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<b>M.C., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 11-380</b>
	)	<b>Issued: November 3, 2011</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>CUSTOMS &amp; BORDER PROTECTION,</b>	)	
<b>Casa Grande, AZ, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
 RICHARD J. DASCHBACH, Chief Judge  
 COLLEEN DUFFY KIKO, Judge  
 MICHAEL E. GROOM, Alternate Judge

On December 9, 2010 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs (OWCP) dated October 27 and November 16, 2010. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issues are: (1) whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty causally related to factors of his federal employment; and, (2) whether OWCP properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On May 24, 2010 appellant, then a 38-year-old border patrol agent, submitted an occupational disease claim, alleging post-traumatic stress disorder (PTSD) while in the performance of duty in July 2010. He was first aware of the illness and its relationship to his employment on May 10, 2010.<sup>2</sup> In letters dated August 9, 2010, OWCP informed appellant of the type of evidence needed to support his claim and asked that the employing establishment respond. In an undated statement, appellant indicated that, while working in Casa Grande, Arizona, he was exposed to many close calls and instances of high stress including armed encounters with illegal aliens and drug cartels and that he was nearly run over while patrolling. He searched for and apprehended armed bandits and drug smugglers and had seen many dead bodies, including murder victims who were dismembered. Appellant described his PTSD condition and how it had changed his life.

By report dated August 19, 2010, Lawanna Burress-Holland, Ph.D., a licensed psychotherapist, advised that she treated appellant on June 3, 2010. Appellant presented with symptoms of severe PTSD including frequent nightmares, panic attacks and distressing recollections of traumatic events that occurred while he was serving as a border patrol agent. He reported that he isolated himself, had a sense of a foreshortened future, difficulty sleeping, frequent irritability/anger, hypervigilance, an exaggerated startle response and digestive problems, meeting each of the criteria for a diagnosis of severe PTSD. Dr. Burress-Holland stated that appellant attended weekly therapy and recommended that he continue to work as an instructor.

On August 27, 2010 OWCP asked appellant to address specific dates, times and places of the incidents that he referenced in his statement. It provided a copy of the statement to the employing establishment and asked that it respond. From September 21 to October 4, 2010, OWCP attempted contact with the employing establishment by telephone, asking that it respond to appellant's allegations.

By letter dated October 4, 2010, OWCP informed appellant that he had provided sufficient information to establish a *prima facie* basis for his claim and that, when the employing establishment provided a response, he would be referred for a second-opinion evaluation. Appellant was told that, after receipt of the physician's report, a decision would be issued.

In a decision dated October 27, 2010, OWCP denied appellant's claim, finding that he failed to establish that the claimed incidents occurred or submit medical reports providing a firm diagnoses with an opinion on causal relationship.

On November 5, 2010 appellant requested reconsideration.

Matthew Carver, a supervisory border patrol agent at the Casa Grande station submitted a November 8, 2010 statement. He advised that the job of a border patrol agent was inherently dangerous and stressful and that agents assigned to the Casa Grande station worked in a dangerous environment where they were exposed to stressful situations including vehicle

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<sup>2</sup> At the time the claim was filed, appellant had transferred to the Artesia, New Mexico, branch as an instructor.

accidents involving fatalities, deceased subjects being found, agents being assaulted, armed encounters and officer-involved shootings. Mr. Carver noted that appellant referred to these types of incidents and that the accuracy of his statement could not be evaluated due to lack of specific information regarding dates, locations, names of persons involved or report number. In a November 9, 2010 letter, John A. Bush, a senior patrol agent, advised that he worked with appellant at the Casa Grande station from July 2004 to October 2008 and described an incident when they assisted the Casa Grande Police Department in a large fight involving 50 to 60 gang members, where gunshots were fired. He described a second incident when he and appellant were driving all terrain vehicles in the desert, trying to intercept smugglers. Appellant was ahead of Mr. Bush and warned him that a large truck was approaching, without lights and all agents were nearly run down. Mr. Bush concluded that he and appellant encountered numerous stressful situations together, noting that the job was violent and agents faced threats on a daily basis.

By decision dated November 16, 2010, OWCP denied appellant's reconsideration request, stating that his letter did not raise substantive legal questions and he did not submit new and relevant evidence sufficient to warrant merit review.

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

To establish his claim that he sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that he has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to his condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his stress-related condition.<sup>3</sup> If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.<sup>4</sup> When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.<sup>5</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>6</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>7</sup> When an employee experiences emotional stress in carrying out his or her employment duties and the medical evidence establishes that the disability resulted from an

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<sup>3</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>4</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>5</sup> *Id.*

<sup>6</sup> 28 ECAB 125 (1976).

