



## **ISSUES**

The issues are: (1) whether appellant has established an employment-related disability during the period October 12, 2010 to June 5, 2011; and (2) whether OWCP properly denied a merit review under section 8128(a).<sup>3</sup>

## **FACTUAL HISTORY**

On February 2, 2012 appellant, then a 29-year-old painter, filed an occupational disease claim (Form CA-2) alleging an emotional condition as a result of her federal employment. On the claim form, she stated that she had been subject to sexual assault and harassment, described the nature of her condition as post-traumatic stress disorder (PTSD), depression, anxiety, psychological trauma and adjustment disorder.

In a narrative statement, appellant alleged that she had been the subject of sexual harassment by a coworker on January 6, 2010 and on March 23, 2010. She stated that in June 2010 she filed a discrimination complaint against her supervisor for failing to report the incidents and creating a hostile work environment.<sup>4</sup> In September 2010, the coworker's employment was terminated. Appellant alleged that she was subject to retaliation by management and felt isolated and harassed by her coworkers.

The evidence submitted included an investigation report indicating that appellant and the identified coworker had been interviewed on June 15 to 16, 2010. The report states that the coworker admitted to physical contact as alleged but denied sexual intent.

An employing establishment supervisor submitted a February 8, 2012 letter acknowledging that the coworker's employment was terminated for cause relating to appellant's allegations. The supervisor denied harassment or creation of a hostile work environment.

In a report dated December 29, 2010, Dr. Kevin Yao, a Board-certified neurosurgeon, reported a history of daily headaches for the prior seven months. He noted that a recent brain magnetic resonance imaging (MRI) scan shown a pituitary lesion consistent with an adenoma. In a note dated January 6, 2011, Dr. Yao stated that appellant had severe headaches and needed medical leave at that time.

Appellant began treatment with Dr. Michael Taormina, a Board-certified neurologist, on June 6, 2011. Dr. Taormina noted headaches for "1 to 2 years" and she reported that she was assaulted and harassed at work before the headaches began. Appellant was "undecided" about her return to work. In a duty status report (Form CA-17) dated June 6, 2011, Dr. Taormina diagnosed tension-type headaches and marked she was disabled for work.

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<sup>3</sup> *Id.* at § 8128(a).

<sup>4</sup> The record contains a July 7, 2010 letter from the employing establishment stating that the complaint had been dismissed.

In a form report dated June 28, 2011, Dr. Taormina stated that appellant was being treated for “headaches due to psychological trauma, the trauma being sexual harassment.” In a report dated October 13, 2011, he stated that she was being treated for tension headaches and could not return to the same work site where the sexual harassment occurred. In a January 31, 2012 note, Dr. Taormina stated, “[Appellant’s] headaches are related to prior psychological trauma arising from her workplace.” In an attending physician’s report (Form CA-20) dated February 15, 2012, he diagnosed tension headache and checked a box “yes” the condition was employment related.

By report dated March 20, 2012, Dr. Ana Parodi, a psychiatrist, stated that appellant was seen for a fitness-for-duty examination. She noted a history that appellant had been subject to sexual harassment and felt ostracized by other coworkers. Dr. Parodi diagnosed chronic, mild PTSD, stating that appellant’s “current symptoms impact on her performing the military mission” and she missed days of work.

On May 25, 2012 OWCP accepted the claim for mild, chronic PTSD. Appellant was advised to claim compensation for wage loss through a Form CA-7. OWCP also issued a statement of accepted facts dated May 25, 2012, listing as an accepted work factor of sexual harassment by a coworker. With respect to appellant’s other claims of harassment or discrimination, it found the evidence did not establish a compensable work factor.

Appellant submitted a Form CA-7 dated June 4, 2012 claiming compensation from October 12, 2010 to February 27, 2012. In a note dated July 26, 2012, Dr. Taormina stated that she was diagnosed with headaches and anxiety “due to sexual harassment at work.” He stated that appellant could not return to work to the unit where these events took place.

By letter dated August 1, 2012, OWCP stated that the claim was accepted for “other acute reaction to stress, unspecified.”

An August 9, 2012 memorandum noted that a conference was held with respect to appellant’s pay rate and work stoppage. The memorandum noted that she had worked intermittently from October 12, 2010 to February 24, 2011, and then stopped. OWCP began paying compensation for wage loss as of June 6, 2011, the date appellant began treatment with Dr. Taormina.

By decision dated October 11, 2012, OWCP denied compensation for the period October 12, 2010 to June 5, 2011. It found the medical evidence was insufficient to establish disability for work due to the accepted conditions.

Appellant requested reconsideration. In a report dated March 25, 2011, Dr. Yao stated that she was to be evaluated on March 30, 2011 and then referred to a local neurologist. He would then determine “if the patient will be relieved to go back to work.” In a report dated January 3, 2011, Dr. Babak Morvarid, a Board-certified psychiatrist, stated that appellant was being treated for headaches in the setting of an abnormal MRI scan. He diagnosed chronic tension-type headaches. The headaches were not likely to be directly related to the adenoma, but hormonal dysfunction could cause emotional responses. In a report dated January 24, 2011,

Dr. Justina Dietz, an osteopath, diagnosed a pituitary adenoma. On March 10, 2011 she stated that appellant had been advised that her headaches were not due to the adenoma.

