



## **FACTUAL HISTORY**

On October 7, 2013 appellant, then a 63-year-old meat cutter, filed an occupational disease claim (Form CA-2) alleging that he developed anxiety and depressive disorders due to exposure to being required to engage in practices at work which violated the employing establishment's policies and practices. He indicated that he first became aware of his claimed condition on March 1, 2011 and first realized on the same date that it was caused or aggravated by factors of his federal employment. Appellant stopped work on August 25, 2011 and he was separated from the employing establishment effective May 23, 2012 due to his inability to perform his duties as a meat cutter.

The record contains an August 31, 2012 investigative report in which the Defense Commissary Agency's Inspector General determined that it had been substantiated that several workplace practices at the employing establishment violated agency rules and guidelines, including improper repacking and dating of processed meat products, improper pricing and mislabeling, poor inventory management, and a single incident of poultry being packaged in the meat department area.<sup>2</sup>

In an undated report received on October 29, 2013, Dr. Borina Dramov, an attending Board-certified psychiatrist and neurologist, indicated that she had primarily been treating appellant for injuries sustained when he was attacked and beaten at his home on August 24, 2011.<sup>3</sup> She noted that appellant provided her with a July 9, 2013 statement which detailed his claims that, between 2003 and 2011, he was asked to carry out actions at work which he believed were either illegal or at least in violation of the employing establishment's policies and procedures.<sup>4</sup> Appellant further asserted in his July 9, 2013 statement that he was instructed to cut meat without performing a cutting test, and to repackage unsold meat and attach new sell-by dates to the labels. Dr. Dramov provided an opinion that being required to violate the law and the employing establishment's policies and procedures contributed to appellant's current depressive and anxiety disorders. She indicated that other factors also contributed to appellant's anxiety and depressive disorders, such as his wife's heart attack in 2010 and his daughter having multiple surgeries around that same time period. Dr. Dramov noted, however, that there was no doubt that at the time that he was attacked on August 24, 2011 he had already developed anxiety disorder and depressive disorder which were contributed to by his work duties and disclosures.

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<sup>2</sup> The record reveals that the investigation addressed a number of allegations made by appellant regarding work practices at the employing establishment.

<sup>3</sup> The Board notes that on September 22, 2011 appellant filed a traumatic injury claim (OWCP File No. xxxxxx219) alleging that on August 24, 2011 he sustained a work injury in the form of three head lacerations, left eye laceration, and trauma to his head, neck, chest, ribs, knees, and left wrist. Regarding the cause of injury, appellant asserted that he was attacked on August 24, 2011 by unidentified coworkers due to his whistleblower activities at work, including exposing employees who falsified product order invoices and mishandled inventory. In decisions dated November 10, 2011, June 1, 2012, and June 19, 2013, OWCP denied appellant's claim because he failed to establish that the August 24, 2011 attack occurred in the performance of duty. By decision dated July 2, 2014, the Board affirmed OWCP's June 19, 2013 decision finding that appellant had not established a work-related injury on August 24, 2011 because he failed to establish that the August 24, 2011 attack occurred in the performance of duty. Docket No. 14-0116 (issued July 2, 2014).

<sup>4</sup> The record contains a copy of appellant's July 9, 2013 statement.

She noted that appellant's being attacked at his home on August 24, 2011 by individuals who told him to stop talking about various practices at work certainly made these conditions even worse.

On November 27, 2013 OWCP requested that appellant submit additional evidence in support of his claim. In a December 9, 2013 statement, appellant provided details about his claim that supervisors required him to engage in practices at work which violated employing establishment policies and practices, including being forced to sell meat that was past its expiration date.<sup>5</sup>

OWCP referred appellant for a second opinion examination to Dr. Alberto G. Lopez, a Board-certified psychiatrist and neurologist, in order to evaluate whether he sustained a diagnosed medical condition causally related to the implicated factors his federal employment and, if so, whether he continued to have any residuals, including disability, due to such a condition. It provided Dr. Lopez with a February 13, 2014 statement of accepted facts which indicated that it had been accepted that appellant was instructed by supervisors to engage in practices at the employing establishment which violated established agency rules and guidelines. These practices included improper repacking and dating of processed meat products, improper pricing and mislabeling, poor inventory management, and a single incident of poultry being packaged in the meat department area.

