

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish an emotional condition in the performance of duty; (2) whether OWCP properly denied appellant's request for the issuance of a subpoena; and (3) whether it properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 10, 2014 appellant, then a 54-year-old intelligence analyst, filed an occupational disease claim (Form CA-2) alleging that he sustained post-traumatic stress disorder (PTSD), generalized anxiety disorder with panic attacks, and major depressive disorder due to exposure to various work factors over time. He claimed that he was exposed to repeated psychological abuse, trauma, and anguish and that "illegal and pernicious adverse actions" had been taken against him. Appellant indicated that he first became aware of his claimed conditions on October 17, 2013 and first realized on September 29, 2014 that they were caused or aggravated by his federal employment.

On the same Form CA-2, appellant's immediate supervisor indicated that appellant was reassigned from his normal position to Headquarters, Commandant's office, while waiting to return to normal duties or further disposition due to his inability to pass a Counterintelligence Scope Polygraph following numerous attempts. He indicated that this failure resulted in loss of confidence and appellant's removal from access to the Sensitive Compartmented Information Facility (SCIF). As of August 24, 2014, appellant was reassigned from Headquarters, U.S. Special Operations Command (HQ USSOCOM) to Headquarters, Defense Intelligence Agency (HQ DIA) at Bolling Air Force Base in Washington, DC.

Appellant submitted an October 15, 2014 statement in which he discussed the incidents and conditions at work, which he believed caused his claimed emotional conditions. He referenced Department of Defense Instruction 5210.91, which he believed dictated that he should be exempted from polygraph testing due to his emotional condition.³ Appellant asserted that, despite having produced medical documentation of his emotional status, he was improperly subjected to polygraph testing and interrogation on five occasions between 2011 and 2014.⁴ He noted that, from October 7, 2013 to August 4, 2014, he was not allowed to do his regular job because he could not successfully complete the polygraph testing. Appellant reported being relieved of employment at HQ USSOCOM and being involuntarily reassigned to HQ DIA. He indicated that he was assigned menial work, in an area with coworkers some called "misfits," as a form of punishment by management. Appellant noted that he filed an appeal over access denials stemming from an inability to pass polygraph testing. He noted that he filed an Equal

³ Appellant asserted that this instruction provided that "written procedures shall be established to exempt or postpone examinations when individuals are considered medically, psychologically, or emotionally unfit to undergo an examination."

⁴ In particular, appellant asserted that he provided such medical evidence prior to an August 5, 2014 polygraph session.

Employment Opportunity (EEO) complaint for discrimination against him based on his disability.

Appellant submitted a July 31, 2014 letter in which Dr. Michael I. Rothburd, an attending clinical psychologist, indicated that appellant was initially evaluated on June 23, 2014 and was diagnosed with anxiety disorder and PTSD. In an October 17, 2013 report, Dr. Heather Magee, an attending clinical psychologist, diagnosed adjustment disorder with anxiety. On November 14, 2013 she indicated that appellant had been referred to her due to his situational anxiety and that it would be helpful for him to use sick leave to address symptoms related to occupational stress. In a September 29, 2014 report, Dr. Gary K. Arthur, an attending Board-certified psychiatrist, diagnosed chronic PTSD, generalized anxiety disorder, and major depressive disorder and found total disability.

In a November 6, 2014 statement received on December 11, 2014, appellant's immediate supervisor indicated that on July 31, 2014 he received a letter from Dr. Rothburd, which used the terms "anxiety disorder" and "post-traumatic stress disorder." He indicated that, to his knowledge, this was "the first time [PTSD] was used." The supervisor listed the dates of appellant's polygraph testing on March 23 and 25, 2011, January 31 and June 26, 2012, and August 5, 2014 and discussed appellant's attempts to pass his polygraph testing.⁵ A performance appraisal covering the rating period October 1, 2013 to August 22, 2014 was also submitted.

In a letter dated December 24, 2014, OWCP requested that appellant submit additional factual and medical evidence in support of his claim. It also requested additional information from the employing establishment.

In a January 13, 2015 statement, appellant reported that as of May 2014 he had not passed the polygraph testing and he asserted that management advised him that his employment would be terminated. He advised that he was unfairly stripped of his position in October 2013 and removed from his office. Appellant indicated that on August 5, 2014 he was forced to take another polygraph test or else adverse action would be taken against him.⁶

Appellant submitted a January 19, 2015 statement in which a coworker indicated that she was aware that he was unable to pass the polygraph examination. The coworker noted that, after being reassigned to another job, appellant complained that he occupied a position which required little or no work and that his colleagues infrequently interacted with him. The coworker believed that the reassignment had left appellant depressed and dejected. Appellant also submitted the findings of a September 25, 2014 Minnesota Multiphasic Personality Inventory test and additional medical evidence.

