



## **ISSUE**

The issue is whether OWCP properly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal counsel contends that appellant submitted relevant and pertinent new evidence in support of his claim.

## **FACTUAL HISTORY**

On April 10, 2012 appellant, a 49-year-old air traffic control specialist, filed an occupational disease claim (Form CA-2) alleging an emotional condition due to factors of his federal employment, including deviation from normal training protocol, a hostile work environment, union and management attitude, and political views.

By decision dated May 25, 2012, OWCP denied the claim as appellant had not established fact of injury. A request for a hearing was filed and in an October 19, 2012 decision, an OWCP hearing representative vacated the prior decision and remanded the case for further development. The hearing representative explained that, although the May 25, 2012 decision was correct, appellant had submitted evidence warranting further development.

Upon further review of the evidence, by decision dated November 29, 2012, OWCP again denied the claim for failing to establish fact of injury. It found that the evidence was insufficient to establish a compensable factor of employment.

Appellant again requested a hearing. In a July 3, 2013 decision, an OWCP hearing representative affirmed the prior decision.

On July 29, 2014 appellant, through counsel, requested reconsideration and submitted additional evidence in support of his claim, including records from his Equal Employment Opportunity (EEO) complaint. Included with these submissions was an October 22, 2013 transcript for the deposition of a coworker who testified about appellant's skill checks, training, and job performance. The coworker noted appellant's overall job performance rating and discussed protocol and appellant's involvement. Additionally, appellant submitted an October 22, 2013 transcript for the deposition of his trainer, who testified in general about the filing of appellant's training reports and specifically about an event involving a DC 10 landing and a Falcon ready to depart. Appellant's trainer added that he provided appellant with daily feedback.

By decision dated September 24, 2014, OWCP denied appellant's request for reconsideration of the merits finding that he had failed to submit relevant and pertinent new evidence sufficient to warrant a merit review. Appellant also failed to show that OWCP had erroneously applied or interpreted a point of law or to offer a relevant or legal not previously considered by OWCP.

## LEGAL PRECEDENT

Section 8128(a) of FECA does not entitle a claimant to a review of an OWCP decision as a matter of right; it vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>3</sup> OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>4</sup>

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by 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.<sup>5</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received 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 Board finds that OWCP improperly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

On appeal, counsel contends that appellant submitted relevant and pertinent new evidence in support of his claim. In support of his July 29, 2014 reconsideration request, appellant submitted records from his EEO complaint, including October 22, 2013 transcripts for the depositions of his coworker and trainer. The Board finds that the deposition transcripts are relevant and pertinent new evidence.<sup>8</sup> These depositions present factual testimony about appellant's training, job performance, and the culture of his work environment. The underlying issue is whether appellant has established a compensable factor of employment. This testimony is new and relevant in consideration of whether appellant has established a compensable factor of employment. The requirements for reopening a case for merit review do not include the requirement that a claimant submit all evidence which may be necessary to discharge his burden

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<sup>3</sup> *Id.* Under section 8128 of FECA, the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. 5 U.S.C. § 8128(a).

<sup>4</sup> See *Annette Louise*, 54 ECAB 783, 789-90 (2003).

<sup>5</sup> 20 C.F.R. § 10.606(b)(3). See *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

<sup>6</sup> *Id.* at § 10.607(a).

<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> See *M.W.*, Docket No. 11-1287 (issued March 26, 2012) (where the Board held that OWCP improperly denied the claimant's request for reconsideration of his emotional condition claim on the basis that the deposition transcripts he submitted from an EEO complaint were new and relevant evidence presenting factual testimony about the EEO process, the investigation involving the employee's claim, and the overall culture of the employee's work environment).

of proof. The claimant need only submit evidence that is relevant and pertinent and not previously considered.<sup>9</sup> 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.<sup>10</sup>

Accordingly, the Board finds that OWCP improperly refused to reopen appellant's case for further reconsideration of the merits. This case will therefore be remanded for merit review, to be followed by an appropriate decision.

### **CONCLUSION**

The Board finds that OWCP improperly refused to reopen appellant's case for further reconsideration of the merits pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the September 24, 2014 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.<sup>11</sup>

Issued: July 12, 2016  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> 20 C.F.R. § 10.606(b)(3); *see J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>10</sup> *Id.* at § 10.607(a); *see also Robert G. Burns*, 57 ECAB 657 (2006).

<sup>11</sup> James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.