



## ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

## FACTUAL HISTORY

On February 5, 2014 appellant, then a 36-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that for months he had been subjected to harassment and disparate treatment by his immediate supervisor and the patrol agent-in-charge. He alleged that the latest incident occurred on February 4, 2014. Appellant alleged that he suffered from psychological injuries and that the psychological injuries caused physical injury to his heart, brain, and body. He did not stop work.

By development letter dated April 15, 2014, OWCP informed appellant that additional information was necessary to support his claim and afforded 30 days for appellant to submit this information.

Appellant responded by submitting medical evidence and copies of correspondence regarding leave requests. He also submitted two narrative statements received by OWCP on May 13, 2014 wherein he discussed the alleged employment factors which he believed caused his medical condition. Appellant discussed at length multiple disputes with regard to his limited-duty work assignment, timesheets, leave under Family and Medical Leave Act (FMLA), and administratively uncontrolled overtime (AUO). The disputes cited to included, but were not limited to, a dispute that arose between appellant and his supervisor on February 4, 2014. Appellant also made allegations of a hostile work environment, harassment, disparate treatment, and discrimination. He further contended that his supervisor completed paperwork, but that this was inappropriate as his supervisor had a conflict of interest. Appellant also argued that his supervisor signed the claim form and therefore verified the truthfulness of his statements.

By decision dated May 20, 2014, OWCP denied appellant's emotional condition claim. It noted that the evidence submitted was insufficient to establish a traumatic injury on February 4, 2014. OWCP found that evidence submitted indicated that appellant had been actively involved in a series of interactions with his supervisor with regard to personnel and administrative disagreements that predated the incident of February 4, 2014, but that it would not consider other incidents or exposure that occurred over a period of longer than one workday or shift, *i.e.*, February 4, 2014. It denied appellant's claim as he had not established a factor of employment as there was a lack of evidentiary proof that his reactions to administrative actions of February 4, 2014 were compensable.

On May 27, 2014 appellant requested an oral hearing before an OWCP hearing representative.<sup>3</sup>

Appellant was represented by counsel during the hearing, held on December 16, 2014. Counsel contended that OWCP erroneously failed to address the medical evidence, and that the claim should have been treated as an occupational disease claim. The hearing representative noted that, as the claim was filed for a traumatic injury, he would consider the claim as a traumatic injury claim. However, appellant could file an occupational disease claim (Form CA-2). He testified and explained why he believed that he received disparate treatment with regard to the matters occurring on February 4, 2014.

On January 22, 2015 appellant filed an occupational disease claim (Form CA-2) for an adjustment disorder. He alleged that members at the Gibraltar Border Patrol harassed him, subjected him to a hostile work environment, and treated him disparately. In a February 12, 2015 letter, OWCP explained that this cumulative injury claim was a duplicate of the current traumatic injury claim, and indicated that all documents had been combined in the current file.

By decision dated March 4, 2015, OWCP's hearing representative affirmed the May 20, 2014 decision denying appellant's emotional condition claim. She considered the alleged employment factors of February 4, 2014 and found that appellant had not established a compensable factor of employment. The hearing representative explained that administrative and personnel matters did not fall under coverage of FECA unless a claimant established error or abuse. She also determined that appellant had not submitted evidence corroborating his allegation that he had been the victim of discrimination or harassment on February 4, 2014.

On March 1, 2016 appellant requested reconsideration. In his request, he made numerous arguments including, *inter alia*, several allegations of impropriety with regard to actions by management prior to February 4, 2014. Appellant made allegations with regard to error, harassment, and disparate treatment with regard to his AUO and FMLA including requiring paperwork that was not required of others, proper compensation for hours worked, improper contact by management on February 4, 2014, and disputes with regard to his travel time. He also argued that, at the hearing, counsel made clear that the incidents stemmed over more than one day, and that the case should be considered an occupational disease claim. Appellant noted that he filed a subsequent Form CA-2 in January 2015, as discussed with the hearing representative, but that the occupational disease claim was consolidated with this claim. He argued that his occupational disease case was closed, without affording him due process. Appellant noted that, pursuant to OWCP's procedures, the submission of an incorrect form is a technical error and it is improper for OWCP to deny a case because a claimant failed to submit the correct form.<sup>4</sup>

---

<sup>3</sup> By letter dated July 25, 2014, counsel asked that two subpoenas be issued for the hearing. By letter dated November 20, 2014, the hearing representative denied appellant's request for subpoenas as he had not presented a persuasive argument or evidence which would compel the conclusion that the presence of the requested individuals at the hearing was necessary for a full presentation of the compensation case.

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims, Forms Used for Initial Filing*, Chapter 2.800.3(c)(2) (June 2011).

