

**United States Department of Labor
Employees' Compensation Appeals Board**

W.S., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
RALPH H. JOHNSON MEDICAL CENTER,
Charleston, SC, Employer

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**Docket No. 12-992
Issued: February 7, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 4, 2012 appellant filed timely appeals of October 31 and December 7, 2011 decisions of the Office of Workers' Compensation Programs (OWCP) that denied his request for reconsideration without a merit review. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these decisions. Because more than 180 days elapsed from December 14, 2010, the date of the most recent merit decision to April 4, 2012, the Board lacks jurisdiction to review the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's requests for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On September 5, 2008 appellant, then a 53-year-old medical administration officer, filed an occupational disease claim alleging that his preexisting emotional condition was aggravated

¹ 5 U.S.C. § 8101 *et seq.*

by numerous employment factors. He managed the Myrtle Beach Clinic in South Carolina from 2001 to 2004 and the Savannah Clinic in Georgia since 2004, but received less pay than other similarly-situated administrators. Shortly after appellant relocated to the Savannah Clinic, a staff shortage led to a backlog of patient cases from 2004 to 2006. As a result, he worked overtime on nights and weekends. Appellant also detailed numerous disagreements with management regarding performance ratings, promotions, bonuses, instructions and disciplinary actions as well as incidents of harassment.

Appellant also filed a formal complaint of discrimination with the employing establishment's Office of Resolution Management. Following a May 9, 2008 investigative report and an October 31, 2008 hearing before an administrative law judge of the Equal Employment Opportunity Commission (EEOC), the employing establishment issued a final order on December 11, 2008. The order adopted the judge's ruling that appellant was not subjected to discrimination or harassment on the basis of race, sex, age, disability or reprisal.

By decision dated April 6, 2009, OWCP denied appellant's claim, finding that the factual evidence failed to identify a compensable factor of employment.²

Appellant's then-counsel requested an oral hearing, which was held on July 22, 2009. On October 1, 2009 an OWCP hearing representative affirmed the April 6, 2009 decision with modification. She found that the factual evidence established that: (1) a staff shortage resulted in a backlog of patient cases at the Savannah Clinic from 2004 and 2006; and (2) appellant worked overtime during this period. The medical evidence, however, did not sufficiently establish that these job factors aggravated appellant's preexisting emotional condition. With respect to his other allegations, such as the matter regarding his pay, the hearing representative concluded that they were not substantiated and did not involve a compensable factor of employment.

Counsel requested reconsideration on September 30, 2010 and submitted new evidence. On December 14, 2010 OWCP denied modification of the October 1, 2009 decision. OWCP found that the medical evidence did not establish that appellant's condition was aggravated by the established factors and that appellant's other allegations such as harassment, discrimination and retaliation in the workplace were not substantiated.

Appellant requested reconsideration on August 18, 2011 and submitted new evidence. In an EEOC decision issued January 21, 2011, Carlton M. Hadden, Director of the Office of Federal Operations, found that appellant received less compensation than a similarly-situated female administrator, in violation of the Equal Pay Act. He reversed the employing establishment's December 11, 2008 final order, in part. Appellant asserted that this supported his allegation of discrimination. By decision dated October 31, 2011, OWCP denied appellant's request on the grounds that he did not present new evidence warranting further merit review.

Appellant requested reconsideration on November 23, 2011, arguing that the January 21, 2011 EEOC decision constituted new evidence not previously considered by OWCP. By decision dated December 7, 2011, OWCP denied his request on the grounds that he did not present new evidence warranting further merit review.

² This decision, which was originally dated March 13, 2009, was reissued to preserve appellant's appeal rights.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that the evidence or argument submitted by a claimant must either: (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 considered by OWCP.⁴ Where the request for reconsideration fails to meet at least one of these standards, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

ANALYSIS

By decision dated October 1, 2009, an OWCP hearing representative found that appellant's allegation of pay disparity did not constitute a compensable factor of employment. OWCP affirmed this holding on December 14, 2010. On August 18, 2011 appellant timely requested reconsideration of the December 14, 2010 merit decision. He submitted a January 21, 2011 EEOC decision that found a violation of the Equal Pay Act and reversed, in part, the employing establishment's December 11, 2008 final order. OWCP denied appellant's request on October 31, 2011, finding that he did not offer new evidence warranting further merit review. A subsequent request was denied on December 7, 2011 on the same basis.

The Board finds that the January 21, 2011 EEOC decision constitutes relevant and pertinent new evidence not previously considered by OWCP. An underlying issue of the December 14, 2010 merit decision was whether the alleged pay disparity constituted a compensable factor of employment for appellant's emotional condition claim. The Board has held that matters relating to pay are administrative functions of the employing establishment and fall outside the coverage of FECA;⁶ however, such matters will be considered compensable factors of employment where the evidence discloses error or abuse on the part of the employing establishment.⁷ In this case, appellant submitted a January 21, 2011 EEOC decision that found a violation of the Equal Pay Act. Since this decision established error on the part of employing establishment, it is relevant to the issue of whether appellant established a compensable factor of employment.⁸ Therefore, OWCP was obligated to conduct a merit review of the claim.⁹

³ 5 U.S.C. § 8128(a).

⁴ *E.K.*, Docket No. 09-1827 (issued April 21, 2010). See 20 C.F.R. § 10.606(b)(2).

⁵ *L.D.*, 59 ECAB 648 (2008). See 20 C.F.R. § 10.608(b).

⁶ See, e.g., *Frederick D. Richardson*, 45 ECAB 454 (1994); *Michael Thomas Plante*, 44 ECAB 510 (1993).

⁷ *M.D.*, 59 ECAB 211 (2007); *Ruth S. Johnson*, 46 ECAB 237 (1994). See also *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

⁸ *Pamela I. Holmes*, 49 ECAB 581 (1998). While EEOC findings are not dispositive of proceedings brought under FECA, they are nonetheless instructive to such proceedings. *Id.* Cf. *Jimmy L. Day*, 48 ECAB 654 (1997) (holding that an EEOC decision favorable to claimant, while not binding in its result, was of sufficient probative value to *prima facie* shift the weight of the evidence in favor of claimant as it offered significant support to his allegations of error or abuse and raised a substantial question as to whether the employer committed error or abuse in personnel matters).

⁹ *D.M.*, Docket No. 10-1844 (issued May 10, 2011).

Reopening a claim for merit review does not require a claimant to submit all evidence that may be necessary to discharge his burden of proof.¹⁰ If OWCP should determine that the new evidence submitted lacks probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹¹

On remand OWCP shall conduct a merit review of the case, further develop the record as necessary and issue an appropriate merit decision.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the December 7 and October 31, 2011 decisions of the Office of Workers' Compensation Programs be set aside and the case remanded for further merit review.

Issued: February 7, 2013
Washington, DC

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

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

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

¹⁰ See *Kenneth R. Mroczkowski*, 40 ECAB 855 (1989); *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹¹ See *Dennis J. Lasanen*, 41 ECAB 933 (1990).