In an undated statement received on February 4, 2015 and a March 24, 2015 statement received on March 24, 2015, appellant's immediate supervisor indicated that appellant was properly issued a lower classification security badge in October 2013. He noted that appellant

⁵ It appears that the copy of the November 6, 2014 statement submitted on December 11, 2014 is incomplete.

⁶ Appellant indicated that he experienced a nervous breakdown during and after a polygraph examination on March 25, 2011.

was reassigned to another work location and subsequently lost access to classified workstations and networks. The supervisor indicated that polygraph testing was properly administered and noted that appellant was not under his supervision after August 24, 2014.

Additional administrative documents were submitted to the record. In a May 21, 2014 letter, the Insider Threat Program Coordinator for the employing establishment indicated that appellant was reassigned, noting that the decision to reassign him was not solely based on his inability to pass polygraph testing. In an April 29, 2015 statement, the Chief of the Credibility Assessment Program of the employing establishment indicated that the administration of two polygraph tests per year was not considered excessive under the relevant standards. He advised that no standards were violated with respect to appellant's polygraph testing.⁷

By decision dated June 8, 2015, OWCP denied appellant's claim for a work-related emotional condition. It found that appellant failed to establish any of his alleged compensable work factors. OWCP determined that appellant had not established error or abuse with respect to administrative matters, regarding the management of polygraph testing, security clearance matters, or reassignment to different jobs and/or workplaces.

Appellant submitted a June 19, 2015 statement in which he requested a hearing with an OWCP hearing representative regarding OWCP's June 8, 2015 decision denying his emotional condition claim. He again asserted that, after providing notification to the responsible officials of his official diagnoses, he should have been considered unfit for the polygraph testing. Appellant argued that provisions of Title 32 of the Code of Federal Regulations supported this position. He noted that he was subjected to polygraph testing on five occasions during a three-year time span, which he believed exceeded the number of times that the polygraph testing could be administered. Appellant asserted that management committed wrongdoing when he was involuntarily relieved of employment at HQ USSOCOM and involuntarily reassigned to HQ DIA. He expressed his disagreement with OWCP's finding that he failed to establish any compensable work factors.

Appellant also submitted a July 29, 2015 request to subpoena three witnesses (Dr. Rothburd, Dr. Arthur, and a coworker) and various "key" documents concerning management's handling of polygraph testing and security matters in his case. He submitted additional medical reports from 2015.

During the telephone hearing held on December 22, 2015, appellant testified that he was unemployed and had been placed on disability retirement as of September 15, 2015. He again alleged that the employing establishment was aware of his inability to undergo the polygraph sessions. Appellant reported that he had briefly been admitted to the hospital in August 2014 after a severe panic attack.

In a decision dated February 19, 2016, OWCP's hearing representative affirmed OWCP's June 8, 2015 decision denying his claim for an emotional condition. She determined that

⁷ The record also includes a February 6, 2014 advisory letter to appellant from the Chief of the Defense Intelligence Central Adjudication Facility of the employing establishment. It noted that a "favorable security clearance determination" had been made in his case based on his decision to seek mental health care.

appellant failed to establish any compensable work factors. The hearing representative found the evidence insufficient to establish that being required to take the polygraph or the reassignment of duties were compensable factors. Additionally, she denied his request for subpoenas for three witnesses and key documents as appellant did not demonstrate his inability to obtain any written evidence from the individuals. Moreover, the hearing representative found that the “key documents could have been secured by other means such as “a Privacy Act, Freedom of Information Act (FOIA), or other disclosure procedures.

Appellant submitted a July 18, 2016 statement in which his representative argued that the employing establishment committed error and abuse with respect to administrative matters. In her statement, the representative argued that the polygraphs, when administered to an individual such as appellant, with a mental, emotional, or psychological disorder, and coupled with unfavorable actions taken against him, actually caused his mental health situation to cascade to the point where he could not effectively function. She also argued that the medical evidence should have been considered sufficient to exempt appellant from the testing.⁸ The representative claimed that the employing establishment committed error or abuse because appellant had to undergo repeated polygraph testing and because he was reassigned away from classified information.

