



Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>4</sup>

### **ISSUE**

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

### **FACTUAL HISTORY**

This case has previously been before the Board.<sup>5</sup> The facts and circumstances of the case as set forth in the prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 10, 2008 appellant, then a 44-year-old retired health communications specialist, filed an occupational disease claim (Form CA-2) alleging that her federal employment aggravated her depression and anxiety and caused post-traumatic stress disorder. She indicated that she first became aware of her conditions in August 2000 and related them to her federal employment on April 1, 2008. OWCP assigned this case File No. xxxxxx431.<sup>6</sup>

By decision dated April 2, 2009, OWCP denied the claim, finding that it was untimely filed. Appellant timely requested a hearing. After a preliminary review, by decision dated June 3, 2009, an OWCP hearing representative found that OWCP had not properly developed the claim and remanded the case for further development. By decision dated February 3, 2010, OWCP found that appellant had not met her burden of proof to establish an emotional condition in the performance of duty. Appellant again requested a hearing before an OWCP hearing representative.

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<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> The Board notes that appellant submitted evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>5</sup> Docket No. 17-0700 (issued July 7, 2017); Docket No. 16-0148 (issued March 17, 2016); Docket No. 14-1196 (issued May 6, 2015); Docket No. 13-1522 (issued November 14, 2013); Docket No. 12-0860 (issued November 5, 2012).

<sup>6</sup> Appellant also has a February 25, 2002 occupational disease claim (Form CA-2), alleging that factors of her federal employment caused an emotional condition. This claim was adjudicated by OWCP under File No. xxxxxx622. After initial denial of that claim, on October 21, 2003, a hearing representative with OWCP's Branch of Hearings and Review found that appellant had established one compensable employment factor that, from March 24 to 26, 1999, she and other workers were required to put together approximately 80 two-inch binders in a short turn-around time with inadequate instruction given. However, the hearing representative found that the medical evidence of record did not support that her condition was caused or aggravated by the accepted employment factor. Appellant continued to pursue appeal options, however the claim remained denied. In June 2008, OWCP administratively combined File Nos. xxxxxx622 and xxxxxx431, with the former serving as the master file.

By decision dated July 28, 2010, an OWCP hearing representative affirmed the February 3, 2010 decision.

On December 28, 2010 and January 28 and June 28, 2011 appellant, through her representative, requested reconsideration. By decisions dated January 6, June 2, and July 8, 2011, OWCP denied appellant's reconsideration requests. The representative again requested reconsideration on July 20, 2011 and submitted additional evidence. By decision dated January 12, 2012, OWCP denied modification finding that, as none of the documents submitted substantiated that appellant established a compensable factor of employment, she had not met her burden of proof to establish that she sustained an emotional condition in the performance of duty.

Appellant, through her representative, appealed to the Board on March 7, 2012. In that appeal, her representative asserted: that an Equal Employment Opportunity Commission (EEOC) decision supported her claim of workplace discrimination; that the employing establishment illegally placed a "red flag alert" on her personnel file; that OWCP and the employing establishment illegally colluded, thus violating appellant's due process; and that OWCP practiced fraud and willful misconduct by misrepresenting facts by not fully addressing all alleged acts of discrimination, and by not explaining what a "flag alert" meant under FECA.

By decision dated November 5, 2012, the Board reviewed the evidence submitted. OWCP combined File Nos. xxxxxx622 and xxxxxx431 and found that appellant had not met her burden of proof to establish an emotional condition in the performance of duty.

On February 25, 2013 appellant, through her representative, requested reconsideration, asserting that the employing establishment erred when appellant was not considered for promotion. She submitted additional medical evidence and a partial, unsigned investigative document dated August 26, 2002 that discussed an EEOC complaint she had previously filed. By decision dated April 25, 2013, OWCP denied modification.

On June 13, 2013 appellant, through her representative, again filed an appeal to the Board. She asserted that the employing establishment committed error and abuse in failing to process appellant's applications for promotion appropriately. By decision dated November 14, 2013, the Board found that, as the provenance of the investigative report was unknown and unverified, it was of no probative value. The Board also found that the report contained nothing that would support appellant's assertion of error on the part of the employing establishment, and concluded that she had not established that the employing establishment committed error or abuse regarding her applications for promotion. The Board concluded that she, therefore, had not established an emotional condition in the performance of duty.<sup>7</sup>

On December 19, 2013 appellant, through her representative, requested reconsideration with OWCP, reasserting that the employing establishment committed error when appellant was not considered for promotion. She submitted August 22, 2002 correspondence addressed to appellant by the employing establishment. The correspondence advised appellant that she had been authorized to receive priority consideration for the position of human resources assistant, GS-203-07, or the next substantially similar position in Atlanta, GA. She was informed that this had

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<sup>7</sup> Docket No. 13-1522 (issued November 14, 2013).

been authorized due to an administrative error that was made in association with announcement number MP2-01-164, which was a personnel assistant position, GS-203-6/7. In the August 22, 2002 correspondence, the employing establishment acknowledged that an error had been made in evaluating appellant's basic qualifications, and that she was inappropriately rated as not qualified. By decision dated April 10, 2014, OWCP denied appellant's reconsideration request. It found that the evidence submitted did not contain a relevant legal argument not previously considered.

