

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

P.S., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Northport, NY, Employer**

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**Docket No. 13-1957
Issued: March 20, 2014**

Appearances:
Timothy W. McLaughlin, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 12, 2013 appellant filed a timely appeal from a May 7, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying an emotional condition claim and a July 17, 2013 nonmerit decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he sustained an emotional condition in the performance of duty; and (2) whether OWCP properly denied his request for reconsideration pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 10, 2012 appellant, then a 47-year-old electrician supervisor, filed an occupational disease claim (Form CA-2) alleging that he sustained anxiety and depression on or before April 6, 2012 due to unspecified work factors. He stopped work on May 10, 2012.

In an April 6, 2012 statement, an employing establishment workers' compensation manager stated that, earlier that day, appellant was found unconscious in his office with the door locked. When he regained consciousness, his speech was slurred and he appeared unsteady. Appellant was then taken to an employing establishment emergency room. He met with the compensation manager on April 25, 2012 and characterized the April 6, 2012 incident as a "meltdown" caused by job-related anxiety. The manager then instructed appellant to complete a notice of occupational disease.

In a May 17, 2012 letter, OWCP advised appellant of the type of additional evidence needed to establish his claim, including a complete description of the work factors alleged to have caused the claimed anxiety and depression. It also requested a statement from appellant's attending physician explaining how and why the identified incidents would cause the claimed emotional condition.

In response, appellant submitted May 2, 2012 reports from Dr. Suzanne Tuzel, an attending Board-certified psychiatrist, diagnosed anxiety disorder not otherwise specified due to an April 6, 2012 workplace incident, resulting in a psychiatric hospitalization from April 6 to 10, 2012. Dr. Tuzel stated that appellant was "unable to tolerate any work-related stress at this time."

By decision dated June 18, 2012, OWCP denied appellant's claim on the grounds that fact of injury was not established. It found that he did not establish any compensable work factors.

In a February 4, 2013 letter, appellant requested reconsideration. In an associated statement, he attributed his condition to the stress of being promoted to electrical shop foreman. Appellant stated that "the work load, the lack of staffing and the antiquated power structure at the [employing establishment]," having to answer "questions on the phone on Saturdays and Sundays, coordinating contractors to come in and make repairs or going in myself to make repairs." He noted that he had no prior history of mental health problems before April 6, 2012 and had no nonoccupational stressors.

In a March 6, 2013 letter, OWCP afforded appellant 30 days to submit additional information about staffing shortages, equipment problems and why he found his workload stressful.

The employing establishment workers' compensation manager provided a March 14, 2013 statement noting that appellant's "workload was and remains heavy" but two additional electricians were hired since January 2012. The manager acknowledged that the electrical system was aging and that major renovations were planned. She confirmed that, as a supervisor, appellant was required to "respond to calls from subordinates" on Saturdays and Sundays,

including on site supervision of staff and contractors “even on his ... nonwork time, specifically because the hospital operates around the clock, 365 days per year.” The manager alleged that appellant had been counseled for performance deficiencies, was issued a four-day suspension, and was disciplined in the past for intoxication while on duty.

Appellant submitted an April 16, 2013 rebuttal to the compensation manager’s March 14, 2013 statement, asserting that there was one electrical supervisor hired since 2007 but no electricians. A major power failure due to aging equipment took many weeks of constant attention, further stressing his already understaffed division. Also, supervising contractors was not in his job description as there were other staff members assigned to this task. Appellant denied being counseled for performance deficiencies. He submitted two undated coworker statements noting the difficulties of meeting management demands with a limited staff.

In an April 24, 2012 note, Dr. Tuzel held appellant off work for three months “[d]ue to work-related stressors.”

By decision dated May 7, 2013, OWCP denied appellant’s claim on the grounds that causal relationship was not established. It found that he established as compensable due to his having to work outside of his job description, he worked overtime on weekends and had to service a major power failure that required weeks of constant work. OWCP further found that a four-day suspension related to his April 6, 2012 breakdown was not compensable as no error or abuse was shown in how the employing establishment handled this administrative disciplinary matter. It found that Dr. Tuzel’s reports were insufficient to establish causal relationship because she did not explain how and why the accepted work factors would cause the claimed emotional condition.

In a June 28, 2013 letter, appellant requested reconsideration. He stated that he was enclosing additional reports from Dr. Tuzel. There are no medical reports in the record that accompany the request for reconsideration or received prior to July 17, 2013.

By decision dated July 17, 2013, OWCP denied a merit review on the grounds that appellant’s June 28, 2013 letter did not raise a substantive legal question or include new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an “employee of the United States” within the meaning of FECA; that the claim was filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged; and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.³

² *Joe D. Cameron*, 41 ECAB 153 (1989).

³ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

Where disability results from an employee's reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁴ To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting the allegations with probative and reliable evidence.⁵ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁶

In cases involving emotional conditions, the Board has held that when working conditions are alleged as factors in causing disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship.⁷ If a claimant implicates a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.⁸

The Board has held that a variety of work factors are compensable under FECA. Among them, overwork is a compensable factor of employment if appellant submits sufficient evidence to substantiate this allegation.⁹ Also, in certain circumstances, working overtime is sufficiently related to regular or specially assigned duties to constitute a compensable employment factor.¹⁰ Additionally, conditions related to stress resulting from situations in which an employee is trying to meet his or her position requirements are compensable.¹¹

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition due to the stress of performing his job as electrical foreman, including being made to work overtime on Saturdays and Sundays, overwork due to short staffing and the excessive demands produced by aging power equipment and failure. The employing establishment corroborated appellant's account of these events. OWCP accepted as compensable that appellant had workload requirements that were difficult to meet, was made to work overtime and had to oversee a major power system repair. The Board

⁴ 5 U.S.C. §§ 8101-8193. *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Ruthie M. Evans*, 41 ECAB 416 (1990).

⁶ *Effie O. Morris*, 44 ECAB 470 (1993).

⁷ See *Norma L. Blank*, 43 ECAB 384 (1992).

⁸ *Marlon Vera*, 54 ECAB 834 (2003).

⁹ *Bobbie D. Daly*, 53 ECAB 691 (2002); *Robert W. Wisenberger*, 47 ECAB 406, 408 (1996); *Chester R. Henderson*, 42 ECAB 352 (1991); *Manuel W. Vetti*, 33 ECAB 750 (1982). See *Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984) (the Board held that an unusually heavy workload is covered under FECA).

¹⁰ *Ezra D. Long*, 46 ECAB 791 (1995).

¹¹ *Trudy A. Scott*, 52 ECAB 309 (2001).

finds that appellant has established overwork,¹² overtime¹³ and the power system repair duties as compensable employment factors in this case.¹⁴

Appellant also attributed his condition, in part, to a four-day suspension related to the events of April 6, 2012. Disciplinary actions including oral reprimands, discussions or letters of warning for conduct are noncompensable, administrative actions unless the employee shows management acted unreasonably.¹⁵ To support such a claim, a claimant must establish a factual basis by providing probative and reliable evidence.¹⁶ In the present case, appellant did not submit evidence indicating that the employing establishment acted unreasonably in imposing any disciplinary actions. The Board notes that there is very little description of the suspension in the record. Therefore, appellant has not established the suspension as a compensable work factor.¹⁷

Although appellant established the compensable work factor of overwork, OWCP denied the claim as the medical evidence was insufficient to establish causal relationship. Dr. Tuzel, an attending Board-certified psychiatrist, did not provide medical rationale explaining how and why the accepted work factors would cause the claimed emotional condition. Appellant provided May 2 and April 24, 2012 reports from Dr. Tuzel diagnosing an anxiety disorder and holding appellant off work due to work stress. However, she did not explain how and why the accepted work factors of overtime, overwork, and trying to meet the requirements of his position in completing the power system repairs would cause the diagnosed anxiety disorder. The lack of medical rationale reduces the probative value of Dr. Tuzel's opinion on causal relationship.¹⁸ The Board therefore finds that appellant did not meet his burden of proof in establishing that he sustained an emotional condition in the performance of duty as alleged.

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, section 10.606(b)(2) of Title 20 of the Code of Federal 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. Section 10.608(b) provides that

¹² *Bobbie D. Daly*, *supra* note 9.

¹³ *Ezra D. Long*, *supra* note 10.

¹⁴ *Trudy A. Scott*, *supra* note 11.

¹⁵ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁶ *See Barbara J. Nicholson*, 45 ECAB 843 (1994).

¹⁷ *Janice I. Moore*, 53 ECAB 777 (2002).

¹⁸ *Deborah L. Beatty*, 54 ECAB 340 (2003).

when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof. Appellant need only submit relevant, pertinent evidence not previously considered by OWCP. When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.

ANALYSIS -- ISSUE 2

In his June 28, 2013 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. He noted that he was submitting additional medical evidence, but there are no additional reports of record received. A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant did not submit any new and relevant evidence in this case.

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 submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review. The July 17, 2013 decision denying reconsideration is proper under the law and facts of the case.

CONCLUSION

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty as alleged. The Board further finds that OWCP properly denied reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 17 and May 7, 2013 are affirmed.

Issued: March 20, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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