In a June 2, 2014 report, Dr. Lopez detailed appellant's factual and medical history, noting that he complained of being required to perform illegal and unethical acts at work and of being attacked on August 24, 2011. He reported the findings of his evaluation of appellant on June 2, 2014 and diagnosed depression (unspecified), anxiety disorder (unspecified), post-traumatic stress disorder, cocaine abuse in remission, and rule out concussive syndrome. Dr. Lopez indicated that appellant had a long-standing depressive disorder and anxiety disorder which were related to his work. He found that appellant was traumatically assaulted "apparently off the job" on August 24, 2011 and that he then developed post-traumatic stress symptoms including nightmares and paranoia.<sup>6</sup> Dr. Lopez explained his opinion regarding why he felt that the depressive disorder and anxiety disorder were work related, noting that the employment factors causing this condition were present prior to the nonwork-related assault on August 24, 2011. He indicated that the depressive disorder and anxiety disorder occurred because appellant was induced to illegally sell meat that was unsuitable for sale.<sup>7</sup> Dr. Lopez advised that, as far as his psychiatric condition was concerned, appellant was able to work as a meat cutter, but he was not able to work at his former workplace at the employing establishment.

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<sup>5</sup> Appellant also submitted a December 16, 2013 letter from his counsel at the time and some entries from his personal journal describing events at work in 2011.

<sup>6</sup> Dr. Lopez noted that appellant was brutally assaulted with loss of consciousness, and then suffered poor memory and concentration thereafter. He indicated that appellant felt that the August 24, 2011 assault was work related, but he noted that this determination would be left to the trier of fact.

<sup>7</sup> Dr. Lopez noted that customers complained to appellant about the high prices for meat that did not look desirable, and that he was asked to repackage meat that had not sold by the expiration date and to attach a new sell-by date on the label. He indicated that he agreed with Dr. Dramov's opinion that appellant's depressive and anxiety disorders were related to this element of his work.

He indicated that appellant feared retaliation at his former workplace. Dr. Lopez noted that appellant remained symptomatic with respect to depression and anxiety, but advised that he should respond to psychotherapy.

By decision dated June 30, 2014, OWCP accepted that appellant sustained depressive disorder (not elsewhere classified) and anxiety state (unspecified). Appellant filed claims for compensation (Form CA-7) alleging disability beginning August 25, 2011 and continuing due to these accepted employment conditions.

By a separate decision also dated June 30, 2014, OWCP indicated that although appellant's claim had been accepted for depressive disorder (not elsewhere classified) and anxiety state (unspecified), it was denied for post-traumatic stress disorder and concussive disorder because the medical evidence of record did not establish that these medical conditions were related to the accepted employment factors. It noted that it had only been accepted that appellant was instructed by his supervisors to perform his work duties as a meat cutter in ways that violated established employing establishment policies and procedures. OWCP discussed Dr. Lopez' June 2, 2014 report and found that it established that appellant sustained depressive disorder and anxiety state due to the established employment factors. It indicated that Dr. Lopez advised that appellant developed post-traumatic stress disorder due to the August 24, 2011 assault, but it noted that the August 24, 2011 incident was not accepted as work related.

OWCP requested that Dr. Lopez provide a supplemental report answering several questions it posed about the nature and extent of appellant's medical conditions and disability.

In a supplemental report dated October 3, 2014, Dr. Lopez advised that appellant did not have a psychiatric condition preventing him from returning to work, despite having indicated in his June 2, 2014 report that, as far as his psychiatric condition was concerned, he was able to perform work as a meat cutter, but not at his former workplace at the employing establishment. He noted that appellant did not have any partial or total disability resulting from the accepted anxiety disorder or depression. Dr. Lopez explained that the previously noted restriction from returning to work at the employing establishment was preventative and prophylactic.

By decision dated November 21, 2014, OWCP denied appellant's claim for disability beginning August 25, 2011 due to his accepted emotional conditions of depressive disorder and anxiety state. It found that the record did not contain a medical report relating his claimed disability on or after August 25, 2011 to the accepted employment conditions. OWCP indicated that on October 3, 2014 Dr. Lopez clarified his June 2, 2014 report that indicated that appellant could not return to his former workplace. Dr. Lopez explained that appellant had no disability due to his accepted employment conditions and noted that his prior restriction was only preventative and prophylactic in nature.

On April 22, 2015 appellant requested reconsideration of OWCP's November 21, 2014 decision denying his claim for disability beginning August 25, 2011.

