

<sup>2</sup> For OWCP decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of OWCP decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e).

## **FACTUAL HISTORY**

This is the third appeal before the Board. Appellant, a 65-year-old timekeeper, filed a Form CA-2a claim for a recurrence of disability on June 1, 2009 under case file number xxxxxx663. She alleged that she sustained a recurrence of her work-related disability on April 10, 2009, which required her to stop work on April 15, 2009. Appellant indicated on the form that her initial work injury occurred on June 24, 1986. The employing establishment stated that she was working light duty at the time of her alleged injury, four hours a day, at a position which was tailored to accommodate her restrictions.

In a June 2, 2009 memorandum, it was indicated that OWCP had informed the employing establishment that appellant could not file a Form CA-2a for a psychiatric condition and that she needed to file a new claim; however, if she was filing for “one of the other accepted conditions,” she could file a recurrence claim. By letter dated June 4, 2009, appellant asked the employing establishment to send her a copy of her records pertaining to her previously filed case file number xxxxxx281. She apparently never received these records.

In a June 15, 2009 letter to OWCP, appellant stated that because the employing establishment did not provide her with the proper accommodations required by her work-related disability, which were necessitated by her previously sustained emotional condition and a traumatic injury, she had sustained an aggravation of her emotional condition. She asserted that her work duties required her to sit for extended periods of time, which aggravated her preexisting right knee condition and caused pain in her neck, back and knees. Appellant alleged that the employing establishment denied her supervisory support and job-related training and left her alone in her office to answer the telephone; this resulted in extreme anxiety, nervousness, loss of sleep and an intense feeling of distress when she was reminded of her previous traumatic injury. She further stated that she was not provided with computer training, a permanent computer, a desk tailored to her special needs or her own workspace. Appellant contended that all of her special needs and accommodations stemming from her previous work injury were outlined in her medical records by an independent medical specialist.

In a report dated July 17, 2009, Denise M. Morales, a behavioral therapist, stated that she examined appellant on December 20, 2007, at which time she related symptoms of depressed mood, fatigue, social withdrawal, lack of appetite, anxiety, hypervigilance and an inability to relax. Appellant also experienced recurrent episodes of fear and a choking sensation when experiencing periods of anxiety. Ms. Morales stated that appellant was trying to deal with the trauma she endured years ago at her workplace when she was physically attacked.

By decision dated October 22, 2009, OWCP denied compensation for a claim based on an emotional condition. In an order dated February 25, 2011,<sup>3</sup> the Board vacated OWCP’s October 22, 2009 decision. OWCP noted that appellant had presented evidence indicating that she sustained both an emotional injury and a traumatic physical injury, possibly related to an assault she sustained while at work. In addition, it had indicated that she had “other accepted conditions” which could have provided the basis for the accommodations the employing

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<sup>3</sup> Docket No. 10-1097 (issued February 25, 2011).

establishment fashioned for her light-duty job; however, the record did not contain a job description outlining work duties which were tailored to adhere to these physical restrictions. As appellant had alleged that the employing establishment forced her to exceed her physician's work restrictions, the Board found that OWCP was required to determine whether her allegation that she was being required to work beyond one's physical limitations could constitute a compensable employment factor if such activity was substantiated by the record. The Board therefore remanded the case and directed the district office to obtain a contemporaneous medical report containing a description of appellant's work restrictions stemming from her previous injury and a contemporaneous job description of her subsequent work duties on light duty, and where she was working at the time of her alleged April 15, 2009 work stoppage. It instructed OWCP, after obtaining these records, to determine whether appellant established that management's refusal to allow her to adhere to medical restrictions stemming from her previous work injury may have resulted in a compensable emotional condition. The facts of this case are set forth in the Board's February 25, 2011 decision and are by reference herein incorporated.

By decision dated June 30, 2011, OWCP found that appellant failed to establish that she sustained an emotional condition in the performance of duty, finding that she failed to provide sufficient evidence to establish a compensable act of employment. Accordingly, it found that she failed to establish fact of injury.

On July 5, 2011 appellant, through her attorney, requested an oral hearing, which was held on October 12, 2011.

By decision dated December 19, 2011, OWCP's hearing representative affirmed the June 30, 2011 decision. He found that appellant failed to implicate a compensable factor of employment, failed to establish fact of injury and failed to provide medical evidence sufficient to establish that she had an emotional condition causally related to any employment factor.

