

FACTUAL HISTORY

On March 11, 2011 appellant, then a 48-year-old supervisory air traffic control specialist, filed an occupational disease claim alleging that he sustained stress due to his work environment. He stopped work on January 4, 2011 and did not return.

In a statement received April 25, 2011, appellant related that in 2008 he accepted a position as a front line manager at a location dealing with hundreds of grievances. When he arrived the atmosphere was tense and he learned that one group of employees was “talking [him] up and one group was tearing [him] down.” The union representative, Jana Pitre, told him that she could say anything about him or his family and it would be considered negotiation. Tim Pforsich, a manager, instructed appellant to negotiate a religious accommodation issue with Ms. Pitre. Appellant referenced a December 12, 2008 statement, in which he described Ms. Pitre’s accusation that he and Mr. Pforsich made her feel like she was being raped. After the comment, Ms. Pitre was placed on administrative leave pending an investigation. When she returned she again told appellant that he and Mr. Pforsich made her feel like she was being raped. Appellant requested assistance dealing with Ms. Pitre but did not receive guidance. When Allie Metcalf began working as air traffic manager, she told appellant that she believed either he or Ms. Pitre would need to leave before things got better. Appellant told Ms. Metcalf and Andy Richards, a district manager, that the “fact that someone that I work with feels that I make her feel as bad as if I had raped her ... is an issue that needs to be resolved.” He tried to bid for another position but was not selected. Ms. Pitre was charged with driving under the influence and appellant had to help her so that she would not lose her medical clearance. Ms. Metcalf and Mr. Richards criticized appellant’s performance and placed him on an improvement program. Appellant believed that an operational error was occurring and informed management but nothing was done. He became increasingly stressed due to “the palpable animosity in the cab and the apparent lack of any sort of support or objective examination of the situation.”

In a statement dated March 24, 2011, Mr. Richards related that appellant performed at a satisfactory or better level for several years. Ms. Metcalf, however, informed Mr. Richards that appellant’s work had become unsatisfactory. The employing establishment provided him opportunities to improve.

In a statement dated April 1, 2011, Ms. Metcalf indicated that she began working as air traffic manager in March 2010. Appellant was not skilled at labor management. Ms. Metcalf told him that she believed that either he or Ms. Pitre would need to leave for things to get better given their “contentious relationship.” She placed appellant on a performance improvement plan as he was not successfully working traffic or managing employees. Ms. Metcalf related that he received a high level of support.

On April 22, 2011 the employing establishment controverted appellant’s claim, arguing that his symptoms began with the selection of Ms. Metcalf instead of himself for air traffic manager.

By decision dated August 31, 2011, OWCP denied appellant’s emotional condition claim after finding that he did not establish any compensable factors of employment. It found that he attributed his condition to administrative actions not compensable absent a showing of error or

abuse, including the assignment of work, actions by his supervisor, not being able to hold a particular position, performance issues and reporting an alleged operational error. OWCP further found that appellant had not factually established the incidents alleged with Ms. Pitre, including her reference to feeling like she was being raped in their discussions.

On August 16, 2012 appellant, through his attorney, requested reconsideration. Counsel maintained that his case was similar to *D.H.*,³ where the claimant alleged stress managing subordinates. He noted that in *D.H.*, the Board held that the claimant had established a compensable factor of employment where her regularly assigned duties as a supervisor required her to manage her subordinates and make decisions in her capacity as manager.

In support of his reconsideration request, appellant submitted June 14 and July 9, 2012 statements.⁴ In a statement dated June 14, 2012, he described strife with Ms. Pitre and her comments in December 2008 about feeling like he and Mr. Pforsich had raped her. Mr. Pforsich resigned because he did not want to deal with a “clearly unbalanced employee.” Appellant related that he received conflicting guidance in dealing with “disruptive employees.” He asserted that his performance deteriorated after he returned to a front line manager position.

In a witness statement dated June 6, 2012, Mr. Pforsich described his difficulties as a manager working with subordinates Scott Larsen and Ms. Pitre. He stated, “Their conduct was so egregious that, if they had been employed outside of the [F]ederal [G]overnment, they would have been terminated immediately.” Mr. Pforsich related that appellant “had the daily responsibility of dealing with [Mr.] Larsen and [Ms.] Pitre.” He asserted that appellant did not get assistance from the district manager, who wanted to avoid action against Mr. Larsen and Ms. Pitre because of their union connections. Mr. Pforsich began an investigation of Ms. Pitre after she maintained that he and appellant made her feel like she had been raped but the district manager canceled the investigation.