In a January 5, 2015 report, Dr. Isidro R. Quiroga, an attending clinical psychologist, summarized the factual recitation portion of Dr. Lopez' June 2, 2014 report and discussed his psychological evaluation of appellant on January 5, 2015. He diagnosed post-traumatic stress

disorder, depression (unspecified), anxiety disorder (unspecified), cocaine abuse in remission, and postconcussive syndrome. Dr. Quiroga posited that, based on all information at his disposal, appellant's psychiatric disorders were predominantly related to his work. He discussed treatment options and indicated that appellant was totally disabled from work. Dr. Quiroga indicated that, even if appellant's treatment was successful, he could not return to his former workplace at the employing establishment.<sup>8</sup>

By decision dated May 28, 2015, OWCP denied modification of its November 21, 2014 decision denying appellant's claim for disability beginning August 25, 2011. It noted that Dr. Quiroga did not provide a rationalized medical opinion relating appellant's claimed disability on or after August 25, 2011 to the accepted employment conditions.

On August 13, 2015 appellant requested reconsideration of OWCP's May 28, 2015 decision.

In an August 4, 2015 report, Dr. Richard Alloy, an attending clinical psychologist, discussed appellant's factual and medical history and reported the findings of his psychological evaluation on that date. He noted that appellant, who attended the evaluation with his wife, reported that he was required to violate employing establishment policies and procedures in his former employment and that he was attacked at his home on August 24, 2011. Dr. Alloy diagnosed depressive disorder, anxiety disorder, psychotic disorder, somatoform disorder, chronic post-traumatic stress disorder, and cognitive disorder. He noted that appellant was working up until the assault on August 24, 2011, but could no longer work after that incident. Dr. Alloy indicated that as recently as July 14, 2011, appellant received an outstanding performance rating at the employing establishment and posited that this created an impression of his strong commitment to his job while at the same time he was dealing with the rapid and serious buildup of stress in less than two months. He noted that Dr. Dramov's report<sup>9</sup> "shows the emphasis is on the stress, anxiety, and depression while putting the assault itself into a secondary level of concern." Dr. Alloy asserted that this represents strong evidence and support for the date of August 25, 2011 being the "tipping point" from accumulated stress and, therefore, the onset date for his permanent total disability. He noted, "It would appear from the information obtained from [appellant and his wife] plus the letter from neurologist Dr. Dramov, that the assault solidified in [appellant's] mind he was not liked or wanted at the workplace, and that his anxiety, depression, and paranoia [were] in effect justified." Dr. Alloy opined that the sum total of accumulated workplace stress pushed him over the edge psychologically, rendering him totally permanently disabled as of August 25, 2011.

By decision dated November 12, 2015, OWCP denied modification of its May 28, 2015 decision. It noted that Dr. Alloy did not provide a rationalized medical opinion relating appellant's claimed disability on or after August 25, 2011 to the accepted employment conditions.

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<sup>8</sup> In a work capacity evaluation form (Form OWCP-5a) dated March 17, 2015, Dr. Quiroga indicated that appellant was totally disabled beginning August 25, 2011.

<sup>9</sup> Dr. Alloy's reference is to Dr. Dramov's undated report received by OWCP on October 29, 2013.

On February 21, 2016 appellant requested reconsideration of OWCP's November 12, 2015 decision.<sup>10</sup>

In a February 20, 2016 report, Dr. Alloy indicated that the nonwork-related August 24, 2011 assault had blinded OWCP to the effects of the ongoing accepted anxiety and depression because it had become difficult to "separate out" this work-related condition from the effects of the August 24, 2011 assault. He noted that when he wrote in his August 4, 2015 report that August 24, 2011 incident was a "tipping point" in appellant's condition, he meant this from a "chronological perspective, and not causation." Dr. Alloy repeated portions of his August 4, 2015 report and noted that there was a reasonable medical probability that the ongoing progression and exacerbation of appellant's accepted anxiety and depression would have continued absent the August 24, 2011 assault, ultimately rendering him totally disabled regardless of the assault.

By decision dated May 19, 2016, OWCP denied modification of its November 12, 2015 decision. It determined that Dr. Alloy's supplemental February 20, 2016 report did not establish that appellant sustained disability on or after August 25, 2011 due to the accepted depressive disorder and anxiety state conditions, which were accepted as only being related to the fact that appellant was required to violate employing establishment policies and procedures while working as a meat cutter.

On September 23, 2016 appellant requested reconsideration of OWCP's May 19, 2016 decision.