In a statement dated December 29, 2011, received by OWCP on February 10, 2012, appellant alleged that there were numerous actions conducted by the employing establishment which caused her stress and constituted compensable acts of employment. These included:

(1) The fact that when she returned to work from her period of disability there were not enough workstations in her office, which forced her to frequently stand for extended periods. This made appellant uncertain of her work duties and her employment status;

(2) That while Maribeth Affeldt, a business manager, stated that she did not recall leaving appellant by herself at the worksite, this was because appellant rarely saw her. Appellant asserted that Ms. Affeldt was seldom in her office and had her door closed when she was there at work. She also denied Ms. Affeldt's claim that she saw her on a daily basis while she was working at the employing establishment; at one point Ms. Affeldt was on military leave for an entire week but failed to tell appellant whom to consult in her absence. Appellant asserts that this constituted neglect and showed that management was not concerned with reacclimating her into the work environment after her long absence. She alleged that this made her uncomfortable because Ms. Affeldt was not present to observe

the effect of the stressful situations she was placed into. As a result appellant was left alone in an area of the hospital that was partly isolated and was required to answer the telephone, a duty with which she was not comfortable and for which she was not trained;

(3) Appellant alleged that Ms. Affeldt was responsible for her failure to attend orientation for new employees, which left her unprepared for some of the work duties she was required to perform in order to ensure her successful return to work. In addition, she asserted that while management was under the impression that she would be working eight hours, her treating physician had limited her to working from 8 a.m. to 12.00 p.m. Appellant further asserted that Ms. Affeldt wrongly stated that she did not know appellant would have to go to Montrose for computer training. This caused her extreme stress because she had previously been assigned to Montrose, in 1986, at which time she was left alone in a locked psychiatric unit occupied by about 21 clients; she recalled being grabbed and beaten across the head, back and shoulders by an unruly client. Appellant alleged that a referee physician had stipulated that she was not supposed to go to Montrose; this restriction disregarded his advice and she was ordered to go there, which showed an outright disregard for her emotional and physical health;

(3) Appellant asserted that Ms. Affeldt wrongly stated that she was absent from work on certain dates when she actually did work; this demonstrated her lack of involvement and concern to assist her in having a successful transition back into the workforce.

(5) Lastly, appellant states that the chief of police asserted that she lacked an employee photo identification card to enter her worksite. She conceded this. However, appellant asserted that she had previously been allowed to enter the facility without the identification card. This constituted an additional concern which caused her to experience stress and anxiety on a daily basis. Appellant attempted to obtain the proper identification but encountered repeated, unnecessary delays.

Appellant alleges that due to management's unresponsiveness to her concerns and its lack of support and training, she was acutely stressed to the point that she experienced an accelerated blood pressure, nausea, dizziness, hypervigilance, sleeplessness, acute anxiety and reactive depression.

By letter dated June 13, 2012, counsel requested reconsideration.

By decision dated September 16, 2012, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision.

By order dated May 2, 2013,<sup>4</sup> the Board vacated OWCP's September 16, 2012 decision on the grounds that it failed to consider evidence it received prior to that decision; *i.e.*,

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<sup>4</sup> Docket No. 13-80 (issued May 2, 2013).

appellant's December 29, 2011 statement. The Board remanded for OWCP to consider appellant's statement.

By decision dated May 31, 2013, OWCP denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require OWCP to review its prior decision. It stated that OWCP had previously denied appellant's claim on the grounds that she failed to submit medical evidence from a qualified physician sufficient to establish the medical component of her emotional condition claim. OWCP found that the evidence she submitted still failed to contain any medical evidence from a qualified physician; therefore, it found that she provided no new evidence material to the issues at hand.

### **LEGAL PRECEDENT**

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that OWCP erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by OWCP; or by submitting relevant and pertinent evidence not previously considered by OWCP.<sup>5</sup> 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>6</sup>

### **ANALYSIS**

In support of her request for reconsideration, appellant submitted additional factual evidence, *i.e.*, her December 29, 2011 statement, which contained numerous allegations that she experienced stress at her workplace on the part of management in the course of her regular duties. These allegations, if credited, could constitute a compensable act of employment. This evidence constitutes new and relevant evidence pertaining to the issue in this case, *i.e.*, whether appellant established a *prima facie* case that she sustained an emotional condition in the performance of duty. The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence, which may be necessary to discharge her burden of proof.<sup>7</sup> The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.<sup>8</sup> 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.<sup>9</sup> In this case, appellant has submitted relevant and pertinent evidence not previously considered by OWCP.

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<sup>5</sup>20 C.F.R. § 10.606(b). *See generally* 5 U.S.C. § 8128(a).

<sup>6</sup>*Howard A. Williams*, 45 ECAB 853 (1994).

<sup>7</sup>*See Paul Kovash*, 49 ECAB 350 (1998).

<sup>8</sup>*See* 20 C.F.R. § 10.606(b).

<sup>9</sup>*Supranote 7.*

Based on the circumstances discussed above, therefore, the case shall be remanded to OWCP to consider appellant's December 29, 2011 statement and determine whether it is sufficient to establish an employment factor which may give rise to a compensable disability under FECA and to establish a *prima facie* case that she sustained an emotional condition in the performance of duty. The Board will, therefore, set aside OWCP's May 31, 2013 decision. After such development OWCP shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that OWCP abused its discretion by refusing to reopen appellant's claim for an emotional condition for review of the merits.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 31, 2013 decision is set aside and remanded, in accordance with this opinion.

Issued: November 20, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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