

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**K.S., Appellant**

**and**

**DEPARTMENT OF THE ARMY, PINE BLUFF  
ARSENAL, Pine Bluff, AR, Employer**

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**Docket No. 18-0845  
Issued: October 26, 2018**

*Appearances:*  
*C.B. Weiser, Esq., for the appellant<sup>1</sup>*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 13, 2018 appellant, through counsel, filed a timely appeal from an October 12, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant sustained an emotional condition causally related to the accepted April 10, 2013 employment incident.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 25, 2013 appellant, then a 48-year-old industrial worker, filed a traumatic injury claim (Form CA-1) alleging that, on April 10, 2013, she experienced insomnia, nervousness, and a loss of appetite after "multiple M98 flash bang canisters detonated." The employing establishment indicated that approximately 40 M98 canisters ignited and that she was "exposed to loud noise associated with flashbang canisters igniting."

Appellant received treatment at the employing establishment's clinic on April 15, 2013 from Dr. Diego Gonzalez, Board certified in pediatrics.<sup>4</sup> Dr. Gonzalez diagnosed status post exposure to loud noise and noted that she was upset and experiencing headaches and stomach aches. He indicated that appellant's hearing was normal.

On April 18, 2013 Dr. Mary Katherine Howard, Board-certified in family practice, treated appellant for anxiety, headaches, and stomach pain after she was involved in an explosion at work. She noted that she was "in the same room as the explosion, but was not physically injured due to plate glass." Dr. Howard discussed appellant's complaints of insomnia because "her mind races and [she] relives the scene when she closes her eyes." She diagnosed panic disorder without agoraphobia.

Dr. Howard, on May 7, 2013, obtained a history of appellant experiencing constant headaches, neck pain, crying, and memory loss after an explosion a month earlier. She diagnosed postconcussion syndrome, insomnia, left neck pain, headache, and panic disorder without agoraphobia.

On May 10, 2013 Dr. Shamim A. Malik, a psychiatrist, obtained a history of appellant working with grenades in a small room. Appellant saw flames and yelled at everyone to exit the room, and as they got to the door there was an explosion. Since the incident she had experienced panic, fear, depression, and nervousness. Dr. Malik diagnosed post-traumatic stress disorder (PTSD), panic disorder with agoraphobia, and an adjustment disorder with mixed anxiety.

The employing establishment, in a May 14, 2013 statement, advised that the ignition or functioning of the M98 flash bang canisters did not meet its definition of a detonation. It related that the devices were designed to flash and bang and generate debris that could result in small cuts

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<sup>3</sup> Docket No. 16-0782 (issued July 8, 2016).

<sup>4</sup> Dr. Gonzalez is of the rank of Lieutenant Colonel.

or lacerations without the proper protective gear, and that an individual holding a device when it functioned would lose “one or more digits.” The employing establishment indicated that appellant had “exited the cubicle before any of the canisters functioned.”

In a May 16, 2013 attending physician’s report (Form CA-20), Dr. Howard diagnosed insomnia as a result of a mental disorder, headache, panic disorder with depressive symptoms, and postconcussion syndrome. She indicated by checking a box marked “yes” that the condition was caused or aggravated by employment, noting that appellant had no symptoms of headaches, anxiety, or insomnia prior to the explosion at work.

In a May 19, 2013 statement, appellant related that on April 10, 2013 she saw sparks while inserting match stems into M98 flash bang grenades. She yelled for her coworkers to leave the room, pushed the door open, and heard “multiple explosions going off.” Appellant related that she was not injured physically as she covered her ears while running away. She related, “I first noticed that something was wrong immediately after the explosions. I thought I was going to die. My feelings of fear have been present continuously. I have experienced stomach aches, headaches, inability to sleep, inability to eat, crying spells, depression, anxiety, and nervousness....”

On May 21, 2013 Dr. Howard diagnosed insomnia due to a mental disorder, postconcussion syndrome, left neck pain, headache, and panic disorder without agoraphobia.<sup>5</sup>

In a June 4, 2013 statement, J.G., who works for the employing establishment, related:

“[R.S.] was standing outside [the cubicle] when he saw [appellant] run outside a few seconds before he heard the first pop. After the first pop, he heard several pops and a boom. [R.S.] did not know when the deluge went off. He [stated] everyone was wearing the proper safety gear. [R.S.’s] suggestions were to have a buster separation to prevent fire from moving and setup for easier exit facing the door.”