In an August 15, 2016 report, Dr. Gregory L. Katz, an attending clinical psychologist, noted that he had seen appellant on three occasions, the last time being on August 12, 2015. He discussed appellant's factual and medical history and summarized several medical reports of record. Dr. Katz noted that appellant discussed his former whistleblower activities and the August 24, 2011 assault. He opined that appellant's primary diagnoses of depression and anxiety were directly related to his employment and that these could be seen as part of a "complex post-traumatic stress disorder" where he suffered multiple and recurrent stressors related to being ordered to perform unethical or illegal acts by the supervisors, as well as stress due to reporting these acts. Dr. Katz indicated that the primary need for treatment and periods of disability were related to the events of appellant's employment, and only minimally by the nonindustrial stressors, including the assault on August 24, 2011. He found that appellant was largely recovered from the emotional/psychological sequelae secondary to the assault, and posited that the primary factors influencing his ongoing anxiety and depression were the events of his employment associated with his whistleblowing. Dr. Katz indicated that appellant was preoccupied with his former whistleblowing activities and the fact that supervisors and coworkers unfairly harassed him and retaliated against him for speaking out about their wrongdoing. He indicated that, while the August 24, 2011 incident was a traumatic event, it was only a minor contributor to appellant's overall symptom picture and disabling condition.

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<sup>10</sup> In November 28 and December 1, 2015 letters, appellant indicated that he would like an employment factor added to the statement of accepted facts. He asserted that an employment factor occurred when, during a meeting on the morning of August 24, 2011, his supervisor told him that he would have to work with a former coworker and a former supervisor with whom he had difficulty working in the past.

Dr. Katz noted that appellant felt that his supervisor was “setting him up” for stress and conflict by assigning him to work with a coworker he had previously reported for his poor performance, and appellant indicated that this led to his decision to take off work on August 25, 2011.<sup>11</sup>

In an October 10, 2016 report, Dr. Katz noted that appellant continued to ruminate about being mistreated after engaging in whistleblower activities and that he was distressed that he lost his job due to reporting the wrongdoing of supervisors. He found that appellant continued to be totally disabled from work. On October 26, 2016 Dr. Katz indicated that appellant continued with his anxiety and depression and noted that he expressed difficulty understanding how he could have been mistreated for reporting the abuses and unethical conduct by other employees. Appellant continued to be disabled due to the severity of his mental health symptoms. In a December 2, 2016 report, Dr. Katz indicated that appellant continued to be preoccupied with stressors related to his whistleblower activities and expressed his belief that “it does not make sense” that he had to suffer for reporting wrongdoing.

In a December 22, 2016 decision, OWCP denied modification of its May 19, 2016 decision. It noted that Dr. Katz did not provide a rationalized medical opinion relating appellant’s claimed disability on or after August 25, 2011 to the accepted employment conditions.

On February 6, 2017 appellant requested reconsideration of OWCP’s December 22, 2016 decision. In a January 26, 2017 statement, he argued that his work stoppage on August 25, 2011 was caused by a departmental meeting he attended with a supervisor on August 24, 2011, as well as by another departmental meeting he attended with a supervisor approximately a week prior to August 24, 2011. Appellant generally asserted that the reports of attending physicians supported his disability claim.

In statements dated February 27, March 3, 7, and 18, and April 7, 2017, appellant requested that the diagnosis of complex post-traumatic stress disorder be added to the accepted conditions and again argued that his work stoppage on August 25, 2011 was caused by the two departmental meetings he attended in August 2011. He resubmitted a copy of his December 1, 2015 statement, a December 16, 2013 letter from his former counsel, and some entries from his personal journal describing events at work in 2011.

In a January 24, 2017 report, Dr. Katz indicated that appellant continued with depression and anxiety and ruminated about the stressors he experienced after his whistleblower activities. He complained that he had no support from superiors, many of whom were involved in illegal or inappropriate actions on the job. Dr. Katz indicated that appellant became disabled on August 25, 2011. He found that appellant’s disability and need for treatment were a direct result of a combination of stressors, the first being the August 24, 2011 assault, and the second being the events of his employment resulting from his being treated negatively by supervisors and coworkers after making his whistleblower reports. Dr. Katz noted that appellant’s disability began the day after he had to meet with a supervisor about whom he had made complaints. He indicated that, by August 24, 2012, appellant had recovered from his post-traumatic stress

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<sup>11</sup> Dr. Katz noted that it was at this point appellant was in agreement with his wife to seek treatment in the form of psychotherapy.

syndrome symptoms caused by the August 24, 2011 assault and posited that his ongoing depression/anxiety after that point were due to the events of his employment associated with the whistleblowing.