Appellant again filed an appeal with the Board on April 29, 2014. Her representative asserted that OWCP erred in denying merit review because she submitted evidence establishing that the employing establishment had committed error and abuse in failing to process promotion applications appropriately. By decision dated May 6, 2015, the Board found that the August 22, 2002 correspondence was pertinent to the merit issue in this case and thus, OWCP had improperly denied appellant's request for a merit review pursuant to section 8128(a) of FECA. The Board remanded the case to OWCP to review the merits of her claim.<sup>8</sup>

By decision dated June 12, 2015, OWCP denied modification of its prior decisions. It specifically noted that in February 2002 appellant was working as a GS-9, Step 4 health communications specialist, and that a résumé found in the record indicated that she had served in that position since 1998. OWCP found that the evidence, therefore, demonstrated that rather than "seeking upward mobility," she actually applied for a job with a lower salary and scope of responsibility than the one held, such that the GS-6/7 position found in announcement number MP2-01-164 would not be considered a "promotion." It concluded that there was no error or abuse demonstrated in omitting appellant from a list of qualified applicants because, as noted in the August 22, 2002 correspondence, the employing establishment corrected its error by giving appellant priority consideration in a similar position.

Appellant, through her representative, again appealed to the Board. By decision dated March 17, 2016, the Board found that, while the August 22, 2002 correspondence from the employing establishment acknowledged error with regard to announcement number MP2-01-164, since this announcement was for a GS-6/7 position and appellant had been working in a GS-9 position since 1998, this position would not be considered a "promotion." Moreover, by its August 22, 2002 correspondence, the employing establishment corrected its error by giving appellant priority consideration in a similar position. The Board concluded that appellant had not established a compensable factor of employment. Therefore, the medical evidence was not addressed.<sup>9</sup>

On May 4, 2016 appellant, through her representative, requested reconsideration. She maintained that, since it took over 18 months for the employing establishment to admit error, having to deal with this caused appellant to develop depression and anxiety. The representative submitted an April 27, 2016 report in which Dr. A. Benjamin Eubanks, an attending psychiatrist, advised that appellant's depression and anxiety developed because the employing establishment denied wrong-doing when it omitted her name from the posted MP2-01-164, GS-7, position in

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<sup>8</sup> Docket No. 14-1196 (issued May 6, 2015).

<sup>9</sup> Docket No. 16-0148 (issued March 17, 2016).

November 2000, and that her condition was further exacerbated by the employing establishment's delay until August 2002 when it admitted error.

By decision dated October 14, 2016, OWCP reviewed the merits of appellant's claim and denied modification of its prior decisions. It found that, as appellant had not established a compensable factor of employment, it was unnecessary to address the medical evidence submitted.

The representative again filed an appeal with the Board on February 6, 2017. By decision dated July 7, 2017, the Board affirmed the October 14, 2016 decision, finding that appellant had not met her burden of proof to establish an emotional condition in the performance of duty. The Board reviewed its March 17, 2016 decision and found that there was no evidence that the employing establishment acted unreasonably in its delay of notifying appellant of its administrative error regarding announcement MP2-01-164. As such, the delay did not constitute a compensable factor of employment.<sup>10</sup>

Appellant's representative again requested reconsideration on April 19, 2018. She submitted a lengthy statement reiterating matters previously addressed by OWCP and the Board and evidence previously of record. The representative also asserted that appellant had not been a GS-9 in 1998 as indicated by both OWCP and the Board and that this constituted error such that a compensable factor of employment had been established. She additionally submitted policies and documents of general information, and two Notifications of Personnel Action (Form SF-50). The first SF-50 indicated that appellant, who had been a GS-7, Step 6 secretary, was promoted to a position of administration operations assistant, at the GS-7, Step 6 level, effective May 24, 1998. The second SF-50 indicated that, effective September 26, 1999, appellant was promoted from a GS-7, Step 6 level health communications specialist, to a GS-9, Step 2 level health communications specialist. She also submitted an October 5, 1998 letter, previously of record, in which the employing establishment congratulated her on her selection for the position of health communication specialist, GS-7, with potential to GS-9.

