits based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).

The Board accordingly finds that OWCP properly determined that appellant was not entitled to further review of the merits of her claim pursuant to any of the three requirements under 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>37</sup>

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish an emotional condition in the performance of duty. The Board further finds that 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>34</sup> *Id.* at § 10.608.

<sup>35</sup> *Id.* at § 10.606(b)(3); *see J.W.*, Docket No. 19-1795 (issued March 13, 2020).

<sup>36</sup> *I.J.*, Docket No. 19-1278 (issued December 30, 2019).

<sup>37</sup> 20 C.F.R. § 10.608; *see M.M.*, Docket No. 20-0523 (issued August 25, 2020).



**ORDER**

**IT IS HEREBY ORDERED THAT** the January 31, 2020 and October 31, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 5, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board