By decision dated April 24, 2017, 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 appellant submitted in support of his reconsideration request was repetitious in nature.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA has the burden of proof to establish 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 timely filed within the applicable time limitation period of FECA, that an injury was sustained 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.<sup>12</sup> In general the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.<sup>13</sup> This meaning, for brevity, is expressed as disability for work.<sup>14</sup>

The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. The opinion of the physician must be based on a complete 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 between the diagnosed condition and the specific employment factors identified by the claimant.<sup>15</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that appellant sustained depressive disorder (not elsewhere classified) and anxiety state (unspecified). In accepting these conditions, it found that they were related to accepted employment factors, *i.e.*, appellant's being instructed by supervisors to engage in practices at the employing establishment which violated established agency rules and guidelines. These practices included improper repacking and dating of processed meat products, improper pricing and mislabeling, poor inventory management, and a single incident of poultry being packaged in the meat department area. Appellant filed claims for compensation alleging disability beginning August 25, 2011 and continuing due to these accepted employment conditions. By decisions dated November 21, 2014, November 12, 2015, and May 19 and December 22, 2016, OWCP denied appellant's disability claim finding that he failed to submit sufficient medical evidence in support of his claim.

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<sup>12</sup> *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

<sup>13</sup> *See* 20 C.F.R. § 10.5(f).

<sup>14</sup> *Roberta L. Kaaumoana*, 54 ECAB 150 (2002); *see also A.M.*, Docket No. 09-1895 (issued April 23, 2010).

<sup>15</sup> *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

The Board finds that appellant did not meet his burden of proof to establish disability on or after August 25, 2011 due to his accepted emotional conditions, depressive disorder and anxiety state.

Appellant submitted a January 5, 2015 report in which Dr. Quiroga, an attending clinical psychologist, diagnosed post-traumatic stress disorder, depression (unspecified), anxiety disorder (unspecified), cocaine abuse in remission, and postconcussive syndrome. Dr. Quiroga posited that appellant's psychiatric disorders were predominantly related to his work. He discussed treatment options and indicated that appellant was totally disabled from work. Dr. Quiroga indicated that, even if appellant's treatment was successful, he could not return to his former workplace at the employing establishment. In a work capacity evaluation form dated March 17, 2015, he indicated that appellant was totally disabled beginning August 25, 2011.

The Board notes that these reports of Dr. Quiroga do not establish appellant's claim for disability on or after August 25, 2011 due to their limited probative value with respect to this issue. Dr. Quiroga did not provide any medical rationale in support of his opinion on causal relationship. The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.<sup>16</sup> Dr. Quiroga did not describe the accepted conditions, depressive disorder and anxiety state, or explain how they could have caused disability on or after August 25, 2011. Moreover, he diagnosed a condition that has not been accepted as work-related, post-traumatic stress disorder, and it is unclear whether he felt that this condition was solely responsible for appellant's disability.<sup>17</sup>

In an August 4, 2015 report, Dr. Alloy, an attending clinical psychologist, indicated that a report of an attending physician<sup>18</sup> showed that "the emphasis is on the stress, anxiety, and depression" while the August 24, 2011 assault was of secondary concern. He asserted that this represented strong evidence for August 25, 2011 being the "tipping point" from accumulated stress and, therefore, the onset date for appellant's permanent total disability. Dr. Alloy noted that it appeared that "the assault solidified in [appellant's] mind he was not liked or wanted at the workplace, and that his anxiety, depression, and paranoia [were] in effect justified." He opined that the sum total of accumulated workplace stress pushed appellant over the edge psychologically, rendering him permanently totally disabled as of August 25, 2011. In a February 20, 2016 report, Dr. Alloy indicated that it had become difficult to "separate out" appellant's work-related depression and anxiety from the effects of the August 24, 2011 assault.

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<sup>16</sup> *C.M.*, Docket No. 14-88 (issued April 18, 2014).