By decision dated May 9, 2018, OWCP denied appellant's April 19, 2018 request for reconsideration of the merits of her claim, finding that the evidence submitted was insufficient to warrant merit review.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>11</sup> OWCP has discretionary authority in this regard and has imposed certain

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<sup>10</sup> Docket No. 17-0700 (issued July 7, 2017).

<sup>11</sup> This section provides in pertinent part: the 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).

limitations in exercising its authority.<sup>12</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>13</sup>

Upon receipt of a timely application, OWCP exercised its discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>14</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>15</sup>

### ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In the April 19, 2018 request for reconsideration, appellant's representative asserted that OWCP and the Board committed error because each indicated that appellant had been a GS-9 health communications specialist since 1998. However, a review of the record and past OWCP and Board decisions indicates that each relied on a résumé completed by appellant and which she had submitted to OWCP on June 26, 2003. In that résumé appellant indicated that from "1998 to present" she had been a health communications specialist at the employing establishment.

With her April 19, 2018 reconsideration request, appellant submitted two Form SF-50s. The first indicated that appellant, who had been a GS-7, Step 6 secretary, was promoted to a position of administration operations assistant, at the GS-7, Step 6 level, effective May 24, 1998. The second SF-50 indicated that, effective September 26, 1999, appellant was promoted from a GS-7, Step 6 level health communications specialist, to a GS-9, Step 2 level health communications specialist, effective September 26, 1999. The record does not contain an SF-50 indicating when appellant was appointed to the health communications specialist position.<sup>16</sup> It

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<sup>12</sup> 20 C.F.R. § 10.607.

<sup>13</sup> C.C., Docket No. 18-0316 (issued March 14, 2019); *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 OWCP's 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 (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>14</sup> 20 C.F.R. § 10.606(b)(3).

<sup>15</sup> *Id.* at § 10.608(b).

<sup>16</sup> The record does contain a position description for the health communications specialist position. This indicates that it is a GS-7/9 position.

does contain an October 5, 1998 letter from the employing establishment to appellant congratulating her on her selection for the position of health communication specialist, GS-7 with potential to GS-9. The letter does not indicate when appellant was to begin the position.

The Board finds any error in misstating when appellant became a GS-9 to be harmless error. In its March 17, 2016 decision on the merits, the Board found that, as appellant was working as a GS-9 in February 2002, when she applied for the GS-6/7 position found in announcement number MP2-01-164, this would not be considered a “promotion.” The Board further found that, by its August 11, 2002 correspondence, the employing establishment corrected any error by giving appellant prior consideration in a similar position. The Board concluded that appellant had not established this as a compensable factor of employment.<sup>17</sup> Thus, while the record now indicates that appellant did not become a GS-9 until September 26, 1999, this definitive evidence was not before the Board in prior appeals. Moreover, it is irrelevant to the issue of whether OWCP committed error and abuse with regard to the MP2-01-164 announcement and, therefore, is irrelevant to the issue of whether appellant established an emotional condition in the performance of duty causally related to factors of her federal employment. It thus does not constitute a relevant legal argument under section 10.606(b)(3).<sup>18</sup>

As to the other arguments raised by appellant on reconsideration, the Board has previously addressed each one and found that she has not established a compensable factor of employment. Such findings of the Board are *res judicata* absent further merit review by OWCP. Thus, appellant is not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>19</sup>

The Board further finds that the additional evidence appellant submitted on reconsideration insufficient to meet the requirements of section 10.606(b)(3). As noted by OWCP in its May 9, 2018 decision, much of the evidence was duplicative. Material which is duplicative does not constitute a basis for reopening a case. Appellant also submitted policies and additional documents of general information that were not specific to appellant. The Board has held that such articles lack evidentiary value as they are of general application and not determinative of whether specific conditions are causally related to the particular employment factors in a claim.<sup>20</sup>

Additional evidence submitted on reconsideration included performance ratings, correspondence, an academic transcript, an accident report, and additional general information concerning appellant. The submission of this evidence does not require reopening of appellant’s claim for further merit review because it does not address the underlying issue of whether appellant has established a compensable factor of employment. The Board has held that the submission of

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<sup>17</sup> *Supra* note 10.

<sup>18</sup> *Supra* note 15.

<sup>19</sup> *T.B.*, Docket No. 18-1214 (issued January 29, 2019).

<sup>20</sup> *See J.C.*, Docket No. 17-0089 (issued July 18, 2017).

evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>21</sup>

Because appellant's request for reconsideration did not include relevant and pertinent new evidence, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(3).<sup>22</sup>

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

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 18, 2019  
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

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<sup>21</sup> See *B.J.*, Docket No. 18-0756 (issued September 11, 2018).

<sup>22</sup> 20 C.F.R. § 10.606(b)(3)(iii); see *D.P.*, Docket No. 17-0290 (issued May 14, 2018).