



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup>

Appellant, then a 42-year-old aircraft mechanic, filed an occupational disease claim (Form CA-2) on August 10, 2015. He alleged that he sustained an emotional condition, as well as headaches, nausea, dizziness, and balance problems, as a result of factors of his federal employment, OWCP File No. xxxxxx068. Appellant had a prior claim for right shoulder and lumbar injuries on January 24, 2013.<sup>3</sup> The alleged employment factors for the emotional condition claim included that the employing establishment erred in forcing him to return to work outside of his medical restrictions. Appellant also alleged that an employing establishment physician altered the work restrictions to force him to return to work in May 2013.

With respect to the original claim, under OWCP File No. xxxxxx246, appellant had filed a traumatic injury claim (Form CA-1) alleging that he sustained injuries when he slipped and fell in the performance of duty on January 24, 2013. The accepted conditions were: closed dislocation of the right shoulder and closed right acromioclavicular dislocation. It subsequently accepted displacement of lumbar intervertebral disc and permanent aggravation of myelopathy.

Appellant underwent right shoulder surgery on March 1, 2013. The record contains a form report dated April 10, 2013 from an employing establishment physician, Dr. Tommy Love, an osteopath. Dr. Love indicated that appellant could lift one pound to waist only. By form report dated May 15, 2013, he again restricted appellant to one-pound lifting below the waist.

In a report dated May 21, 2013, Dr. Michael Metcalf, a Board-certified orthopedic surgeon, indicated that appellant was concerned about depression and mood swings. He recommended that appellant be treated for postconcussion symptoms. Dr. Metcalf provided results on examination of the right shoulder and indicated that he had increased appellant's work restrictions, and he was now able to lift five pounds to waist level.

Dr. Love completed a May 22, 2013 report and reported that appellant could lift no more than five pounds above the waist. The record indicates that appellant returned to a light-duty job on May 29, 2013. By report dated June 10, 2013, Dr. Bryson Smith, a Board-certified neurosurgeon, indicated that appellant reported worsening low back pain and left leg pain. He reported that, per appellant's request, appellant would be restricted from lifting at work for one week, until a magnetic resonance imaging (MRI) scan was performed.

The January 24, 2013 claim record under File No. xxxxxx246 contains a nurse's report dated July 17, 2013. The nurse reported that appellant was complaining that he was "wronged" by an employing establishment physician. Appellant alleged that he was only supposed to lift two pounds above the waist per Dr. Metcalf, but the employing establishment physician had

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<sup>2</sup> Docket No. 16-0906 (issued November 9, 2016). The Board issued an order remanding the case to OWCP for combination of relevant case files.

<sup>3</sup> *Order Remanding Case*, OWCP File No. xxxxxx246. OWCP administratively combined the claims with OWCP File No. xxxxxx246 serving as the master file.

ordered five pounds above the waist. He also felt humiliated as the light-duty job was based on cleaning tables and serving others. Appellant stopped work and filed a claim for compensation (Form CA-7) commencing July 14, 2013.

As to the current claim on August 10, 2015 appellant filed an occupational disease claim (Form CA-2), alleging that he suffered an emotional condition causally related to factors of his federal employment. On the claim form he alleged that he was sent back to work against his treating physician's restriction of no lifting above the waist. Appellant alleged that the employing establishment physician falsified/alterd the work restriction to five pounds above the waist.

On August 19, 2015 OWCP received an undated statement from appellant's supervisor. The supervisor wrote that he was aware, when appellant returned to work, that his physician and the employing establishment physician had provided different work restrictions. According to the supervisor, appellant was given duties more in line with no lifting, in order to minimize hindering his recovery. The supervisor wrote that appellant was instructed to take it slow and not hurt himself. Appellant was instructed that he could clean off the tables or counter-tops, or help fill out identification tags for parts. The supervisor indicated that appellant was not to lift anything above the waist.

In an undated letter received by OWCP, on August 31, 2015, appellant discussed his January 24, 2013 employment injury under OWCP File No. xxxxxx246. He asserted that there was an unwarranted, illegal return to work.

By decision dated September 22, 2015 under OWCP File No. xxxxxx068, OWCP denied the claim for an emotional condition and related physical symptoms. It found that appellant had not established the alleged employment factors.

On October 22, 2015 appellant requested a review of the written record by an OWCP hearing representative. In an October 19, 2015 letter, he wrote that he was forced to show up for work in May 2013 because he was not receiving compensation. Appellant again asserted that he had been wrongfully returned to work.

By decision dated March 8, 2016, the hearing representative affirmed the September 22, 2015 OWCP decision. He found that appellant had not established any compensable work factors with respect to the claim for compensation.