<sup>17</sup> In a June 2, 2014 report, Dr. Lopez, an OWCP referral physician indicated that, as far as his psychiatric condition was concerned, appellant was able to work as a meat cutter, but noted that he was not able to work at his former workplace at the employing establishment. However, in a supplemental report dated October 3, 2014, he advised that appellant did not have any partial or total disability resulting from the accepted anxiety disorder or depression. Dr. Lopez explained that the previously noted restriction from returning to work at the employing establishment was preventative and prophylactic. It is well established that the possibility of future injury constitutes no basis for the payment of compensation. *Gaeten F. Valenza*, 39 ECAB 1349, 1356 (1988). Therefore, Dr. Lopez' opinion does not establish appellant's claim for disability on or after August 25, 2011.

<sup>18</sup> Dr. Alloy's reference is to Dr. Dramov's undated report received by OWCP on October 29, 2013.

He noted that there was a reasonable medical probability that the ongoing progression and exacerbation of appellant's accepted anxiety and depression would have continued absent the August 24, 2011 assault, ultimately rendering him totally disabled regardless of the assault.

In these reports, Dr. Alloy has provided an opinion that appellant had been disabled since August 25, 2011 primarily due to his work-related depression and anxiety, rather than due to the August 24, 2011 assault.<sup>19</sup> However, his mere recitation of this causal relationship is of limited probative value absent a medical explanation which supports his opinion. The Board has held that mere conclusory opinion provided by a physician without the necessary medical rationale explaining how and why the work condition or work factors were sufficient to result in the claimed medical condition or disability is insufficient to meet a claimant's burden of proof to establish a claim.<sup>20</sup> Dr. Alloy did not discuss the accepted conditions of depressive disorder and anxiety state in any detail or explain the medical process of how they could have been competent to cause disability on or after August 25, 2011. He did not discuss objective findings from specific examinations/evaluations that supported his opinion on causal relationship. Such medical rationale is especially necessary in the present case because appellant stopped work immediately after he suffered the nonwork-related assault on August 24, 2011 and he did not seek psychiatric or psychological treatment until after that nonwork-related event.

In an August 15, 2016 report, Dr. Katz, an attending clinical psychologist, indicated that appellant was largely recovered from the emotional/psychological sequelae secondary to the August 24, 2011 assault, and he posited that the primary factors influencing his ongoing anxiety and depression were the events of his employment associated with his whistleblowing. He advised that appellant was preoccupied with his former whistleblowing activities and the fact that supervisors and coworkers unfairly harassed him and retaliated against him for speaking out about their wrongdoing. Dr. Katz opined that, while the August 24, 2011 incident was a traumatic event, it was only a minor contributor to appellant's overall symptom picture and disabling condition. He noted that appellant felt that his supervisor was "setting him up" for stress and conflict by assigning him to work with a coworker he had previously reported for his poor performance, and appellant indicated that this led to his decision to take off work on August 25, 2011. In an October 10, 2016 report, Dr. Katz noted that appellant continued to ruminate about being mistreated after engaging in whistleblower activities and that he was distressed that he lost his job due to reporting the wrongdoing of supervisors. In October 26 and December 2, 2016 reports, he indicated that appellant continued to be preoccupied with the mistreatment he suffered for reporting the wrongdoing of supervisors and coworkers.

The Board notes that Dr. Katz's reports would not establish appellant's claim for disability on or after August 25, 2011. The reports are of limited probative value with respect to

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<sup>19</sup> The Board notes that the August 24, 2011 assault was nonwork-related in nature. This issue was adjudicated in under a separate claim (OWCP File No. xxxxxx219). In a decision dated July 2, 2014, the Board affirmed a June 19, 2013 decision of OWCP finding that appellant had not established a work-related injury on August 24, 2011 because he failed to establish that the August 24, 2011 attack occurred in the performance of duty. The Board notes that its decisions and orders are final upon the expiration of 30 days from the date of issuance and, in the absence of new review by OWCP, the subject matter is *res judicata* and not subject to further consideration by the Board. See 20 C.F.R. § 501.6(d); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

<sup>20</sup> *J.D.*, Docket No. 14-2061 (issued February 27, 2015).

this issue due to their lack of medical rationale on causal relationship.<sup>21</sup> Dr. Katz did not describe the accepted conditions, depressive disorder and anxiety state, or explain how they could have caused disability on or after August 25, 2011. The Board notes that Dr. Katz' reports are of limited probative value for the further reason that they are not based on an accurate factual history. He advised that appellant's medical condition and work stoppage on August 25, 2011 were due, at least in part, to several events/conditions that have not been accepted as employment factors, including appellant's claims that supervisors and coworkers unfairly harassed him and retaliated against him for his whistleblower activities and that a supervisor was "setting him up" for stress and conflict by assigning him to work with a coworker he had previously reported for his poor performance.<sup>22</sup> The Board has held that an opinion on a given medical question is of limited probative value if it is not based on a complete and accurate factual and medical history.<sup>23</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.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>24</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>25</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>26</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not

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<sup>21</sup> *Y.D.*, Docket No. 16-1896 (issued February 10, 2017); *D.R.*, Docket No. 16-0528 (issued August 24, 2016) (finding that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how the claimed condition/disability was work related).

