



Commission investigation corroborated that the employing establishment took two years to correct this error.

### **FACTUAL HISTORY**

This case has previously been before the Board. In a claim adjudicated by OWCP under file number xxxxxx622, on February 25, 2002 appellant, then a 38-year-old health communications specialist, who last worked on January 16, 2002, filed an occupational disease claim (Form CA-2), alleging that factors of her federal employment caused an emotional condition. OWCP denied the claim on September 26, 2002, finding that she did not establish that she sustained an emotional condition in the performance of duty. Appellant, through her representative, requested a hearing that was held before an OWCP hearing representative on May 29, 2003. By decision dated October 21, 2003, the OWCP hearing representative found that appellant established one factor as compensable, that from March 24 to 26, 1999, she and other workers were required to put together approximately 80 two-inch binders in a short turn-around time with inadequate instruction. He, however, found that the medical evidence of record did not support that her condition was caused by the accepted employment factor.

Appellant retired in 2003. On October 15, 2004 she requested reconsideration. In a November 9, 2004 decision, OWCP denied appellant's reconsideration request. Appellant filed an appeal with the Board on February 11, 2005. In a nonmerit decision dated November 17, 2005, the Board found that OWCP properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).<sup>2</sup>

Appellant, through her representative, again requested reconsideration on March 2, 2007. On May 3, 2007 OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error. On July 25, 2007 appellant filed an appeal with the Board. In a January 14, 2008 decision, the Board found that, as appellant's March 2, 2007 reconsideration request was untimely filed and that she failed to demonstrate clear evidence of error, OWCP properly denied a merit review of her claim in its May 3, 2007 decision.<sup>3</sup>

On April 10, 2008 appellant filed a second occupational disease claim, adjudicated by OWCP under file number xxxxxx431. She indicated that her federal employment aggravated her depression and anxiety, and caused post-traumatic stress disorder (PTSD). Appellant maintained that she was first aware of the PTSD condition and its relationship to employment on April 1, 2008. The employing establishment noted that appellant retired in 2003 and referenced her previous claim. In June 2008 OWCP doubled file numbers xxxxxx622 and xxxxxx431, with the former serving as the master file. In an April 2, 2009 decision, it denied the 2008 claim as it was untimely filed. Appellant requested a hearing. After a preliminary review, in a June 3, 2009 decision, an OWCP hearing representative found that OWCP did not appropriately develop the claim and remanded the case for further development. After further development, by decision dated February 3, 2010 OWCP found that appellant did not sustain an emotional condition in the

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<sup>2</sup> Docket No. 05-754 (issued November 17, 2005).

<sup>3</sup> Docket No. 07-2002 (issued January 14, 2008).

performance of duty. Appellant again requested a hearing, that was held on May 7, 2010. On July 28, 2010 an OWCP hearing representative affirmed the February 3, 2010 decision.

On December 21, 2010, January 24 and June 23, 2011 appellant's representative requested reconsideration. In nonmerit decisions dated January 6, June 2, and July 8, 2011 respectively, OWCP denied appellant's reconsideration requests. Appellant's representative again requested reconsideration on July 16, 2011 and submitted additional evidence. In a January 12, 2012 decision, OWCP reviewed the merits of appellant's claim and found that, as none of the documents submitted substantiated that she established a compensable factor of employment, she did not establish that she sustained an emotional condition in the performance of duty.

Appellant's representative filed an appeal with the Board on March 7, 2012. She asserted that an EEO Commission decision supported appellant's claim of workplace discrimination; that the employing establishment illegally placed a "red flag alert" on her personnel file; that OWCP and the employing establishment illegally colluded, thus violating appellant's due process; and that OWCP practiced fraud and willful misconduct by misrepresenting facts, by not fully addressing all alleged acts of discrimination, and by not explaining what a "flag alert" meant under FECA.

In a November 5, 2012 decision, the Board reviewed the merits of appellant's claim and found that she did not meet her burden of proof to establish an emotional condition causally related to factors of her federal employment. The Board reviewed both file numbers xxxxxx622 and xxxxxx431. Regarding the allegation that a flag alert was placed on appellant's personnel file, the Board noted that, while the record contained copies of a promotion certificate dated November 15, 2001 that included handwritten notations regarding appellant's race and EEO activity, the employing establishment explained that it was not standard protocol for the race and EEO activity of an applicant to be annotated on a promotion certificate prior to it being given to hiring officials, and it was the type information requested by EEO investigators when an EEO complaint had been filed. The Board found that, as there was nothing in the record to indicate when and by whom the notations on the promotion certificate were made, appellant did not establish a compensable factor of employment in this regard. The Board further noted that the record did not contain a final EEO Commission decision on the merits of appellant's EEO complaints and only contained a nonfinal January 6, 2003 EEO Commission decision that merely found that appellant's claim should go forward.<sup>4</sup> As to appellant's argument on appeal that her due process was violated by OWCP, the Board noted that, as an administrative body, it did not have jurisdiction to review a constitutional claim such as that made by appellant and therefore lacked jurisdiction to review the merits of appellant's argument regarding due process. Lastly, regarding her assertion that OWCP practiced fraud and willful misconduct in denying her claim, the Board found that matters relating to the handling of a workers' compensation claim were administrative in nature and did not arise in the performance of duty.<sup>5</sup>