Appellant submitted a copy of a February 18, 2014 memorandum regarding security clearance processes, which was produced by the Chief of the Special Security Office of the employing establishment. The official discussed appellant’s failure to fully complete polygraph testing. Appellant also submitted duty status reports CA-17 forms produced by Dr. Arthur on February 25, April 5, and July 13, 2016.

By decision dated July 25, 2016, OWCP denied appellant’s request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence and argument submitted by appellant was repetitious or irrelevant.

LEGAL PRECEDENT -- ISSUE 1

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers’ compensation. Where the disability results from an employee’s emotional 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.⁹ On the other hand, the disability is not covered where it results from such factors as an employee’s fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.¹⁰

⁸ The representative argued that Department of Defense Instruction 5210.91 and provisions of Title 32 of the Code of Federal Regulations supported this position.

⁹ *Lillian Cutler*, 28 ECAB 125 (1976).

¹⁰ *Gregorio E. Conde*, 52 ECAB 410 (2001).

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.¹¹ However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.¹² In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹³

Appellant has the burden of establishing by the weight of the reliable, probative, and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.¹⁴ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected a condition for which compensation is claimed and a rationalized medical opinion relating the claimed condition to compensable employment factors.¹⁵

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or 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 and which working conditions are not deemed factors of employment and may not be considered.¹⁶ If a claimant does implicate 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.¹⁷

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete and accurate factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship

¹¹ *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹² *William H. Former*, 49 ECAB 324 (1998).

¹³ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹⁴ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

¹⁵ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

¹⁶ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

¹⁷ *Id.*

between the diagnosed condition and the specific employment factors identified by the claimant.¹⁸

ANALYSIS -- ISSUE 1

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied appellant's emotional condition claim because he failed to establish any compensable employment factors. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.¹⁹ Rather, he has alleged error and abuse in administrative and personnel matters.

Appellant alleged that the employing establishment committed wrongdoing by requiring him to undergo polygraph testing and by altering his work duties and work conditions due to the results of same. Such 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. However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.²⁰

The Board finds that appellant has not established that the employing establishment committed error and abuse by administering polygraph testing to him between 2011 and 2014. Appellant did not present any documents, such as the findings of a complaint or grievance, establishing that the employing establishment committed error or abuse by conducting the polygraph testing.²¹ The submission of the medical evidence that appellant asserts the employing establishment had seen prior to the August 5, 2014 polygraph testing would not, in and of itself, be sufficient to show that he should have been exempted from undergoing the testing.²² Appellant referenced Department of Defense Instruction 5210.91 and parts of Title 32 of the Code of Federal Regulations, which he believed were violated because the employing establishment proceeded with polygraph testing. However, his mere opinion that these provisions were violated would not constitute probative evidence of error or abuse by the employing establishment. Moreover, appellant did not submit evidence supporting his assertion that the frequency of polygraph testing to which he was subjected exceeded any established limit such that the employing establishment committed error or abuse. The Chief of the Credibility

¹⁸ *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

¹⁹ *See supra* note 9.

²⁰ *See supra* note 12.

²¹ Appellant indicated that he filed an EEO complaint regarding the polygraph testing, but the record does not contain a final decision regarding any such complaint.

²² Appellant's immediate supervisor indicated that on July 31, 2014 he received a letter from Dr. Rothburd, which used the terms "anxiety disorder" and "post-traumatic stress disorder." He indicated that, to his knowledge, this was "the first time [post-traumatic stress disorder] was used."

Assessment Program of the employing establishment indicated that the administration of two polygraph tests per year was not considered excessive under the relevant standards and the Board notes that the administration of polygraph tests to appellant fell within these standards.²³

There is no evidence in the record showing that the employing establishment acted abusively or erroneously by removing appellant from his regular duties, reassigning him to new duties, or adjusting the parameters of his security clearance. Appellant has not submitted evidence showing that management violated any specific rule or regulation by carrying out these actions. He has not established his claims that he was placed in an office for “misfits” where other colleagues refused to interact with him and that he was given little to no work to perform as an improper form of punishment. Appellant has not submitted the findings of any complaint or grievance showing that these administrative/personnel actions constituted error or abuse by the employing establishment.

Thus, appellant has not established a compensable work factor under FECA with respect to his claims that the employing establishment committed error or abuse regarding administrative or personnel matters.