<sup>22</sup> Appellant also indicated that he was distressed that he lost his job due to reporting the wrongdoing of supervisors. However, the record reflects that appellant was separated from the employing establishment effective May 23, 2012 due to his inability to perform his duties as a meat cutter, rather than due to his whistleblowing activities. On appeal appellant argues that he stopped work on August 25, 2011 due to the effects of his attendance at two meetings in August 2011. However, these two meetings have not been accepted as compensable employment factors.

<sup>23</sup> *E.R.*, Docket No. 15-1046 (issued November 12, 2015).

<sup>24</sup> This section provides in pertinent part: "[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).

<sup>25</sup> 20 C.F.R. § 10.607.

<sup>26</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be "received" by OWCP within one year of the OWCP decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System. *Id.* at Chapter 2.1602.4b.

previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>27</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>28</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>29</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>30</sup> 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.<sup>31</sup>

### **ANALYSIS -- ISSUE 2**

OWCP issued its latest merit decision on December 22, 2016. Appellant timely requested reconsideration of this decision on February 6, 2017.

The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), thereby warranting reopening of the case for review of the merits of the claim. In his application for reconsideration, appellant did not identify a specific point of law or show that it was erroneously applied or interpreted by OWCP, nor did he advance a new and relevant legal argument not previously considered by OWCP.

In his January 26, 2017 statement requesting reconsideration, and several other statements produced between February and April 2014, appellant argued that his August 25, 2011 work stoppage was caused by two employment factors, a departmental meeting he attended with a supervisor on August 24, 2011, as well as another departmental meeting he attended with a supervisor approximately a week prior to August 24, 2011. The submission of this argument would not require reopening of appellant's claim for merit review because his argument does not address the particular issue involved.<sup>32</sup> These two departmental meetings have not been accepted as employment factors and appellant's mere assertion that they constituted employment factors, without any supporting documentation or reference to Board precedent, would not establish them as such. The Board notes that the main issue of the present case is essentially medical in nature, *i.e.*, whether appellant submitted sufficient medical evidence to establish disability on or after

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<sup>27</sup> 20 C.F.R. § 10.606(b)(3).

<sup>28</sup> *Id.* at § 10.608(a), (b).

<sup>29</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>30</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>31</sup> *John F. Critz*, 44 ECAB 788, 794 (1993).

<sup>32</sup> *See supra* note 30.

August 25, 2011 due to his accepted emotional conditions, depressive disorder and anxiety state. That is a medical issue which must be addressed by relevant medical evidence.<sup>33</sup>

In support of his reconsideration request, appellant submitted Dr. Katz's January 24, 2017 report. However, this report was similar to previously submitted reports of Dr. Katz which OWCP considered and determined did not establish appellant's claim for work-related disability on or after August 25, 2011.<sup>34</sup> As noted above, the Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not constitute a basis for reopening a case.<sup>35</sup> A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit pertinent new and relevant medical evidence on the above-noted medical issue of the case.

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 disability on or after August 25, 2011 due to his accepted emotional conditions, depressive disorder and anxiety state. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>33</sup> See *Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>34</sup> In his January 24, 2017 report, Dr. Katz provided an opinion that appellant had disability beginning August 25, 2011 due to his medical condition related to being treated negatively by supervisors and coworkers after making his whistleblower reports. This report is similar to the reports of Dr. Katz that had previously been considered by OWCP, including his August 15, 2016 report.

<sup>35</sup> See *supra* note 29. Appellant resubmitted a copy of his December 1, 2015 statement, a December 16, 2013 letter from his former counsel, and some entries from his personal journal describing events at work in 2011. However, as noted, submission of previously submitted evidence already considered by OWCP would not require reopening a claim for merit review. See *id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 24, 2017 and December 22, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 16, 2018  
Washington, DC

Christopher J. Godfrey, 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