By decision dated June 7, 2013, OWCP denied appellant’s emotional condition claim. It determined that she had not established a compensable employment factor.

OWCP thereafter received an April 11, 2013 note from the employing establishment’s clinic indicating that appellant had a headache and recommended that she work in a different location for a week. In an April 30, 2013 report, a physician assistant diagnosed a tension headache and acute reaction to stress. He found that appellant could return to her usual employment in a different location.

In a June 7, 2013 Form CA-20, Dr. Gonzalez provided the history of injury as appellant leaving a cubicle when a flash bang grenade initiated resulting in a loud noise. He diagnosed a tension headache and checked a box marked “yes” that the condition was caused or aggravated by employment, noting that the flash bang grenade caused a loud noise. Dr. Gonzalez indicated that

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<sup>5</sup> Appellant also received treatment beginning in May 2013 from a licensed clinical social worker.

he wanted to challenge the claim as audiometry results and witness statements determined that appellant was “not close to [the] grenade initiation.”

Dr. Gonzalez, in a June 7, 2013 letter, advised that appellant had worked in law enforcement and was qualified to handle weapons and thus should “not have been alarmed by the loud popping noises produced by the M98 canister device.” He noted that the evidence showed that she was not near the ignition as it caused “significant hearing shift for the employees that were truly exposed.”

Dr. Malik, in a progress report dated June 14, 2013, noted that appellant related that she was experiencing flashbacks, depression, and nervousness.<sup>6</sup> He diagnosed PTSD, panic disorder with agoraphobia, and an adjustment disorder with mixed anxiety and depressed mood.

In a witness statement received June 18, 2013, R.S. advised that he saw four women leave a cubicle and then heard M98 rounds going off. In a July 15, 2013 statement, appellant related that by the time she reached the door after she saw sparks coming from the M98 grenade canister “multiple explosions were going off.”

Appellant, on July 29, 2013, requested an oral hearing before an OWCP hearing representative. At the telephone hearing, held on November 18, 2013, she related that she was pressing busters into flash bang grenades when she saw sparks. Appellant had signed a standard operating procedure that indicated that an individual had three to five seconds to get away if a flash bang grenade ignited. She yelled to her coworkers to leave and was the first to the door because she was closest. When appellant reached the door the canisters were exploding. She related that the flash bang grenades made an extraordinarily loud noise and that she was in an 8 by 10 room with 40 or 50 of the devices. The explosions knocked out the light fixtures. At the hearing, one of appellant’s coworkers, who was also in the room when the flash bang grenades ignited, related that police officers used them to disperse crowds, but that they were supposed to be 100 feet away from people when they went off. Appellant noted that they made an incredible noise and that many went off.

In an October 21, 2013 attending physician’s statement form, Dr. Malik diagnosed PTSD, panic disorder with agoraphobia, and an adjustment disorder with mixed anxiety and a depressed mood. He found that appellant was not able to resume her previous position “due to her concern about the potential for explosion and panic response to sounds of explosions.”

The employing establishment, on November 20, 2013, submitted a diagram showing the location of individuals at the time of the M98 flash bang accident. M.T., an employee, again advised that appellant was outside the cubicle when the initiation occurred, noting that she did not have acute hearing trauma.

By decision dated February 5, 2014, OWCP’s hearing representative set aside the June 7, 2013 decision. She found that appellant had established as a compensable employment factor that she was working when a canister ignited resulting in explosions, and that she was opening the door of the cubicle when she heard the first explosion. The hearing representative found that R.S.’s

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<sup>6</sup> Dr. Malik provided additional progress reports on June 21 and July 18, 2013.

statement that appellant was outside the cubicle at the time of the first explosion less credible as he indicated that all women were outside, which was not supported by the evidence.<sup>7</sup> She instructed OWCP to prepare a statement of accepted facts (SOAF) and refer appellant for a second opinion examination to determine whether she sustained a medical condition as a result of the compensable employment factor.