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<sup>4</sup> The Board also noted that the January 6, 2003 EEO Commission decision had been reviewed by OWCP in its October 21, 2003 decision rendered under file number xxxxxx622.

<sup>5</sup> Docket No. 12-860 (issued November 5, 2012).

On February 25, 2013 appellant, through her representative, requested reconsideration with OWCP and asserted that the employing establishment committed error when appellant was not considered for promotion. She submitted a partial, unsigned investigative document dated August 26, 2002 that discussed an EEO complaint filed by appellant and additional medical evidence. In a merit decision dated April 25, 2013, OWCP denied modification of its prior decision.

On June 13, 2013 appellant, through her representative, filed an appeal with the Board. She asserted that the employing establishment committed error and abuse in failing to process appellant's applications for promotion appropriately. In a November 14, 2013 decision, the Board found that, as the provenance of the investigative report was unknown and unverified, it was of no probative value. The Board further noted that the report contained nothing that would support appellant's assertion of error by the employing establishment,<sup>6</sup> and concluded that appellant did not establish that the employing establishment committed error or abuse regarding her applications for promotion and, thus, she did not establish an emotional condition in the performance of duty.<sup>7</sup>

On December 19, 2013 appellant's representative requested reconsideration, again asserting that the employing establishment committed error when appellant was not considered for promotion. She submitted correspondence dated August 22, 2002, addressed to her by the employing establishment. The correspondence advised appellant that she had been authorized to receive priority consideration for the position of human resources assistant, GS-203-07, or the next substantially similar position in Atlanta, Georgia. Appellant was informed that this had been authorized due to an administrative error that was made in association with announcement number MP2-01-164, which was a personnel assistant position, GS-203-6/7. In the August 22, 2002 correspondence, the employing establishment acknowledged that an error was made in evaluating her basic qualifications and that she was inappropriately rated as not qualified. In a nonmerit decision dated April 10, 2014, OWCP denied appellant's reconsideration request. It found that the evidence submitted did not contain a relevant legal argument not previously considered.

Appellant filed an appeal with the Board on April 29, 2014. Her representative asserted that OWCP erred in denying merit review because she submitted evidence to establish that the employing establishment committed error and abuse in failing to process promotion applications appropriately. By decision dated May 6, 2015, the Board found that the August 22, 2002 correspondence was pertinent to the merit issue in this case and OWCP thus improperly denied appellant's request for a merit review pursuant to section 8128(a) of FECA. The Board remanded the case to OWCP to review the merits of her claim. The facts and the law of the previous Board decisions are incorporated herein by reference.<sup>8</sup>

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<sup>6</sup> The Board noted that the report contained a list of exhibits that were not forwarded with the reconsideration request.

<sup>7</sup> Docket No. 13-1522 (issued November 14, 2013).

<sup>8</sup> Docket No. 14-1196 (issued May 6, 2015).

In a June 12, 2015 decision, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions. It specifically noted that she had been in a GS-9 position since 1998 and, therefore, the GS-6/7 position found in announcement number MP2-01-164 would not be considered a "promotion." OWCP concluded that there was no error or abuse demonstrated in omitting appellant from a list of qualified applicants because, as noted in the August 22, 2002 correspondence, the employing establishment corrected its error by giving appellant priority consideration in a similar position.

### **LEGAL PRECEDENT**

To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit the following: (1) medical evidence establishing that she has an emotional or stress-related disorder; (2) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her stress-related condition.<sup>9</sup> If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.<sup>10</sup> 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.<sup>11</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. In the case of *Lillian Cutler*,<sup>12</sup> the Board explained that there are distinctions as to the type of employment situations giving rise to a compensable emotional condition arising under FECA. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within coverage under FECA.<sup>13</sup> When an employee experiences emotional stress in carrying out his or her employment duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability results from his or her emotional reaction to a special assignment or other requirement imposed by the employing establishment or by the nature of the work.<sup>14</sup> Allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.<sup>15</sup> Where the claimant alleges compensable factors of employment, he or she must substantiate such

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<sup>9</sup> *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>10</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

<sup>11</sup> *Id.*

<sup>12</sup> 28 ECAB 125 (1976).

