



condition on January 1, 2003 and realized her illness was caused by her work on April 1, 2005. Appellant stopped work on April 1, 2007 and returned to restricted duty on September 14, 2007 and stopped completely on October 13, 2007.<sup>1</sup>

In a letter dated September 4, 2007, the Office asked appellant to submit additional information including a detailed description of the employment factors or incidents which she believed had contributed to her claimed illness and a comprehensive medical report from her treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by her had contributed to her claimed emotional condition. In a letter of the same date, the Office requested that the employing establishment address appellant's allegations.

In support of her claim, appellant submitted a report from Dr. Michael Navato, a Board-certified psychiatrist, dated April 23, 2007, who treated her for psychotic features and fatigue. Dr. Navato noted that appellant experienced symptoms of confusion, depression, inattention, emotional lability and anxiety and opined that her prognosis of return to competitive employment was poor.

The employing establishment submitted a statement from Susan Palomo, appellant's supervisor, dated September 22, 2007. Ms. Palomo noted that appellant submitted two letters in support of her absence from April 1 to September 13, 2007. She noted that appellant's modified position was within her restrictions and she had no knowledge that appellant was moved to another work area or that she felt her duties were outside her restrictions. Ms. Palomo submitted a job offer dated September 17, 2004, which appellant rejected and noted that she would have to verify the position with her physician. Also submitted was a January 27, 2005 job offer, which appellant accepted and a September 21, 2007 job offer she rejected because she was not offered "tour two."

In a decision dated November 20, 2007, the Office denied appellant's claim on the grounds that the record did not contain factual evidence describing work activities that appellant believed caused or contributed to her emotional condition. It also found that the medical evidence was not sufficient to establish that her condition was caused by her employment duties.

On November 25, 2007 appellant requested reconsideration. She submitted a statement dated November 27, 2007 and noted that she sought treatment from Dr. Navato for her depression and from Dr. Nassaub for her right rotator cuff injury. Appellant noted filing a separate claim for tennis elbow, which was denied by the Office because her supervisor did not submit her claim in a timely manner.

By decision dated December 20, 2007, the Office denied appellant's reconsideration request on the grounds that her letter neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

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<sup>1</sup> Appellant filed the following claims for compensation: left trigger thumb, file number xxxxxx306, bilateral carpal tunnel syndrome, file number xxxxxx291, left shoulder strain, file number xxxxxx061, right shoulder condition, file number xxxxxx061, right shoulder condition, file number xxxxxx343 which was denied by the Office and a right shoulder strain, file number xxxxxx738. These other claims are not presently before the Board.

### LEGAL PRECEDENT -- ISSUE 1

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by factors of her federal employment.<sup>2</sup> To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.<sup>3</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>4</sup> the Board explained that there are distinctions to the type of employment situations giving rise to a compensable emotional condition arising under the Federal Employees' Compensation Act.<sup>5</sup> There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage under the Act.<sup>6</sup> When an employee experiences emotional stress in carrying out her employment duties and the medical evidence establishes that the disability resulted from her emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of an in the course of employment. This is true when the employee's disability results from her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of her work.<sup>7</sup> There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage under the Act. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act. On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>8</sup>

### ANALYSIS -- ISSUE 1

Appellant generally alleged that she was forced to work beyond her tolerance and the employing establishment failed to provide her with a modified job within her restrictions. She indicated that she was stressed when she had to come to work and perform her job and

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<sup>2</sup> *Pamela R. Rice*, 38 ECAB 838 (1987).

<sup>3</sup> *Donna Faye Cardwell*, 41 ECAB 730 (1990).

<sup>4</sup> 28 ECAB 125 (1976).

<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> See *Anthony A. Zarcone*, 44 ECAB 751, 754-55 (1993).

<sup>7</sup> *Lillian Cutler*, *supra* note 4.

<sup>8</sup> See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *id.*

experienced pain in her shoulders, neck, elbows, knees and feet. The Board notes that assignment of duties beyond an employee's work tolerance limitations can be a compensable factor of employment.<sup>9</sup> However, appellant has not provided any specific evidence establishing that the employing establishment assigned her duties beyond her limitations. On September 4, 2007 the Office requested that she submit factual evidence, including a detailed description of the employment factors or incidents that she believed contributed to her claimed illness. Appellant did not provide any additional factual information or discuss specific incidents with respect to her claim. She has not identified any regular or specially assigned duties that have caused an emotional condition. The record contains no probative evidence supporting appellant's assertions that the employing establishment failed to provide a modified job within her restrictions. Instead, the evidence indicates that the employing establishment sought to accommodate her restrictions. The record establishes that the employer provided appellant with light duty as noted in job offers dated September 17, 2004, January 27, 2005 and September 21, 2007. Therefore, the Board finds that there is insufficient evidence to establish that appellant worked beyond her restrictions.

Accordingly, the Board finds that appellant has not submitted sufficient factual evidence identifying employment factors or incidents alleged to have caused or contributed to her claimed emotional condition.

Based on the evidence of record therefore the Board finds that there is no evidence that is sufficient to establish a compensable work factor in this case. Since appellant has not established a compensable work factor, the Board will not address the medical evidence.<sup>10</sup>

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

Under section 8128(a) of the Act,<sup>11</sup> the Office has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,<sup>12</sup> which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

“(1) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(2) Advances a relevant legal argument not previously considered by the (Office); or

“(3) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

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<sup>9</sup> See *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>10</sup> See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

<sup>11</sup> 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.606(b).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>13</sup>

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

Appellant's November 25, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office.

With her November 25, 2007 reconsideration request, appellant submitted only a narrative statement advising that she sought treatment from Dr. Navato for her depression and from Dr. Nassaub for her right rotator cuff injury. She indicated that she filed a separate claim for tennis elbow which was denied because her supervisor did not submit it to the Office timely. However, this is insufficient to show that the Office erroneously applied or interpreted a specific point of law nor does it advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim under section 10.606(b)(2).

With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant failed to submit any additional evidence with her reconsideration request. The Board therefore finds that the Office properly determined that appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her November 25, 2007 request for reconsideration.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law or fact not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office."<sup>14</sup>

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her November 25, 2007 request for reconsideration.<sup>15</sup>

### **CONCLUSION**

The Board finds that appellant has not met her burden of proof in establishing that she developed an emotional condition in the performance of duty. The Board further finds that the Office properly denied appellant's request for reconsideration dated November 25, 2007 without conducting a merit review.

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<sup>13</sup> *Id.* at § 10.608(b).

<sup>14</sup> *Id.* at § 10.606(b).

<sup>15</sup> Following the Office's December 20, 2007 decision, appellant submitted additional evidence to the Office. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 20 and November 20, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 5, 2009  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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