In a February 12, 2014 SOAF, OWCP advised that it had accepted as a compensable employment factor that appellant saw a spark while working on M98 flash bang grenades that were “designed to produce noise rather than detonation. There is no explosion or shrapnel involved. It is made of cardboard, paper and plastic, and generates very limited debris.”

OWCP, on February 19, 2014, referred appellant to Dr. Richard A. Owings, a Board-certified psychiatrist, for a second opinion examination. In a March 23, 2014 report, Dr. Owings noted that she was in a closed room assembling flash bang grenades when she saw sparks and realized that one was going to detonate. Appellant shouted for her coworkers to leave and was the first out the door. She believed that she would die when she heard the explosions going off, but did not sustain hearing loss as she had her hands over her ears. Subsequent to the incident, appellant cried daily, experienced panic attacks, relived the event, and felt depressed and anxious. Dr. Owings noted that she had received security training and was qualified to carry a military handgun and rifle. He diagnosed panic disorder with agoraphobia, depression, and PTSD, and indicated that the “diagnoses were caused by the accepted events. That is the syndromes are all causally linked to the episode of April 10, 2013.” Regarding disability, Dr. Owings related:

“[Appellant] describes continuing disabling symptoms. There [is] an obvious question of secondary gain. There [is] money at stake and [appellant] may consciously be magnifying her complaints for economic gain. There [is] nothing revealed on examination to either prove or disprove that she truly is as symptomatic and disabled as she attests. When I tried to discuss this with [appellant], she became angry, vehement, [and] defensive. This is not incompatible with true pathology. That is people who have suffered trauma typically believe [that] other people do [not] understand what they [have] gone through, and they are justifiably angry and defensive when their suffering is questioned.”

Dr. Owings explained that a diagnosis of PTSD depended on actual exposure to death or serious injury, noting that appellant indicated that she believed that she was in jeopardy when the incident occurred. He opined that she was totally disabled. Dr. Owings advised that appellant had not responded to treatment either due to secondary gain or because the condition of PTSD was sometimes unresponsive to treatment. He determined that exposure to the work setting would “further traumatize her.” Dr. Owings suggested that an investigator could ascertain if appellant was as limited as claimed. He related, “[Appellant’s] report is plausible and very typical for people who legitimately suffer PTSD, but it would be useful to obtain independent evidence that she is or is not as limited as she attests.”

OWCP, on April 3, 2014, advised appellant that it proposed to suspend her compensation, pursuant to 5 U.S.C. § 8123(d), because she did not cooperate with a medical examination when

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<sup>7</sup> The hearing representative included a statement received in another file number in her decision.

she became defensive and angry with Dr. Owings. In an April 11, 2014 response, appellant denied being uncooperative and related that she thought the appointment went well.

On June 2, 2014 OWCP again referred appellant to Dr. Owings. In a report dated June 24, 2014, Dr. Owings indicated that the results of psychological testing were not yet available. He related, "I find [appellant] unable to perform gainful employment based on her testimony that there [is] no job that she can think of or that I can think of that she feels she could accomplish without unbearable anxiety." Dr. Owings again explained that PTSD required actual or threatened serious injury and noted that he did not feel that appellant "was exposed to a traumatizing situation" as it was not a combat grenade that exploded. He advised:

"As I stated in my initial assessment, [appellant] was not in any danger and was well-informed and knew at the time that she was not in any danger. [Appellant] presents as a very typical case of PTSD, but there [is] nothing in her presentation that cannot be feigned. A devil's advocate might describe her as claiming to be traumatized and completely disabled by exposure to a loud bang that posed less real hazard than most July 4<sup>th</sup> firecrackers."

Psychological testing performed on September 16, 2014 revealed "possible over-reporting and selective nonresponding, specifically with somatic and cognitive symptoms. However, overall the protocol is valid and reveals emotional, behavioral, and interpersonal dysfunction ... [the] responses were consistent and interpretable." The evaluator found that appellant's profile was "consistent with credible emotional difficulty with a mix of depressive and anxious features" and provided as diagnoses to rule out depression-related disorder and an anxiety disorder, including PTSD.

Dr. Owings, on September 19, 2014, reviewed the result of psychological testing and indicated that it did not alter his prior findings. He related, "It is difficult to attribute this much psychopathology to the incident [appellant] alleges caused it, and I believe this is critical in proving that she suffers from psychological disability due to PTSD." Dr. Owings advised that appellant could be malingering or have other reasons for her depression and anxiety.