For the foregoing reasons, appellant has not established any compensable work factors under FECA and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.²⁴

LEGAL PRECEDENT -- ISSUE 2

Under 5 U.S.C. § 8126 of FECA, and its implementing regulations (20 C.F.R. § 10.619), subpoenas may be issued by the hearing representative for the attendance and testimony of witnesses and the production of relevant documents. Subpoenas are issued for documents only if they are relevant and cannot be obtained by other means, and for witnesses only where oral testimony is the best way to ascertain the facts. A person requesting a subpoena must submit the request in writing no later than 60 days after the date of the original hearing request and explain why the testimony or evidence is directly relevant to the issues at hand, and why the information cannot be obtained without the use of a subpoena. The decision to grant or deny a subpoena request is within the discretion of OWCP’s hearing representative.²⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant’s request for the issuance of a subpoena.

²³ The record reflects that appellant underwent polygraph testing on March 23 and 25, 2011, January 31 and June 26, 2012, and August 5, 2014.

²⁴ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

²⁵ See 5 U.S.C. § 8126; 20 C.F.R. § 10.619.

In a July 29, 2015 letter, appellant requested the issuance of a subpoena to have three witnesses appear at his hearing scheduled for December 22, 2015 before an OWCP hearing representative (Dr. Rothburd, Dr. Arthur, and a coworker) and for the production of “key” documents.

The Board notes that OWCP’s hearing representative properly determined within her discretion that, with respect to the three witnesses, appellant had not provided sufficient explanation as to how their presence at the December 22, 2015 hearing would have been necessary. Appellant provided no explanation as to how any testimony or account from these individuals at the hearing would have been needed to establish his claim or why the information could not have been obtained by other means. OWCP’s hearing representative indicated that the medical testimony from physicians and the factual testimony from the coworker could have been obtained through written statements, and there was no indication that this option was not available. It was noted that any evidence within the control of the employing establishment, *i.e.*, the purported “key” documents, could have been sought by other means, such as through a Privacy Act request or other disclosure procedure.

LEGAL PRECEDENT -- ISSUE 3

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,²⁶ 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.²⁷ 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.²⁸ 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.²⁹ The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record,³⁰ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.³¹ While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.³²

²⁶ Under section 8128 of FECA, “[t]he 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).

²⁷ 20 C.F.R. § 10.606(b)(3).

²⁸ *Id.* at § 10.607(a).

²⁹ *Id.* at § 10.608(b).

³⁰ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

³¹ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

³² *John F. Critz*, 44 ECAB 788, 794 (1993).

ANALYSIS -- ISSUE 3

Appellant timely requested reconsideration of OWCP's February 19, 2016 decision denying his claim. The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3) requiring OWCP to reopen the case for review of the merits of the claim. In his application 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; nor did appellant advance a new and relevant legal argument not previously considered by OWCP.

In support of his reconsideration request, appellant submitted a July 18, 2016 statement in which his representative argued that the employing establishment committed error and abuse with respect to administrative matters. In her statement, the representative argued that the polygraphs, when administered to an individual such as appellant, with a mental, emotional, or psychological disorder, and coupled with unfavorable actions taken against him, actually caused his mental health situation to cascade to the point where he could not effectively function. However, these arguments that appellant was too psychologically impaired to undergo testing, and that the subsequent reassignment of duties constituted error and abuse by management were considered in OWCP's previous decisions denying his claim. The representative argued that the medical evidence should have been considered sufficient to exempt appellant from the testing, but this matter was also considered in OWCP's previous decisions.³³

The Board finds that the arguments of appellant's representative are essentially restatements of previously considered arguments. The arguments are repetitious and thus insufficient to warrant a reopening of appellant's claim for merit review.³⁴

Appellant submitted a copy of a February 18, 2014 memorandum regarding security clearance processes, which was produced by the Chief of the Special Security Office of the employing establishment. The official discussed appellant's failure to fully complete polygraph testing. However, the document does not have any bearing on whether the employing establishment committed error or abuse regarding the handling of polygraph testing or related matters. Appellant's claim was denied by OWCP because he had not established any compensable work factors. Appellant also submitted CA-17 forms produced by Dr. Arthur on February 25, April 5, and July 13, 2016, but these medical documents are not relevant to the factual question of whether the employing establishment committed wrongdoing regarding polygraph testing administered between 2011 and 2014. As noted above, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.³⁵

³³ The representative argued that Department of Defense Instruction 5210.91 and provisions of Title 32 of the Code of Federal Regulations supported this position. OWCP specifically addressed this argument in its prior decisions.

³⁴ See *supra* note 30.

³⁵ See *supra* note 31.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish an emotional condition in the performance of duty. The Board further finds that OWCP properly denied appellant's request for the issuance of a subpoena and properly denied his request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the July 25 and February 19, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 25, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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