

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated March 19, 2007, the Board set aside OWCP decisions denying appellant's claim that she sustained an emotional condition causally related to factors of her federal employment.³ OWCP found that appellant had not established that she was exposed to unsafe working conditions. The Board determined, however, that she established a compensable employment factor. On May 18, 2005 appellant responded to a telephone call that caused her stress during the performance of her work duties. The case was remanded for OWCP to evaluate the medical evidence and determine whether she sustained an emotional condition as a result of the compensable employment factor. The facts and circumstances as set forth in the prior decision are hereby incorporate by reference.

In a decision dated August 23, 2007, OWCP denied appellant's emotional condition claim. On January 14, 2008 it vacated its August 23, 2007 decision and accepted her claim for a resolved temporary aggravation of major depressive disorder and panic disorder.⁴ OWCP determined that the August 17, 2007 opinion of the second opinion examiner, Dr. Brian Teliho, a Board-certified psychiatrist, established that appellant had a work-related aggravation of her preexisting depression and panic disorder but that it had ceased prior to his examination. It paid appellant compensation from May 20, 2005 to August 17, 2007.

On November 28, 2008 appellant requested reconsideration. She asserted that appeal rights did not accompany OWCP's January 14, 2008 decision. Appellant maintained that the opinion of Dr. R. Bruce Prince, a Board-certified psychiatrist, established that she continued to experience major depression.⁵

On February 20, 2009 OWCP advised appellant that, as it had not issued appeal rights in the prior decision, it would further develop the issue of whether she had a continuing psychiatric condition. On October 22, 2009 it referred her to Dr. R. Michael Prudent, a Board-certified psychiatrist, for a second opinion evaluation. OWCP requested that Dr. Prudent address whether appellant's current condition resulted from the May 18, 2005 compensable work factor or from other work factors. In a report dated November 2, 2009, Dr. Prudent discussed the May 18, 2005 compensable work factor and diagnosed chronic major depressive disorder and panic disorder. He related that it was "apparent that [appellant] has continued to experience marked anxiety, panic attack symptoms, decreased sleep, increased depression and tearfulness since the incident in May 2005." Dr. Prudent further opined that "there are not many objective findings related to that incident [of May 18, 2005] other than to say that incident apparently triggered preexisting

³ On September 6, 2005 appellant, then a 51-year-old bulk mail technician, filed a claim alleging that on May 18, 2005 she sustained a stress-related injury in the performance of duty. Docket No. 07-36 (issued March 19, 2007).

⁴ In another decision dated January 14, 2008, OWCP denied appellant's request for continuation of pay as she did not report her injury within 30 days.

⁵ On March 7, 2008 Dr. Prince evaluated appellant under another file number to determine whether she established an emotional condition as a result of a September 21, 2000 employment injury. In a report dated April 28, 2008, he found that she had chronic somatoform pain syndrome and recurrent depression due to her September 21, 2000 work injury.

anxiety and those anxieties have continued to be problematic for the last four years.” He found that appellant could work two to four hours a day with restrictions.

On November 9, 2009 appellant resubmitted her November 4, 2008 letter requesting reconsideration.

By decision dated January 22, 2010, OWCP denied modification of its January 14, 2008 decision. It determined that Dr. Prince’s opinion regarding whether she sustained an emotional condition under another file number did not support her contention that she continued to have an emotional condition due to the May 18, 2005 employment injury.

In an internal memorandum dated January 22, 2010, OWCP indicated that it should not have referred appellant to Dr. Prudent for a second opinion examination as it had determined that her emotional condition had resolved.

By letter dated October 23, 2010, appellant requested reconsideration. She maintained that Dr. Prudent’s opinion supported that she continued to have anxiety and depression due to the May 18, 2005 work injury and that she was disabled from her usual employment. Appellant questioned why OWCP did not accept Dr. Prudent’s opinion and submitted his report in support of her reconsideration request. She also summarized Dr. Prince’s second opinion examination.

By decision dated January 7, 2011, OWCP denied appellant’s request for reconsideration after finding that the evidence submitted was insufficient to warrant reopening her case for further review of the merits under section 8128. It found that the evidence that she submitted duplicated that previously of record.

On appeal, appellant argues that she continues to experience major depression and panic disorder due to the May 8, 2005 work incident. She relates that she experiences difficulty obtaining medical treatment because of the delay by OWCP in paying her attending physician.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁶ OWCP’s regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.⁷ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁸ When a claimant fails to meet one of the above standards, OWCP

⁶ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.”

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ *Id.* at § 10.607(a).

will deny the application for reconsideration without reopening the case for review on the merits.⁹

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 his burden of proof.¹⁰ 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.¹¹ 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.¹²

ANALYSIS

By decision dated January 14, 2008, OWCP accepted that appellant sustained a temporary aggravation of major depressive disorder and panic disorder that resolved no later than August 17, 2007. On November 28, 2008 appellant requested reconsideration, arguing that the opinion of Dr. Prince, who provided a referral opinion in another file number, was sufficient to show that she continued to experience an emotional condition. By decision dated January 22, 2010, OWCP denied modification of its January 4, 2008 decision after finding that Dr. Prince's opinion was not probative regarding whether appellant had further residuals from her May 18, 2005 work injury.

On October 23, 2010 appellant requested reconsideration. She argued that the November 2, 2009 report from Dr. Prudent, an OWCP referral physician, established that she had further disability due to her accepted temporary aggravation of major depressive disorder and panic disorder and submitted a copy of his report. In the November 2, 2009 report, Dr. Prudent diagnosed chronic major depression and panic disorder. He found that appellant continued to experience anxiety and depression due to the May 18, 2005 compensable work factor.

As noted, the Board does not have jurisdiction over the January 14, 2008 or January 22, 2010 decisions by OWCP. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for review of the merits of the claim. In its January 7, 2011 nonmerit decision, OWCP found that she did not submit sufficient evidence to warrant a merit review of her claim. Appellant's argument that Dr. Prudent found that she had continued disability due to her accepted work injury, however, pertained directly to the issue of whether it properly found that her condition resolved as of August 23, 2007. While OWCP requested a report from him in October 2009 and received his report in December 2009, it did not consider his report in its January 22, 2010 decision nor did appellant raise any arguments regarding his report in her prior request for reconsideration.

⁹ *Id.* at § 10.608(b).

¹⁰ *Donald T. Pippin*, 53 ECAB 631 (2003).

¹¹ *Id.*

¹² *See Annette Louise*, 53 ECAB 783 (2003).

Appellant's argument that it should have considered his opinion is relevant, not previously considered and pertinent to the issue of whether she has ongoing disability due to her accepted employment injury. As she has advanced a legal argument not previously considered by OWCP, she is entitled to a review of the merits of her claim under section 10.606(b).¹³ The case will be remanded for that purpose.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: November 25, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹³ See *Joyce A. Fasanello*, 49 ECAB 490 (1998).