By decision dated September 24, 2014, OWCP denied appellant's emotional condition claim. It found that Dr. Owings' reports constituted the weight of the evidence and established that she had not sustained an emotional condition as a result of the compensable employment factor.

Appellant, on October 7, 2014, requested reconsideration. She submitted a December 23, 2014 report from a licensed clinical social worker.

OWCP, by decision dated September 14, 2015, denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a). It found that she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further merit review.

Appellant appealed to the Board. By decision dated July 8, 2016, the Board set aside the September 14, 2015 decision. The Board found that OWCP had not issued a timely decision on her request for reconsideration. The Board remanded the case for OWCP to issue a merit decision on appellant's request for reconsideration.

By decision dated October 7, 2016, OWCP denied modification of its September 24, 2014 decision. It noted that appellant was not in the room when the canister functioned, was protected by glass, wearing safety gear, and not exposed to debris. OWCP found that Dr. Owings determined that no significant pathology could be attributed to the April 10, 2013 work incident and found possible malingering.

On September 29, 2017 counsel requested reconsideration. He argued that OWCP erred in finding that appellant was not in the room when the flash bang canister went off and noted that both Dr. Malik and Dr. Owings attributed PTSD, depression, and panic disorder with agoraphobia to the compensable employment factor.<sup>8</sup> Appellant submitted a May 23, 2013 Form CA-20 from Dr. Malik diagnosing PTSD, panic disorder with agoraphobia and adjustment disorder with mixed anxiety and depression due to the grenade explosion at work.

By decision dated October 12, 2017, OWCP denied modification of its October 7, 2016 decision. It found that the additional submitted evidence was insufficient to show that appellant sustained an emotional condition causally related to the accepted compensable employment factor.

On appeal, counsel contends that both Dr. Malik and Dr. Owings found that appellant sustained PTSD, panic disorder with agoraphobia and depression due to the accepted work incident. He notes that the psychological testing yielded valid results and demonstrated emotional distress.

### **LEGAL PRECEDENT**

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.<sup>9</sup> 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 frustration from not being permitted to work in a particular environment or to hold a particular position.<sup>10</sup>

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

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<sup>8</sup> Appellant also submitted an August 18, 2017 report from a licensed clinical social worker. Dr. Malik's name is on the report, but it does not contain his signature or any indicia of identification that he reviewed it.

<sup>9</sup> *Supra* note 2; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

<sup>10</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

not be considered.<sup>11</sup> 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.<sup>12</sup>

Causal relationship is a medical issue, and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.<sup>13</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant,<sup>14</sup> must be one of reasonable medical certainty<sup>15</sup> explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>16</sup>

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to proof to establish entitlement to compensation, OWCP shares responsibility to see that justice is done.<sup>17</sup> The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.<sup>18</sup> Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.<sup>19</sup>

### ANALYSIS

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

Appellant established as a compensable employment factor that, while working in an enclosed cubicle on April 10, 2013, she saw a spark coming from an M98 flash bang grenade. She yelled at her coworkers to get out of the room and ran to the door. As appellant reached the door the first flash bang grenade canister activated. The employing establishment advised that about 40 of the M98 flash bang grenades in the room detonated. It indicated that the debris could cause small cuts or lacerations and that someone holding the device when it functioned would lose one or more digits. The employing establishment further advised that being in the room when the grenade activated would result in a serious hearing shift.

Dr. Malik treated appellant beginning May 10, 2013 for PTSD, panic disorder with agoraphobia, and an adjustment disorder with mixed anxiety. Appellant also received treatment

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<sup>11</sup> *Dennis J. Balogh*, 52 ECAB 232 (2001).

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

<sup>13</sup> *John J. Montoya*, 54 ECAB 306 (2003).

<sup>14</sup> *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

<sup>15</sup> *Supra* note 11.

<sup>16</sup> *Judy C. Rogers*, 54 ECAB 693 (2003).

<sup>17</sup> *Jimmy A. Hammons*, 51 ECAB 219 (1999).

<sup>18</sup> 20 C.F.R. § 10.121.