By decision dated January 7, 2013, OWCP reviewed the merits of the claim. It denied modification on the grounds the medical evidence was insufficient to establish disability for the period claimed.

Appellant requested reconsideration and submitted medical evidence previously of record. In a work capacity evaluation report (OWCP-5c) dated December 18, 2012, Dr. Taormina stated that she could work eight hours a day but not at the location where the sexual harassment occurred.

By decision dated May 2, 2013, OWCP denied further merit review of the claim.

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

An employee seeking benefits under FECA<sup>5</sup> has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>6</sup> The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.<sup>7</sup>

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>8</sup> Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he or she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>9</sup> The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>10</sup>

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<sup>5</sup> 5 U.S.C. §§ 8101-8193.

<sup>6</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> 20 C.F.R. § 10.5(f); *see, e.g., Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

<sup>8</sup> *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

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

<sup>10</sup> *Id.*

Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.<sup>11</sup> Rationalized medical evidence is medical evidence based on a complete factual and medical background of the claimant, of reasonable medical certainty and supported by medical rationale explaining the opinion on causal relationship.<sup>12</sup> Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>13</sup>

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

Appellant claimed compensation for wage loss commencing October 12, 2010. According to the August 9, 2012 OWCP memorandum, she worked intermittently through February 24, 2011, when she stopped. As appellant received wage loss commencing June 6, 2011, the issue is whether she had employment-related disability from October 12, 2010 to June 5, 2011.

It is appellant's burden of proof to submit the medical evidence sufficient to establish her claim. The Board finds that she has not met her burden of proof. Appellant was treated by Dr. Yao, who noted in a December 29, 2010 report that she had headaches for the previous seven months. Dr. Yao did not directly discuss disability for work. In a brief note dated January 6, 2011, he noted severe headaches and stated that appellant needed medical leave, without providing further explanation.

The Board notes that the diagnosis of headaches has not been established as causally related to appellant's federal employment. To establish a period of disability based on headaches, appellant would first have to establish the condition as employment related. A probative medical opinion must be based on a complete background. Dr. Yao did not demonstrate an understanding of the employment incidents accepted as compensable work factors, the accepted conditions or address the relevant medical history and diagnostic tests. OWCP has not accepted as compensable the allegations with respect to actions of management or harassment by coworkers. The accepted compensable employment factor was sexual harassment from a specific coworker. None of the physicians of record provide such an opinion. Dr. Taormina briefly stated in a January 31, 2012 note that he felt appellant's headaches were related to psychological trauma at work. In a July 26, 2012 report, he stated that the headaches were due to sexual harassment. These brief statements do not discuss the relevant factual or medical history and do not constitute a rationalized medical opinion on the issue of disability. Dr. Parodi, Dr. Dietz and Dr. Morvarid, did not provide opinions on the issue in question.

The physicians did not address the specific period of claimed disability commencing October 12, 2010. The evidence of record does not contain a rationalized medical opinion with

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<sup>11</sup> *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

<sup>12</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>13</sup> *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

respect to appellant's claim of employment-related disability from October 12, 2010 to June 5, 2011.

On appeal, appellant stated that she was out of work during the period claimed and that the medical evidence was sufficient to establish her claim. She stated that her physicians did not want her working where the assault took place and it was not clear why OWCP denied compensation. The Board finds that the medical evidence of record is not sufficient to establish employment-related disability during the period October 12, 2010 to June 5, 2011.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

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

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>14</sup> OWCP's regulations provides 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: "(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 evidence not previously considered by OWCP."<sup>15</sup> 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(2) will be denied by OWCP without review of the merits of the claim.<sup>16</sup>

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

In the present case, appellant submitted an application for reconsideration and stated that she believed the medical evidence was sufficient to establish the claim for compensation. She did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by OWCP. As the discussion of the prior issue indicated, the issue in the case was a medical issue with respect to the claimed period of disability. Evidence that was previously before OWCP with respect to a merit decision is not sufficient to meet the requirement of 20 C.F.R. § 10.606(b)(2)(3). The evidence must be both new and relevant to the underlying issue. The new December 18, 2012 form report from Dr. Taormina does not discuss the claimed period of disability or provide any new relevant evidence to the issue presented.

The Board 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

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<sup>14</sup> 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.")

<sup>15</sup> 20 C.F.R. § 10.606(b)(2).

<sup>16</sup> *Id.* at § 10.608(b); *see also Norman W. Hanson*, 45 ECAB 430 (1994). In the present case, the "merits" of the claim would be the denial of compensation from October 12, 2010 to June 5, 2011.

point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered by OWCP. The Board accordingly finds OWCP properly denied the application for reconsideration without merit review of the claim.

**CONCLUSION**

The Board finds that appellant has not established an employment-related disability for the period October 12, 2010 to June 5, 2011. The Board further finds that OWCP properly denied appellant's application for reconsideration without merit review of the claim.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 2 and January 7, 2013 are affirmed.

Issued: December 19, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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