On March 25, 2016 appellant filed a timely appealed to the Board. On November 9, 2016 the Board remanded the case to combine the current case file with the prior right shoulder and lumbar claim.<sup>4</sup>

Following the Board's remand, OWCP issued a December 21, 2016 decision. It again found that appellant had not established that any employment factors occurred as alleged.

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<sup>4</sup> See *supra* note 2.

On January 18, 2017 appellant requested a review of the written record before an OWCP hearing representative. He submitted an undated letter alleging that the employing establishment physician had intentionally changed the work restrictions to force him to return to work in 2013. Appellant submitted a copy of a report dated June 28, 2016 from Dr. Susan Wiet, a Board-certified psychiatrist. Dr. Wiet was selected as a second opinion examiner pursuant to the January 24, 2013 claim. She diagnosed major depressive disorder and anxiety disorder. Dr. Wiet opined that appellant's emotional status was the secondary effects of the traumatic injury and appellant's "fractured trust" of the employing establishment.

By decision dated June 6, 2017, the hearing representative affirmed the December 21, 2016 OWCP decision. She found that appellant had not established the alleged employment factors.

### **LEGAL PRECEDENT**

Appellant has the burden of proof to establish by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by factors of his federal employment.<sup>5</sup> This burden of proof includes the submission of detailed description of the employment factors or conditions which he believes caused or adversely affected the condition or conditions for which compensation is claimed.<sup>6</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to employment. There are situations where an injury or illness has some connection with employment, but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it, but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>7</sup>

A reaction to an administrative or personnel matter is generally not covered as it is not related to the performance of regular or specially assigned duties.<sup>8</sup> Nevertheless, if the evidence demonstrates that the employing establishment erred, acted abusively, or unreasonably in the administration of a personnel matter, any physical or emotional condition arising in reaction to such error or abuse may be covered.<sup>9</sup>

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<sup>5</sup> *Pamela R. Rice*, 38 ECAB 838 (1987).

<sup>6</sup> *Roger Williams*, 52 ECAB 468 (2001); *Anna C. Leanza*, 48 ECAB 115 (1996).

<sup>7</sup> *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>8</sup> *See Brian H. Derrick*, 51 ECAB 417, 421 (2000).

<sup>9</sup> *Margreate Lublin*, 44 ECAB 945, 956 (1993).

## ANALYSIS

Appellant filed an occupational disease claim alleging that he sustained an emotional condition, as well as stress-related physical symptoms including headaches, nausea, dizziness, and balance problems. To establish his claim, appellant must allege and substantiate compensable work factors as contributing to his condition. If there are compensable work factors, then the medical evidence is reviewed to determine whether a diagnosed condition causally related to a compensable work factor is established.

Appellant has not alleged that his condition was due to the actual performance of any specific job duties under *Cutler*.<sup>10</sup> Instead, he has alleged that the work assignment was outside of his physician's restrictions. The employing establishment erred with respect to appellant's return to work on May 29, 2013.

Appellant contends that he was forced to work outside his work restrictions, and that, an employing establishment physician, Dr. Love, deliberately falsified his work restrictions to force appellant to return to work.

The Board finds that the evidence of record does not establish error or abuse by the employing establishment. Appellant's supervisor clearly indicated that he was aware of Dr. Metcalf's work restrictions. In a May 21, 2013, Dr. Metcalf had indicated that appellant was able to lift five pounds to waist level. Appellant's supervisor indicated that appellant's work duties did not involve lifting above the waist. He reported that appellant could clean tables and countertops or help fill out identification tags. A claimant must submit probative evidence sufficient to establish that he or she was required to work outside his or her medical restrictions.<sup>11</sup> There is no probative evidence of record establishing that appellant was forced to work outside medical restrictions in this case.

With respect to an allegation of error by the employing establishment physician, Dr. Love, no probative evidence was presented. Dr. Love provided different work restrictions from Dr. Metcalf, but still limited lifting to only five pounds above the waist. There is simply no evidence to substitute that Dr. Love falsified, altered, or otherwise provided an inappropriate medical report as to appellant's work capabilities at the time.<sup>12</sup>

The Board accordingly finds that appellant has not established a compensable factor of employment in this case. Before the medical evidence is reviewed, appellant must first establish a compensable work factor. Since he has not established a compensable work factor, the Board will not address the medical evidence.<sup>13</sup>

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<sup>10</sup> See *T.V.*, Docket No. 16-1519 (issued September 12, 2017).

<sup>11</sup> See *K.E.*, Docket No. 11-0861 (issued November 25, 2011).

<sup>12</sup> *Id.*

<sup>13</sup> See *Margaret S. Krzycki*, 43 ECAB 496 (1992).

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.

**CONCLUSION**

The Board finds that appellant has not established an emotional condition in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 6, 2017 is affirmed.

Issued: November 21, 2017  
Washington, DC

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

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

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