<sup>19</sup> *Melvin James*, 55 ECAB 406 (2004).



from Dr. Howard, whose diagnoses included panic disorder without agoraphobia, insomnia, left neck pain, headaches, and postconcussion syndrome.

On February 19, 2014 OWCP referred appellant to Dr. Owings for a second opinion examination. In the accompanying SOAF, it provided as a compensable employment factor that she saw a spark working with flash bang grenades that produced noise instead of detonating, did not explode, and yielded little debris.

Dr. Owings, in a report dated March 23, 2014, related that appellant was in a small room when she saw sparks from a flash bang grenade and knew one was about to detonate. Appellant was the first one out the door and had her hands over her ears so she did not sustain hearing loss. She related that she thought she was going to die when she heard the explosions and after the incident felt panic, depression, and anxiety. Dr. Owings diagnosed panic disorder with agoraphobia, depression, and PTSD causally related to the accepted employment factor occurring on April 10, 2013. He found that appellant was disabled and that exposure to work would result in additional trauma. Dr. Owings noted that there was a question of secondary gain and that she became angry when this was discussed. He advised that appellant's anger was not incompatible with a legitimate PTSD diagnosis.

In a supplemental report dated June 24, 2014, Dr. Owings advised that a PTSD diagnosis required exposure to actual and threatened serious injury. He found that appellant was not exposed to a traumatic situation as she was not in any actual danger. Dr. Owings noted that she was only exposed to a loud bang. Psychological testing performed September 16, 2014 yielded valid results consistent with emotional problems with depressive and anxious features. Dr. Owings reviewed the results of testing on September 19, 2014 and opined that it did not alter his previous findings. He opined that it was difficult to attribute as much pathology as alleged by appellant to the accepted work factor and indicated that she might be malingering or have other problems.

OWCP denied the claim, finding that the evidence from Dr. Owings established that appellant had not sustained a diagnosed condition causally related to the compensable employment factor. In his initial report, however, Dr. Owings diagnosed panic disorder with agoraphobia, depression, and PTSD causally related to the April 10, 2013 compensable employment factor. In his subsequently submitted June 24 and September 19, 2014 reports, he questioned the PTSD diagnosis, but did not specifically alter or address his prior opinion that appellant sustained panic disorder with agoraphobia and depression causally related to the April 10, 2013 accepted compensable employment factor. OWCP, therefore, erred in relying on Dr. Owings' opinion in finding that she had not established a diagnosed condition causally related to the compensable employment factor.<sup>20</sup>

Dr. Owings questioned his diagnosis of PTSD given that appellant was not in jeopardy from the ignition of the flash bang canisters. He relied, however, upon a SOAF that did not sufficiently describe the effects of the functioning of a flash bang grenade. The SOAF merely noted that the flash bang grenade was "designed to produce noise rather than detonation. There is no explosion or shrapnel involved. [The flash bang grenade] is made of cardboard, paper and plastic, and generates very limited debris." The Board finds that the SOAF provided to Dr. Owings

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<sup>20</sup> See *L.B.*, Docket No. 17-1020 (issued July 10, 2018).

fails to fully and accurately explain the device or the impact of its detonation. When a second opinion physician renders a medical opinion based on an incomplete or inaccurate SOAF, the probative value of the opinion is diminished or negated altogether.<sup>21</sup>

Once OWCP undertakes development of the medical evidence it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>22</sup> Accordingly, the Board finds that the case must be remanded to OWCP. On remand, OWCP should prepare an updated SOAF which fully and accurately explains the explosive device and the impact of its detonation and request that Dr. Owings submit a clarifying report regarding whether appellant sustained an emotional condition as a result of compensable employment factors. Following this and any further development deemed necessary, it shall issue a *de novo* decision.<sup>23</sup>

### **CONCLUSION**

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

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<sup>21</sup> See *R.B.*, Docket No. 14-1043 (issued December 12, 2014); *V.H.*, Docket No. 14-0433 (issued July 3, 2014).

<sup>22</sup> See *M.C.*, Docket No. 09-1880 (issued June 21, 2010); *George Tseko*, 40 ECAB 948 (1989).

<sup>23</sup> See *V.H.*, Docket No. 17-0439 (issued December 13, 2017).

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 12, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 26, 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