



## **FACTUAL HISTORY**

This case has previously been before the Board. On January 24, 2011 the Board set aside a January 15, 2010 OWCP decision denying a merit review.<sup>2</sup> OWCP found that appellant filed an untimely request for reconsideration and failed to establish clear evidence of error. The Board found that she filed a timely request for reconsideration from a January 6, 2009 merit decision. The case was remanded for OWCP to evaluate appellant's request under the proper standard of review for a timely reconsideration request. The facts and circumstances as set forth in the prior decision are hereby incorporate by reference.<sup>3</sup>

Appellant submitted a December 21, 2009 attending physician's report from Dr. Elena F. Herndon, a Board-certified psychiatrist; a January 4, 2010 psychologist's report from Joel Melvin, Ph.D; a May 6, 2008 letter from Charles Barclay, a union representative; and an October 31, 2009 letter from the EEOC accepting her claim for investigation.

By decision dated February 28, 2011, OWCP denied modification of its January 6, 2009 decision. It found the evidence of record failed to establish any compensable work factors.

On December 18, 2011 appellant's counsel requested reconsideration and submitted evidence as set forth below.

In a December 6, 2011 report, Dr. Melvin related that he had treated appellant since 2009 for post-traumatic stress disorder (PTSD). He attributed her condition to sexual harassment by a male coworker. Dr. Melvin related that appellant had no history of PTSD prior to her being subjected to sexual harassment by a coworker. He addressed her EEOC case and discussed the workplace with her.

By decision dated January 12, 2012, OWCP denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant reopening her case for further review of the merits. It found that the evidence was irrelevant to whether she established a compensable factor.

## **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>4</sup> 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) constitute relevant and pertinent new evidence not previously

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<sup>2</sup> Docket No. 10-1404 (issued January 24, 2011).

<sup>3</sup> On January 23, 2008 appellant, then a term 44-year-old painter, filed an occupational disease claim alleging that on April 21, 2007 she first realized that her depression was due to sexual harassment and reprisal. She related that on November 26, 2006 she filed a sexual harassment claim with the Equal Employment Opportunity Commission (EEOC) and had experienced reprisal from the employing establishment as a result of filing her claim.

<sup>4</sup> 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

considered by OWCP.<sup>5</sup> 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.<sup>6</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>7</sup>

### ANALYSIS

The only decision before the Board is OWCP's January 12, 2012 nonmerit decision denying appellant's application for reconsideration of a February 28, 2011 decision that denied her emotional condition claim. OWCP found that the evidence was insufficient to establish any compensable factors of employment. The issue presented is whether her December 18, 2011 reconsideration request met the conditions of 20 C.F.R. § 10.606(b)(2), requiring OWCP to reopen the case for further review of the merits.

The Board finds that appellant did not provide any relevant or pertinent new evidence to the issue of a compensable employment factor. Appellant did not submit evidence to show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered.

Appellant's counsel contended that OWCP erred in failing to properly consider Dr. Melvin's December 6, 2011 medical report as factual support for appellant's claim. He contends that the Board should reverse the January 12, 2012 decision and finds that appellant established that her PTSD was employment related based on Dr. Melvin's determination that it was related to sexual harassment by a coworker. Counsel argued that OWCP applied the correct standard in its February 28, 2011 merit decision denying her claim but an incorrect standard in denying further merit review on January 12, 2012. The Board finds that appellant's argument is not supported by the applicable case law or regulatory precedent. OWCP noted receiving Dr. Melvin's report. It found that, as appellant had not established a compensable employment factor, it did not need to consider the medical evidence of record.<sup>8</sup> The February 28, 2011 decision informed appellant that her claim was denied for failure to establish any compensable work factors. For this reason, the medical reports had no bearing on the issue in question. The underlying issue in the case is not medical in nature. While Dr. Melvin stated that he based his report on EEOC hearing testimony of appellant and her coworkers, he did not provide any specifics as to the alleged incidents of sexual harassment or testimony of coworkers. His comments as to the factual aspects of the claim to instances he did not witness or have direct knowledge of is not relevant to establishing a compensable work factor. As appellant has failed

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<sup>5</sup> 20 C.F.R. § 10.606(b)(2). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>6</sup> *Id.* at § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>7</sup> *Id.* at § 10.608(b). See *Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

<sup>8</sup> See *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *A.K.*, 58 ECAB 119 (2006); *Lori A. Facey*, 55 ECAB 217 (2004).

to establish a compensable employment factor, the medical evidence is not relevant.<sup>9</sup> OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review. The evidence submitted on reconsideration does not satisfy the third criterion for reopening a claim for merit review.

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Further, she has not submitted pertinent new and relevant evidence. Therefore, OWCP properly denied her request for reconsideration.

**CONCLUSION**

The Board finds that OWCP properly determined that appellant's application for reconsideration was insufficient to warrant a merit review of the claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 12, 2012 is affirmed.

Issued: October 26, 2012  
Washington, DC

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

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

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

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<sup>9</sup> *Id.*