<sup>7</sup> *See Robert W. Johns*, 51 ECAB 137 (1999).

emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.<sup>8</sup> Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.<sup>9</sup> Where the claimant alleges compensable factors of employment, he or she must substantiate such allegations with probative and reliable evidence.<sup>10</sup> Personal perceptions alone are insufficient to establish an employment-related emotional condition.<sup>11</sup>

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

Appellant, a border patrol agent, alleged that his work while assigned to the Casa Grande station caused his PTSD condition because he was exposed to many stressful situations that occurred during work. He submitted a personal statement in which he described specific incidents and an August 19, 2010 report from Dr. Burress-Holland. By decision dated October 27, 2010, OWCP denied the claim on the grounds that appellant had not provided substantiating evidence to establish that the claimed incidents occurred or a medical report with an opinion that his emotional condition was caused by factors of employment.

Allegations alone by a claimant are generally insufficient to establish a factual basis for an emotional condition claim but must be corroborated by the evidence.<sup>12</sup> Appellant submitted no witness statements or other evidence to substantiate specific allegations prior to the October 27, 2010 denial of his claim. There is no evidence of record at the time of OWCP's October 27, 2010 decision supporting the claimed employment factors or incidents as alleged.

The October 27, 2010 decision will be affirmed as appellant has not established a compensable factor of employment.

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

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.<sup>13</sup> Section 10.608(a) of the Code of Federal Regulations provides 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).<sup>14</sup> This section provides that the application for reconsideration must be submitted

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<sup>8</sup> *Lillian Cutler*, *supra* note 6.

<sup>9</sup> *J.F.*, 59 ECAB 331 (2008).

<sup>10</sup> *M.D.*, 59 ECAB 211 (2007).

<sup>11</sup> *Roger Williams*, 52 ECAB 468 (2001).

<sup>12</sup> *M.D.*, *supra* note 10.

<sup>13</sup> 5 U.S.C. § 8128(a).

<sup>14</sup> 20 C.F.R. § 10.608(a).

in writing and 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>15</sup> 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.<sup>16</sup>

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

On November 5, 2010 appellant requested reconsideration by checking on an appeal request form that he was requesting reconsideration. He did not contend 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 his claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>17</sup>

With respect to the third above-noted requirement under section 10.606(b)(2), on reconsideration appellant submitted a new November 8, 2010 report in which Mr. Carver, a supervisory border patrol agent, described the job duties of a border patrol agent, indicating that the position was inherently dangerous and stressful. He related that agents assigned to the Casa Grande station worked in an especially dangerous environment. Mr. Bush, a senior patrol agent, advised in a newly submitted statement that he had worked with appellant at the Casa Grande station from July 2004 to October 2008 and described incidents in which appellant was involved in the apprehension of gang members and smugglers.

In order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant's burden of proof. Instead, the requirement 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>18</sup> The statements of Mr. Carver and Mr. Bush constituted new and relevant evidence as they pertain to appellant's assertions regarding his duties to which he attributed his claimed PTSD. The Board finds that OWCP improperly denied appellant's request for review of the merits of his claim. The case will be remanded to OWCP

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<sup>15</sup> *Id.* at § 10.608(b)(1) and (2).

<sup>16</sup> *Id.* at § 10.608(b).

<sup>17</sup> 20 C.F.R. § 10.606(b)(2).

<sup>18</sup> *Billy B. Scoles*, 57 ECAB 258 (2005).

to conduct an appropriate merit review. Following this and such other development as deemed necessary, OWCP shall issue a merit decision on appellant's claim.<sup>19</sup>

### **CONCLUSION**

The Board finds that OWCP properly found that appellant failed to meet his burden of proof to establish that he sustained an emotional condition in the performance of duty by its October 27, 2010 decision and that OWCP improperly refused to reopen his claim for further review of the merits pursuant to section 8128(a) of FECA.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2010 decision of the Office of Workers' Compensation Programs is affirmed. The November 16, 2010 decision is set aside and the case remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: November 3, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>19</sup> As noted above, Mr. Carver advised that appellant had not provided enough specific information regarding the claimed incidents. Neither a position description nor a statement from someone knowledgeable about the incidents claimed by appellant, such as his supervisor at the time of the claimed events, is contained in the case record. This is the type evidence more readily obtained from the employing establishment. Although it is a claimant's burden to establish his or her claim, OWCP is not a disinterested arbiter but, rather, shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source. OWCP shares responsibility to see that justice is done. *R.E.*, 59 ECAB 323 (2008).