

FACTUAL HISTORY

On December 8, 2008 appellant, then a 32-year-old air traffic controller, filed a traumatic injury claim (Form CA-1) alleging that he sustained an emotional condition causally related to his federal employment on November 30, 2008.² On the claim form, he indicated that two planes had come in close proximity to each other.

By decision dated January 22, 2009, OWCP denied the claim, finding there was no compensable work factors established. It found that appellant was in training and not responsible for the planes in question. Furthermore, the planes had remained a safe distance apart.

On April 10, 2009 appellant requested reconsideration of his claim. He stated that he was a certified air traffic controller who had been recently transferred and while he was in training status he was still responsible for the safety of aircraft within his area of jurisdiction. Appellant stated that the aircraft did not maintain safe distance and a safety alert on one of the aircrafts was recorded. He subsequently submitted a May 29, 2009 letter to rebut the statement provided by the employer's air traffic manager.

In a decision dated June 24, 2009, OWCP reviewed the case on its merits and denied modification. It found that safety alerts were not issued by appellant and the evidence did not establish that the planes came in close proximity.

By letter dated June 23, 2010, appellant, through counsel, filed an application for reconsideration. He stated that he made a request on September 28, 2009 to the employing establishment, under the Freedom of Information Act (FOIA), for records pertaining to the November 29, 2008 incident. Appellant noted that a June 16, 2010 response from the employing establishment stated that there were no records, which he felt was incorrect based on prior statements. He contended that he should be entitled to an evidentiary presumption that wrongfully withheld information would support his allegations. Appellant asserted that the employing establishment had not offered any compelling evidence that would refute his statements. He cited case law arguing that, as long as an employment factor contributed in any way to a disabling condition, there was a compensable injury. Appellant argued that he met his burden of proof.

Appellant submitted numerous personnel forms (SF-50), a section of an employing establishment document regarding air traffic incidents and the June 16, 2010 letter from the employing establishment regarding his FOIA request. He also submitted reports from E. Paul Biknell, Ph.D, a clinical psychologist, dated April 13, 2009, April 20 and July 20, 2010. Appellant resubmitted memorandum from employing establishment personnel dated December 17 and 22, 2008 and May 18, 2009. Of record is a copy of an unidentified and undated statement regarding the November 29, 2008 incident. The statement had been included in appellant's May 29, 2009 letter that was before OWCP at the time of the June 24, 2009 merit decision.

² Appellant later clarified that the date of the incident was November 29, 2008.

By decision dated September 27, 2010, OWCP found that the application for reconsideration was insufficient to warrant further merit review of the claim. In a decision dated October 6, 2010, it vacated the September 27, 2010 decision, finding that it contained “typographical and grammatical errors.”³

In a decision dated March 2, 2011, OWCP found that the application for reconsideration was insufficient to warrant merit review of the claim. It found that the application did not meet the requirements for further merit review.⁴

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁵ OWCP’s regulations provide that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: “(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent evidence not previously considered by OWCP.”⁶ Section 10.608(b) states that any application for review that does not meet at least one of the requirements listed in section 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.⁷

ANALYSIS

Appellant submitted a June 23, 2010 application for reconsideration and accompanying evidence. To be entitled to a review of the merits of his claim for compensation, appellant must meet one of the three standards noted above. The Board finds that he did not meet any of the requirements for further merit review.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. In the application for reconsideration, his notes case law regarding causal relationship between an employment factor and a disabling condition. OWCP found that there were no compensable work factors based on the evidence of record. Appellant did not identify a specific point of law in this regard or show that OWCP erroneously applied or interpreted a point of law. He clearly disagreed with OWCP’s finding that the November 29, 2008 incident was not a compensable work factor, but there is no showing that OWCP erroneously applied or interpreted a specific point of law.

³ The decision included a paragraph regarding wage-earning capacity based on a selected position.

⁴ The decision again included an extraneous paragraph regarding wage-earning capacity in a selected position.

⁵ 5 U.S.C. § 8128(a) (providing that “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application).”

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994).

The Board also finds that appellant did not advance a new and relevant legal argument. Appellant argued that the employing establishment withheld evidence and there should be a presumption that corroborating evidence supporting his claim would have been submitted. He does not cite to any authority for invocation of this presumption. If appellant believes there is additional relevant evidence from the employing establishment, then he may seek such evidence in an appropriate forum. In this case, the employing establishment submitted evidence regarding the November 29, 2008 incident, as had appellant, and this evidence was reviewed by OWCP. There is no basis for any evidentiary presumption arising from an employing establishment statement that there are no additional records. Where a legal argument presented has no reasonable color of validity, OWCP is not required to reopen the case for merit review.⁸

With respect to the submission of new, relevant and pertinent evidence, the Board finds that appellant did not meet this requirement. The statements from the employing establishment personnel regarding the November 29, 2008 incident were previously of record and do not constitute new evidence. None of the evidence that was “not previously considered by OWCP” is relevant or pertinent to the issue of a compensable work factor. The personnel records such as SF-50 forms are not relevant to the issue presented. Appellant had stated that he was an air traffic controller who had been transferred and was undergoing training. Such evidence was before OWCP at the time of the June 24, 2009 merit decision. The letters regarding the FOIA requests only establish that the employing establishment maintained there was no additional relevant evidence regarding the incident. Appellant submitted an unidentified document regarding the November 29, 2008 incident, the contents of which had been included with his May 29, 2009 statement and, therefore, it is not considered new evidence. With respect to medical evidence submitted, no compensable work factors had been established and the medical evidence is not relevant to the underlying factual issue.⁹

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or constitute relevant and pertinent evidence not previously considered by OWCP. Since he did not meet the requirements of 20 C.F.R. § 10.606(b)(2), OWCP properly denied the application for reconsideration without merit review of the claim.

CONCLUSION

The Board finds that OWCP properly denied appellant’s application for reconsideration without merit review of the claim.

⁸ *Norman W. Hanson*, 40 ECAB 1160 (1989).

⁹ *See James W. Scott*, 55 ECAB 606 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 2, 2011 is affirmed.

Issued: February 17, 2012
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