In support of his reconsideration request, appellant submitted numerous medical reports, some of which were already in evidence. He also submitted a video and noted that it showed three members of management cornering him in the hallway and denying his right to union representation on October 23, 2013. In addition, appellant submitted portions of testimony at an Equal Employment Opportunity (EEO) hearing.

By decision dated December 1, 2016, OWCP denied appellant's request for reconsideration of the merits of his claim.

### **LEGAL PRECEDENT**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>5</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>6</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>7</sup>

### **ANALYSIS**

The Board finds that OWCP improperly denied appellant's request for reconsideration.

As previously noted, in order to require OWCP to reopen a case for merit review, appellant must show that OWCP erroneously applied or interpreted a specific point of law, advance a new relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP.<sup>8</sup>

Appellant filed a claim for a traumatic injury (Form CA-1). In that claim, he alleged emotional injury due to a pattern of harassment, disparate treatment, and a hostile work environment he had endured for months. It is clear from the face of the claim form that appellant should have filed an occupational disease claim form (Form CA-2). A traumatic injury means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift.<sup>9</sup> An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift.<sup>10</sup> Appellant indicated on his

---

<sup>5</sup> 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.606(b)(3).

<sup>7</sup> *Id.* at § 10.608(b).

<sup>8</sup> *See D.M.*, Docket No. 16-1754 (issued January 10, 2018).

<sup>9</sup> 20 C.F.R. § 10.5(ee).

<sup>10</sup> *Id.* at § 10.5(q).

claim form that he had endured these alleged conditions over a period of months, and that February 4, 2014 was just the latest incident.

As correctly noted by appellant, Federal (FECA) Procedure Manual provides that, while a submission of an incorrect form is a technical error, it is improper to deny a case because a claimant failed to submit the correct form. Rather, OWCP should convert the incorrect claim form to the correct type and notify the claimant and the employing establishment that the claim has been converted and explain the reasons for the conversion.<sup>11</sup>

When OWCP initially denied appellant's claim on May 20, 2014, it indicated that appellant had filed a claim for a traumatic injury on February 4, 2014 and that, therefore, OWCP would not consider other incidents or exposure that occurred for a period of longer than one shift. Appellant requested an oral hearing and, at that time, counsel argued that appellant's case should be considered as an occupational disease claim. The hearing representative stated that as the claim had been adjudicated as a traumatic injury, she would continue to adjudicate it as a traumatic injury claim. She noted that rather than file an amended form, appellant should file a new claim for an occupational disease. Appellant filed a claim for an occupational disease on January 22, 2015. By decision dated February 12, 2015, the hearing representative affirmed the denial of appellant's claim for a traumatic injury.

In his January 22, 2015 occupational disease claim, appellant alleged that members at the Gibraltar Border Patrol Station were harassing him, subjecting him to a hostile work environment, and treating him disparately, and that, as a result thereof, he has suffered from an adjustment disorder. By letter to appellant dated February 12, 2015, OWCP indicated that his claim for an occupational disease was a duplicate of his traumatic injury claim. It placed all documents from the occupational disease claim into the record of the current traumatic injury claim.

On March 1, 2016 appellant requested reconsideration. One of the arguments set forth by appellant at that time was that he was deprived of due process in the denial of his claim for an occupational disease. He argued that OWCP should have converted his claim to an occupational disease claim. Appellant made numerous allegations that his claim was actually an occupational disease claim, but the argument that OWCP erroneously applied its own procedures was made for the first time on reconsideration.

The Board finds that, when requesting reconsideration, appellant established that OWCP erroneously applied or interpreted a specific point of law, *i.e.*, OWCP failed to convert appellant's claim from a traumatic injury claim to an occupational disease claim in accordance with its procedures. It is the duty of the OWCP to develop a claim based on the facts at hand and not solely on the basis of the type of claim form filed in the claim.<sup>12</sup>

---

<sup>11</sup> See *supra* n. 4.

<sup>12</sup> *G.S.*, Docket No. 16-0908 (issued October 26, 2017); *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

It is well established that proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>13</sup> Although a claimant has the burden of proof to establish compensation, OWCP has the responsibility to ensure that justice is done.<sup>14</sup> In this instance OWCP did not properly discharge its burden to make findings as to whether appellant sustained a traumatic injury or an occupational disease.

Thus, the Board will remand the case to OWCP to properly consider appellant's claim, in the alternative, as an occupational disease claim, to be followed by a *de novo* decision.

### **CONCLUSION**

The Board finds that this case is not in posture for decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 1, 2016 is set aside, and this case is remanded for further consideration consistent with this opinion.

Issued: March 20, 2018  
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

---

<sup>13</sup> See *Vanessa Young*, 56 ECAB 575 (2004).

<sup>14</sup> *C.T.*, Docket No. 17-0593 (issued December 15, 2017).