<sup>13</sup> *See Robert W. Johns*, 51 ECAB 137 (1999).

<sup>14</sup> *Supra* note 12.

<sup>15</sup> *J.F.*, 59 ECAB 331 (2008).

allegations with probative and reliable evidence.<sup>16</sup> Personal perceptions alone are insufficient to establish an employment-related emotional condition.<sup>17</sup>

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employing establishment rather than the regular or specially assigned work duties of the employee and are not covered under FECA.<sup>18</sup> Where the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.<sup>19</sup>

### ANALYSIS

The Board finds that appellant did not meet her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment.

Following the Board's May 6, 2015 decision,<sup>20</sup> in a merit decision dated June 12, 2015, OWCP reviewed the evidence submitted by appellant in her December 11, 2013 reconsideration request and denied her emotional condition claim.

As in previous submissions in this case, in her December 11, 2013 reconsideration request, appellant did not attribute her emotional condition to the performance of her regular work duties or to any special work requirement arising from her employment duties under *Cutler*.<sup>21</sup> Rather, in both her December 2013 reconsideration request and with her current appeal to the Board, she asserted that the employing establishment committed error when her applications for promotion were not properly processed. In support of this assertion, appellant submitted correspondence dated August 22, 2002, addressed to her by the employing establishment. The correspondence advised her that she had been authorized to receive priority consideration for the position of human resources assistant, GS-203-07, or the next substantially similar position in Atlanta. Appellant was informed that this had been authorized because an administrative error was made in association with announcement number MP2-01-164, a GS-203-6/7 personnel assistant position. In the August 22, 2002 correspondence, the employing establishment acknowledged that an error was made in evaluating her basic qualifications, and that she had inappropriately been rated as not qualified.

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<sup>16</sup> *M.D.*, 59 ECAB 211 (2007).

<sup>17</sup> *Roger Williams*, 52 ECAB 468 (2001).

<sup>18</sup> *Charles D. Edwards*, 55 ECAB 258 (2004); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

<sup>19</sup> *Kim Nguyen*, 53 ECAB 127 (2001).

<sup>20</sup> *Supra* note 8.

<sup>21</sup> *See James E. Norris*, 52 ECAB 93 (2000).

Appellant's allegations in the present appeal relate to administrative or personnel actions. In *Thomas D. McEuen*,<sup>22</sup> the Board held that an employee's emotional reaction to administrative actions or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employing establishment and do not bear a direct relation to the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances surrounding the administrative or personnel action established error or abuse by the employing establishment superiors in dealing with the claimant.<sup>23</sup> Absent evidence of such error or abuse, the resulting emotional condition must be considered self-generated and not employment generated.

While the August 22, 2002 correspondence from the employing establishment acknowledged error with regard to announcement number MP2-01-164, since this announcement was for a GS-6/7 position and appellant had been working in a GS-9 position since 1998, this position would not be considered a "promotion." Moreover, by its August 22, 2002 correspondence, the employing establishment corrected its error by giving appellant priority consideration in a similar position.

In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of the case to determine whether the employing establishment acted reasonably.<sup>24</sup> The mere fact that personnel actions were later modified or rescinded, does not, in and of itself, establish error or abuse.<sup>25</sup>

In the case at hand, as the correct final administrative result was reached, the Board finds the error of omitting appellant from a list of qualified applicants for a GS-6/7 position described in announcement number MP2-01-164 does not rise to the level of establishing error and abuse. The employing establishment corrected its error by giving appellant priority consideration in a similar position.<sup>26</sup> Appellant therefore has not established that the employing establishment committed error or abuse regarding her applications for promotion.<sup>27</sup>

As appellant failed to establish a compensable employment factor, the Board need not address the medical evidence of record.<sup>28</sup>

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.

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<sup>22</sup> *Thomas D. McEuen*, *supra* note 18.

<sup>23</sup> *Supra* note 19.

<sup>24</sup> *Supra* note 21.

<sup>25</sup> *Supra* note 10.

<sup>26</sup> See *Sharon M. Beck*, Docket No. 00-523 (issued January 2, 2001).

<sup>27</sup> *Supra* note 19.

<sup>28</sup> *Katherine A. Berg*, 54 ECAB 262 (2002).

**CONCLUSION**

The Board finds that appellant did not meet her burden of proof to establish an emotional condition in the performance of duty causally related to factors of her federal employment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 12, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 17, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board