In a statement dated August 8, 2012, Robert Burkart, a coworker, related that before appellant’s arrival as manager two controllers “severely slandered [him].” He described the rape comment by Ms. Pitre and asserted that management “seemed to reward dysfunctional behavior.” Mr. Burkart alleged that there were efforts “to sabotage and undermine” appellant.

By decision dated November 14, 2012, OWCP denied appellant’s request for reconsideration after finding that he had not submitted evidence of raised arguments sufficient to warrant reopening the case for further merit review under section 8128. It found that it had previously addressed the allegations in his statements and that the witnesses recounted their own experiences and thus their statements were immaterial.

On appeal appellant’s attorney argues that OWCP erred in failing to reopen the case for further merit review.

³ Docket No. 09-439 (issued December 29, 2009).

⁴ Appellant also submitted medical evidence.

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 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 considered by OWCP.⁶ 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.⁷ 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.⁸

The requirements for reopening a claim for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden of proof.⁹ The requirements pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹⁰ If OWCP should determine that the new evidence submitted lacks substantive probative value, it may deny modification of the prior decision, but only after the case has been reviewed on the merits.¹¹

ANALYSIS

Appellant alleged that he sustained an emotional condition due to tension and hostility from his subordinates, including an allegation by Ms. Pitre that he made her feel like she had been raped. He additionally attributed his condition to the employing establishment failing to select him for a bid position, performance issues and not receiving assistance from his superiors. OWCP denied appellant's emotional condition claim after finding that he had not established any compensable work factors. It determined that his allegations concerned administrative or personnel matters that were not compensable under FECA absent a showing of error or abuse. OWCP also determined that appellant had not factually established Ms. Pitre's comment about rape.

In his June 14, 2012 reconsideration request, appellant attributed his condition to stress working as a manager with difficult employees. He submitted a statement from Mr. Pforsich

⁵ 5 U.S.C. § 8101 *et seq.* Section 8128(a) of FECA provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

⁶ 20 C.F.R. § 10.606(b)(2).

⁷ *Id.* at § 10.607(a).

⁸ *Id.* at § 10.608(b).

⁹ *Donald T. Pippin*, 53 ECAB 631 (2003).

¹⁰ *Id.*

¹¹ *See Annette Louise*, 53 ECAB 783 (2003).

who related that appellant was responsible for dealing on a day-to-day basis with Mr. Larsen and Ms. Pitre, who he maintained had engaged in “egregious” conduct. OWCP did not address appellant’s allegation that he sustained stress in performing his regular or specially assigned duties as a manager. As discussed, in order to require merit review, it is not necessary that the new evidence be sufficient to discharge appellant’s burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by OWCP.¹²

Additionally, OWCP found that appellant had not factually established that Ms. Pitre told him that he made her feel like she had been raped. On reconsideration, however, both Mr. Pforsich and Mr. Burkhart confirmed that Ms. Pitre made the allegation. Consequently, appellant has submitted new factual evidence supporting his contention.

On reconsideration, appellant’s attorney attributed his emotional condition claim as a result of managing his employees. *Citing D.H.*, he argued that this would be compensable as it arose from his regular work duties.¹³ The Board finds that counsel has set forth a new alternative legal argument sufficient to warrant reopening the case for further merit review. In *D.H.*, the Board held that stress from managing subordinates and making day-to-day decisions as a manager were compensable as part of the claimant’s regularly assigned duties.¹⁴

As appellant raised a new legal argument and submitted new factual evidence, the Board finds that OWCP improperly denied his request for review of the merits of the claim.¹⁵ The case will be remanded to OWCP to conduct an appropriate merit review of the claim. Following this and such other development as deemed necessary, it shall issue a merit decision on the claim.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹² See *Donald T. Pippin*, *supra* note 9.

¹³ See *supra* note 3.

¹⁴ Where a claimed disability results from an employee’s emotional reaction to his regularly or specially assigned duties or to an imposed employment requirement, the disability comes within coverage of FECA. See *Robert Bartlett*, 51 ECAB 664 (2000); *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁵ See A.S., Docket No. 10-1270 (issued January 12, 2011).

ORDER

IT IS HEREBY ORDERED THAT the November 14, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 16, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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